IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Slater v. Slater, 2010 NSSC 353

Date: 20100924
Docket: No. 1206-004771
Registry: Sydney

Between:

William Neil Slater
Petitioner

v.

Shirley Kathleen Slater
Respondent

Decision

Judge: The Honourable Justice Kenneth C. Haley, JFC

Heard: February 16, 17, 2009 in Sydney, Nova Scotia

Counsel: Mr. William Neil Slater, Self Represented
Ms. Robin Gogan, for the Respondent

By the Court:

[1] This matter was before the Court on February 16, 17, 2009. The Petitioner did not appear at trial in spite of receiving notice of the trial dates and he did not provide any reason for his non-appearance.

[2] The Court was satisfied the Petitioner had reasonable and sufficient notice of the proceeding and that he had no intention to attend which is confirmed by the Supplementary Affidavit filed by the Respondent's counsel June 22, 2010 which states as follows:

> I, Robin C. Gogan, of Sydney, in the Cape Breton Regional Municipality, Province of Nova Scotia, make oath and say as follows:
>
> 1. That I am counsel for the Respondent herein and as such have personal knowledge of the matters deposed to except where stated to be based on information and belief, in which case, I believe it to be true.
>
> 2. That on February 9th, 2009, I forwarded an email to the Petitioner, Neil Slater to confirm with him the upcoming trial dates and as well to provide him with a copy of the Answer and Counter Petition that was filed by the Petitioner, Shirley Slater. I also informed Mr. Slater in this e-mail that he has not complied with the two (2) Notices to Produce for Inspection and have again provided him with copies of these documents. Attached hereto as Exhibit "A" is a copy of the e-mail to Mr. Slater. I did not receive a reply.

3. That on February 12th, 2009, I once again attempted to email Mr. Slater to provide him with a copy of our Pre-trial Memorandum and filed Answer and Counter Petition and requested his acknowledgement. Attached hereto as Exhibit "B" is a copy of the aforementioned email. I did not receive a reply.

4. That as I did not receive a response to my emails, on February 13th, 2009, I attempted to fax Neil Slater at a fax number in India New Delhi, however, there was no answer. After five (5) attempts, it was noted that the fax number was incorrect. We subsequently corrected the number and attempted to fax the documents again to Mr. Slater on two (2) occasions, however, there was no answer. Attached hereto as Exhibit "C" is a copy of our correspondence directed to Mr. Slater, as well as the Transmission Journal which confirms our various attempts at faxing the documents to Mr. Slater.

5. That I subsequently requested the assistance of Carol Routledge, in the Human Resources office of Weatherford International on February 13th, 2009, by requesting that she provide the aforementioned correspondence and documents to Neil Slater. Attached hereto as Exhibit "D" is a copy of my correspondence to Carol Routledge.

6. That I am advised by my client and do verily believe that she was in contact with him in the weeks before the Trial by telephone, at which time she advised him of the upcoming Trial dates directly. I am further advised that my client made contact with a co-worker/employer of the Petitioner's in the week prior to the Trial. This co-worker advised that the Petitioner's work scheduled showed that he was expected for a meeting at work on February 16th, 2009, which was the first day of Trial. There appeared to be no indication that the Petitioner was planning an absence from work.

7. That the Trial of this matter proceeded in the absence of the Petitioner, Neil Slater. I had no contact from Mr. Slater until March 2nd, 2009, at which time he called to confirm whether he was divorced, and whether the information regarding the Notice to Produce was still required, and the details of settlement.

8. That I make this Affidavit in support of the motion for the Trial of this matter to proceed in the absence of the Petitioner, Neil Slater and for no improper purpose.

[3] As a result it was appropriate to proceed in the Petitioner's absence by way of the Respondent's Counter Petition.

[4] On the Trial of this matter, the Court heard evidence from the following witnesses.

1. The Respondent, Shirley Slater;
2. Ms. Barbara Larade, Director of the Maintenance Enforcement Program;
3. Walter Sawlor who provided expert evidence in the area of real property; and
4. A. N. Sandy MacNeill who was qualified to give expert evidence in the area of general accounting.

[5] At the conclusion of the evidence the Court requested written submissions from the Respondent's counsel. Due to the Respondent becoming ill the submissions were not submitted to the Court until June 22, 2010, hence the delay in rendering this decision.

FACTS AND EVIDENCE

[6] The Petitioner, William Neil Slater and the Respondent, Shirley Kathleen Slater were married on June 24th, 1984. They separated after a 20-year traditional marriage on September 2nd, 2004.

[7] The Petitioner is presently 50 years of age. He was born on May 25, 1958. The Respondent is presently 49 years of age. Her date of birth is March 30th, 1959. On the separation date, the Petitioner was 46 years old and the Respondent was 45 years old. The parties married when the Petitioner was 26 years old and the Respondent was 25 years old.

[8] There are two children of the marriage; Cruise Robert Slater, born April 18th, 1987, and Aryelle Kathleen Slater, born January 6th, 1989. Cruise was 17 years of age on the date of separation and Aryelle was 15 years of age. Cruise is now 21 years old and Aryelle is 20 years old.

[9] Both children of the marriage are enrolled in post-secondary education. Both continue to be in the custody of the Respondent and both are financially dependant on the parties while they complete their education. Both children continue to be children of the marriage at the present time.

[10] The parties are subject to an Interim Consent Order dated June 22nd, 2005. The Order was consented to on a "without prejudice" basis. The Order provides the Respondent with primary care of the children and the Petitioner with reasonable access. Commencing July 1st, 2005, the Petitioner was required to pay the Respondent the amount of $7,000.00 per month in support, inclusive of child support and spousal support, debt payments and other expenses. The Respondent reports this income to Canada Revenue Agency, but it is currently non-taxable income in its entirety.

[11] The Interim Consent Order was only intended to be a short-term resolution as the parties were scheduled to proceed to Trial on November 8th - 10th, 2005. Unfortunately, the parties' daughter, Aryelle had a terrible accident in August of 2005 and the original Trial dates were adjourned.

[12] The Respondent has been residing in the matrimonial home since separation. The home is located at 114 Oakfield Drive, Marion Bridge, Nova Scotia. Pursuant to the Interim Consent Order, the Respondent has had exclusive possession of the

matrimonial home and contents. She has also been responsible for all of the maintenance of the home as well as all of the payments on the matrimonial debts.

[13] The Respondent has been a traditional housewife and mother for the duration of the marriage. She has been responsible for maintaining the matrimonial home and assets and for raising the children. Her education and training is limited, consisting of an interior decorating course, computer courses, an office administration and legal secretary course.

[14] At the time of the marriage, the Respondent was working as a chambermaid at a hotel. Prior to that, she worked as a secretary in a law office. The Respondent only worked outside the home for several months during th entire period of the marriage.

[15] The Petitioner is employed in the offshore oil and gas industry. He has been employed in this industry throughout the period of marriage. This employment required that the Petitioner be away from home for extended periods of time. Over the course of his career, the Petitioner spent a significant amount of time overseas

in various countries such as Kuwait, India, Scotland, Saudi Arabia, Bahrain, Syria, Africa and Vietnam as well as locations in Canada.

[16] Throughout the marriage, the Respondent and the children of the marriage moved several times in order to support the Petitioner and improve his career prospects. The family has lived in Edmonton, Alberta, Kelowna, British Columbia, Aberdeen, Scotland and Sydney, Nova Scotia.

[17] Given the demands of the Petitioner's career, the parties agreed that the Respondent would not pursue employment outside the home, but rather remain at home with the children. A formal Marriage Contract was signed by the parties on June 7th, 2001, reflecting this agreement. In addition, the Respondent became primarily responsible for all aspects of running the household including maintenance of the home and bill payments. The Petitioner was the sole provider and only source of income for the family throughout the entire period of marriage.

[18] The roles and responsibilities adopted by the parties during the marriage allowed the Petitioner to follow his career path and steadily increase income, job security and accumulate assets. The Respondent cared for the home and the

children and was dependant upon the Petitioner for income. The Respondent sacrificed her own career path and security in support of the Petitioner and his career choices.

[19] The Respondent suffers from Irritable Bowel Syndrome which causes significant pain and discomfort. This condition is aggravated by stress and has been an additional barrier to a return to the workforce.

[20] At the time of separation, the Petitioner was employed with a company based in Calgary, Alberta call Precision Drilling International, but was working in Kuwait on a rotation which required him to work for three months at a time, and allowed him to be home for two weeks every fourth month. This was a typical pattern.

[21] The remuneration of the Petitioner is based upon industry standards. At the time of separation, the Petitioner was employed under a contract with his employer that provided a base salary in US dollars.

[22] In addition to his base salary, the Petitioner's remuneration package included a number of cash and non-cash benefits. The cash compensation included a foreign service premium, a hardship premium and a living allowance. The non-cash compensation included the provision of furnished housing, maid and cooking service, transportation, moving expenses, enhanced vacation time and paid travel. Finally, the Petitioner's employer paid all taxes required by the host county. All payments to the Petitioner were in US dollars.

[23] Subsequently to separation, the Petitioner's employer was sold to a company called Weatherford International. The Head Office for Weatherford International is located in Houston, Texas, USA. As far as the Respondent is aware, the Petitioner has been employed by Weatherford International on a continuous basis since the sale. He is currently working out of a location in India. The Respondent believes that his remuneration continues to be in keeping with industry standards and that it has increased steadily over the years.

[24] The Respondent does not have any financial disclosure from the Petitioner after 2004. The Petitioner has not provided any income tax returns after 2003. The Respondent filed and served two Notices to Produce for Inspection (June 2nd,

2005 and April 8th, 2008) on the Respondent seeking income and employment information. None of the requested information was disclosed.

[25] The Petitioner has no doubt increased his earnings and accumulated additional assets in the period since separation. Unfortunately, he has been absolutely non-compliant in disclosing his income since the Interim Consent Order was issued. The Respondent has been forced to look to other sources for information.

[26] The Petitioner has shown a pattern of non-compliance since separation. He has been uncooperative with requests for disclosure and he has been non-compliant with the Civil Procedure Rules and with the Interim Order. In October of 2007, the Respondent was forced to enroll the Interim Order in the Maintenance Enforcement Program to enforce payment of the interim support. This action was required after the Petitioner made unilateral reductions in the amounts payable. The parties' son, Cruise graduated from high school in June of 2005. Since then he has been attending Memorial University in St. John's, Newfoundland. He is currently completing his final year of his undergraduate degree in science and he has applied to several universities for entry into a Bachelor of Education Program.

[27] Cruise has worked since he was in Grade XI. He worked until the spring of Grade 12 (2005) for a grocery store. His father gave him permission not to work in the summer of 2005, just before he started university. Thereafter, Cruise worked two summers in Sydney with Citizenship and Immigration. Last summer, he worked in Newfoundland.

[28] The parties' daughter, Aryelle was seriously injured in a boating accident on August 14th, 2005. Aryelle was swimming in the Mira river when she came into contact with the propeller of a boat. The boat was owned and operated by the Respondent's friend. The Respondent was present on the boat at the time of the accident.

[29] As a result of the boating accident, Aryelle suffered significant injuries to her leg, pelvis, and stomach. She required extensive periods of treatment, rehabilitation and multiple surgeries in both Sydney and Halifax. Her treatment is ongoing. She has a permanent disability related to her leg and her future prognosis is guarded.

[30] Aryelle was unable to return to high school following her accident for an extended period. However, she kept up with her school work with the help of tutors and she was able to graduate from high school with her friends in June of 2007. She is now enrolled in an Orthodics and Prosthetics Program in Ontario. After completing her current program, Aryelle intends to enroll in a Bachelor of Science program.

[31] Aryelle has been unable to work and contribute to the costs of her education due to her medical condition.

[32] Apart from the physical injuries, the accident had a terrible emotional impact on both Aryelle and the Respondent. The Respondent has been consumed with her daughter's medical care and emotional support since the accident. There are ongoing legal proceedings related to the accident that have contributed to the Respondent's anxiety.

[33] The Petitioner returned to Nova Scotia after Aryelle's accident on or about August 16th, 2005. He remained in Nova Scotia until September 2nd, 2005. Thereafter, he had no contact with the children and did not return to Nova Scotia

until June of 2007 (22 months). He attended Aryelle's high school graduation in June of 2007. He then did not return to Nova Scotia again until June of 2008 when he made a brief visit. He left after being served with the Respondent's Notice to Produce for Inspection and Notice of Request for Trial Date.

[34] The Respondent believes that the Petitioner is now a non-resident of Canada for income tax purposes and therefore his employment income is not subject to the payment of tax with the exception of the local tax withheld and paid by the employer.

[35] The Petitioner is currently in arrears of his support obligations. The Maintenance Enforcement Office was in contact with him in June 2008 as he was then in arrears of over $7,000.00. The Petitioner contacted MEP after was advised that his passport would be revoked. He paid the arrears. However, he is once again non-compliant with the Interim Order.

[36] The Petitioner does pay each of the children $1,500.00 per month. Cruise uses this money for all of his post-secondary expenses. Over and above this

payment, the Petitioner has covered the tuition and book expenses for Aryelle's post -secondary program.

[37] At the time of separation, the parties owned two real properties, including the matrimonial home. In addition to the real property, the parties' other assets included the contents of the home, several vehicles, RRSP accounts, bank account balances, securities, the Petitioner's pension and a Weatherford International stock option account. The Husband has not provided any disclosure with respect to the value of his RRSP account, his pension plan or Weatherford stock option account.

[38] The Respondent seeks sole custody of the children of the marriage, child support, spousal support and a division of assets. She is also seeking incidental relief and costs.

[39] **ISSUES:**

1. Have grounds for divorce been established?

2. If so, what is the appropriate order with respect to custody and the access of the marriage?

3. (a) Should income be imputed to the Petitioner for the purpose of determining the appropriate order for child support and spousal support?

3. (b) If so, what quantum of income should be imputed to the Petitioner?

4. What is the appropriate order with respect to (a) Child Support, (b)Section 7 expenses, (c) Arrears?

5. What is the appropriate order with respect to spousal support?

6. What is the appropriate order with respect to division of the assets?

7. What is the appropriate order with respect to incidental relief?

ANALYSIS AND APPLICABLE LAW

[40] **ISSUE #1 - Divorce** The Court finds that all the procedural aspects of the *Divorce Act* have been proven. The marriage has been proven through provision of the marriage certificate and marked as **Exhibit No. 1.** Also the grounds for divorce as alleged in the Petition for Divorce marked as **Exhibit No. 2** have been proven to the satisfaction of this Court.

[41] The Respondent has stated there is no possibility of reconciliation with the Petitioner and I find the circumstance surrounding the Petitioner's failure to appear confirms that there is no possibility of reconciliation between the parties.

[42] As such, the divorce will be granted and an order will issue on the ground that there has been a permanent breakdown of the marriage in that the spouses have been living separate and apart since September 2nd, 2004 and have lived apart for at least one (1) year immediately preceding the determination of the divorce.

[43] **ISSUE #2 - Custody and Access** The parties have two (2) children of the marriage; Cruise, born April 18th, 1987 (now 21 years old) and Aryelle, born January 6th, 1989 (now 20 years old). At the time of the parties' separation, Cruise was 17 and Aryelle was 15. Both children are enrolled in post-secondary education. In August of 2005, Aryelle was severely injured in a boating accident and she continues to require extensive medical treatment as a result of her injuries. Both children remain dependant on the Respondent for emotional, mental and physical support. She is the parent that is always available to the children. The

children remain dependent on the Petitioner for financial support. Both children continue to be children of the marriage as defined by the *Divorce Act.*

[44] The Respondent's application for sole custody is made pursuant to section 16 of the *Divorce Act*, R.R,C. 1985, c. 3 (2nd Supp) which provides as follows:

Custody Orders

Order for Custody

16. (1) A Court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

Interim order for custody

(7) Without limiting the generality of subsection (6), the court may include in an order under this section a term requiring any person who has custody of a child of the marriage and who intends to change the place of residence of that child to notify, at least thirty days before the change or within such other period before the change as the court may specify, any person who is granted access to that child of the change, the time at which the change will be made and the new place of residence of the child.

Factors

> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> **Past conduct**
>
> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
>
> **Maximum contact**
>
> (10) In making an order under this section, 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 and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[45] The Respondent has been the defacto custodial parent since separation. By way of the Interim Order dated June 22nd, 2005 she has the primary care and control of the children.

[46] The Petitioner has spent very limited time with the children of the marriage following separation. The Respondent's evidence on this issue, and as a whole, was uncontested.

[47] In the Petitioner’s Petition for Divorce he seeks access only.

[48] As a result the Court finds it is in the best interests of the children, Cruise and Aryelle that they remain in the sole care, control and custody of the Respondent and the Court so orders.

[49] The Petitioner shall have reasonable access to his children at reasonable times on reasonable notice, however, given the circumstances of this case such access should be arranged directly with the children and subject to their wishes regarding contact with their father.

[50] **ISSUE # -3(a) - Imputation of Income** The Respondent submits income must be imputed to the Petitioner on the following basis:

> (a) The Petitioner’s remuneration package includes significant non-cash compensation and benefits;
>
> (b) The Petitioner is not subject to the same tax treatment as if he was a resident of Canada; and
>
> (c) The Petitioner has the country tax paid by his employer.

[51] The authority of the court to impute income for child support purposes is found in section 19 of the *Federal Child Support Guidelines* (the **"guidelines**"). Section 19 provides, inter alia, as follows:

> **Imputing Income**
>
> 19. (1) The Court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> (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;
>
> (f) the spouse has failed to provide income information when under a legal obligation to do so.

[52] The Respondent also relies upon section 20 of the Guidelines which states:

> **Non -Resident**
>
> 20 (1) Subject to subsection (2), where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.

[53] The jurisdiction of the Court to impute income in both child and spousal support cases has been considered in numerous cases. The list of factors found in section 19 is not exhaustive and other factors may exist which justify the imputation of income. As noted by Coady J. in **Ghosn v. Ghosn**, 2006 NSSC 2 (CanLll) at para 30

> "the introductory words of section 19(1) of the Guidelines provide that the Court may impute such income as it considers appropriate in the circumstances."

[54] The Respondent did obtain income and contract information from the Petitioner's current employer, Weatherford International. This was in response to a subpoena served to the company in Houston, Texas. The pay information from January, 2004 to January 23rd, 2009 was entered into evidence as **Exhibit No. 9B, Tabs 9, 19, 11 and 12.** The employment contracts dated February 9th, 2004, December 4th, 2004, April 17th, 2004 and January 9th, 2007 were entered as **Exhibits 9B, Tabs 2, 3, 4 and 5**.

[55] The Court was further provided with the Petitioner's income tax returns for the years 2002 and 2003 as **Exhibit 9B, Tabs 6 and 7**. There was also evidence that the Petitioner had not filed a Canadian Income Tax Return since 2003 in the

form of a letter from Jerry Redmond, CA, dated February 11th, 2009 and marked as **Exhibit 9B, Tab 8**.

[56] The Court had the benefit of uncontested evidence from the Respondent that the Petitioner had been looking into the benefits of becoming a non-resident Canadian for tax purposes and that he had applied for and been granted a Right of Abode in Scotland on the basis that his father was born in Scotland. The Respondent's evidence noted that the Petitioner had rarely been to Canada since separation even after his daughter was gravely injured in a boating accident. The evidence of the Respondent was corroborated by documentation that she found in the Petitioner's personal effects left at the matrimonial home following separation. These documents consisted of an Application for a Certificate of Entitlement to the Right of Abode **(Exhibit 9B, Tab 21)** and an excerpt from a book on the subject "The Basic Rules of Canadian Income Taxation" (**Exhibit 9B, Tab 22**).

[57] The Respondent also led evidence to establish that the Petitioner has been divesting himself of Canadian assets. There was evidence that he had de-registered his RRSP in the amount of $12,892.81 sometime before June 24th, 2005. (**Exhibit**

14). This evidence was obtained in response to a subpoena served on the Petitioner's bank. There was also evidence that the Petitioner had let his company, Neil Slater Incorporated, be revoked for non-payment in March 2006 (the last renewal having been made in January 2005) (**Exhibit 9B, Tab 14**). The Petitioner also let his medical insurance lapse. Finally, there was documentary evidence that the Petitioner had failed to disclose assets that he had accumulated both before and after separation. These assets included a 401K plan (**Exhibit 9B, Tab 17**), a Retirement Plan Account with ENSCO (**Exhibit 9B, Tab 19**), a stock plan with Weatherford International (**Exhibit 9B, Tab 13**), the cash surrender value of a life insurance policy (Exhibit 9B, Tab 18) and business bank accounts (**Exhibit 9B, Tab 15**).

[58] Clearly, the Petitioner has shown a propensity for non-disclosure, non-cooperation and a decision to hide his wealth from his wife and children. The Respondent is less than certain that she is aware of all of the Petitioner's income sources or assets at this time.

[59] Courts have consistently imposed sanctions and imputed income to parties who fail to provide the required disclosure. In **MacLean v MacLean** (2001), 200

N.S.R. (2d) 34 (N.S.S.C. [In Chambers]), Goodfellow J. emphasized a "zero tolerance policy" with respect to inaccurate or untimely disclosure at paras. 19 to 21:

> 19 Full disclosure in family matters is a given. Failure of a party to do so will, in most circumstances, result in adverse consequences. Such could include a deeming of income, deeming of value, possibly contempt, if the failure persists, if an Applicant, possibly denial, stay, adjournment/postponement of the relief sought, denial of costs etc.
>
> 20 Failure to comply with the basic prerequisite, full financial disclosure almost automatically will have cost consequences because compliance with such a fundamental requirement should rarely require the Court's intervention – usually, only if there are major practical/time/confidential issues that need to be addressed.
>
> 21 The Court has developed a zero tolerance policy where full financial disclosure could reasonably have been complied with without Court intervention.

[60] In **Guillena** v. **Guillena** (2003), 212 N.S.R. (2d) 101 (N.S.S.C.), an adverse inference was drawn by the Supreme Court due to the husband's failure to comply with the financial disclosure order. Income was imputed to him as a result.

[61] In **MacGillivary** v. **Ross**, 2008 CarswellNS 631, Forgeron J. imputed income to a payor after finding as follows at para 40:

> (a) A negative inference is drawn because Mr. Ross failed to disclose basic financial information when required to do so. Mr. Ross did not provide his 2007 income tax return. Mr. Ross provided no documentary verification for most of his employment expenses despite being asked…He provided no receipts.

[62] In **Ghosn**, supra, Coady J. cited with approval the reasons of the court in **Kapogiannes** v. **Kapogiannes** 2000 CanLII 22424 (ON S.C.), (2000), 10 R.F.L. (5th) 63 (Ont. S.C.J.) at para 40:

> **Kopogiannes**….advanced the principle that where a parent's income is difficult to ascertain for child support purposes because of a history of providing misleading and contradictory information, it is appropriate to impute income at the high end of the range for that job.

[63] In **Kapoor** v. **Kapoor** (1999), 177 N.S.R. (2d) 201 (S.C.) Hood J. imputed income to a payor that had been less than forthright about his actual financial position at paragraph 144:

> [144] Counsel for Dr. Lekhi urges me to impute income to Dr. Kapoor in excess of the $110,000.00 he disclosed on his most recent statement of financial information. I agree that it is appropriate to do so. Section 19(1)(f) of the Child Support Guidelines provides...

> Dr. Kapoor has been less than forthright about his actual financial position. He has not provided to the court all the relevant information about his income…This is not accurate….I therefore impute income to Dr. Kapoor of $200,000.00 per annum.

[64] The above noted cases provides this Court with generous authority to impute income to the Petitioner, who has not disclosed the required financial information. It is appropriate and necessary to impute income in this case to determine a fair outcome for the Respondent and the children of the marriage. The Petitioner should not benefit from his decision to be non-compliant with the Law.

[65] Consistent treatment of children in similar circumstances is one of the objectives of the Guidelines. With this objective in mind, courts have consistently "grossed up" the income of payors who are exempt from paying income taxes or who have the benefit of non-cash compensation.

[66] The Alberta Court of Appeal in **Dahlgren** v. **Hodgson** (1998), 43 R.F.L. (4th) 176, noted that it is essential to gross up a non-taxable income to take into account what the income would have been if it had been taxed. The Court of Appeal noted at para 5:

> …the child support guidelines are premised on the division of financial responsibility based upon the gross before tax income… to ensure that the apportionment of

> responsibility between the parents for child support is based upon the same approach for both parents.

[67] The foregoing approach was adopted by Derrick Fam. Ct. J. in M. (D.A.) v. F. (J.A.), 2008 CarswellNS 229.

[68] In **Morgan** v. **Morgan**, 2001 BCSC 3341, and **Morgan** v. **Morgan** 2000 BCSC 371, income was imputed to the payor, a doctor residing in the United Arab Emirates. The evidence established that Dr. Morgan was employed under a contract that paid a base salary of $185,000.00 per annum. The income was exempt from the payment of income tax. In addition, Dr. Morgan had the benefit of additional non-cash compensation such as housing and transportation. In the 2000 decision, the Court found as follows:

> I have already ruled that as it appears the husband is exempt from paying income tax while residing in the U.A.E.., this exemption from paying tax should be viewed as a benefit. His salary is therefore grossed up to include such a benefit.
>
> It is also, in this case, appropriate to impute income to the respondent of the additional benefit of free housing and an automobile provided at no cost. In his property and financial statement, the respondent notes these benefits, but states that their value is "unknown". He indicates "unknown" at his peril.

> The suggested amount of $30,000 annually for his free accommodation in the U.A.E. plus $6,000 for the automobile, are reasonable amounts, in my view, and I accept those figures.
>
> The financial statement a party must file must detail, in addition to annual income, total benefits, including non-monetary benefits from all sources. Such substantial benefits as free housing and a vehicle should not be excluded from calculation of total income. There will thus be imputed income of an additional $36,000 to the respondent's income.

[69] In the 2001 decision, the Court went on to deal with the issue of Dr. Morgan's employment benefits. In support of her position the payee filed a report of a chartered accountant and chartered business valuator. The Court commented on this evidence as follows:

> (10) … In addition, Mr. Patrickson noted that the employer provided a furnished apartment/housing, free medical care to Dr. Morgan and eligible dependants, transportation provided to and from work, workman's compensation insurance, indemnification and insurance with regard to malpractice coverage for Dr. Morgan, 30 days of paid vacation per year, a plane ticket home and back during vacation period and transportation to the U.A.E. and back home at the beginning and end of the employment contract.
>
> (12) The imputed income of $30,000 for the housing provided and $6,000 for the transportation provided were used in Mr. Patrickson's calculations. Mr. Patrickson then calculated the gross income of Dr. Morgan that he would have earned in British Columbia as an employee, in order to receive the equivalent after tax amount that he receives from his employment contract in the U.A.E.

[70] As a result of his calculations, the chartered business evaluator determined that, notwithstanding a salary of $185,000.00, Dr. Morgan in fact had an effective

pre-tax annual gross income of $430,000.00. The Court accepted the report of the chartered business evaluator including the principles that his income should be grossed up for taxes not paid in Canada, that his income should include non-taxable employment benefits, and that these benefits as well should be grossed up for taxes which would have been paid in Canada.

[71] The approach of the court in **Morgan**, supra, was adopted by Pearlman J. in **Lam** v. **Chui**, 2008 BCSC 1177. In that case, the Wife applied for spousal support and the payor's gross annual salary was grossed up to account for use of a vehicle leased by his employer as well as the payment of vehicle expenses.

[72] The Court thus accepts the Respondent's submission in this regard and will impute income to the Petitioner which will grossed up for the reasons outlined below.

[73] **ISSUE 3(b) Quantum of Imputed Income** The Respondent offered expert evidence from A. N. Sandy MacNeill, CA. Mr. McNeill was qualified to offer opinion evidence in the area of general accounting (**Exhibit No. 11).** His report was tendered and marked as **Exhibit No. 12**.

[74] The Petitioner's income information contained in **Exhibit No. 9(b), Tabs 2 - 7 and 9 - 12** was provided to Mr. McNeill. He was asked to review the disclosure from Waterford International and calculate an equivalent gross Canadian taxable income for the Petitioner. For the purpose of his calculation Mr. MacNeil assumed the Petitioner was not a Canadian Resident for income tax purposes.

[75] As Mr. McNeill explained, the Petitioner's contracts indicated that he was paid in US dollars. The Petitioner's income information broken down by pay period was reviewed and then all sources of earnings were totaled to obtain a gross earnings figure is US dollars. Typically, the Petitioner's earnings included his regular pay, a foreign service premium and a hardship premium. Periodically, the Petitioner was also paid a variety of other amounts such as vacation pay, retention bonuses, restricted corporate stock, and relocation bonuses. Mr. McNeill noted that the Petitioner's company paid his local tax and his housing which were reflected as deductions from income.

[76] From the gross earnings figure, deductions were made to reflect those deductions found in the Petitioner’s pay information. This resulted in a net earnings figure in US dollars. To the net earnings figure, the amounts for housing, medical, dental, insurance and stock purchases were added back which resulted in a “normalized net earnings” or gross earnings in US dollars. This figure was then converted to Canadian funds using the average Bank of Canada rate for the years in question. Finally, Mr. McNeill calculated the equivalent Canadian gross taxable earnings for the Petitioner. He did this by calculating the gross Canadian earnings that would have to be earned to result in the equivalent net Canadian earnings as converted from US dollars.

[77] It was Mr. McNeill’s opinion that in 2007, the Petitioner’s equivalent Canadian gross taxable income was **$539,000.00** and in 2008 the equivalent Canadian income was **$401,000.00** for an average of **$470,000.00.** The foregoing amounts were based upon the Petitioner’s pay information only and did **not** take into account other cash compensation that the Petitioner received such as coverage for travel and education expenses nor did it consider the provision of a vehicle in the host country. It should also be noted that Mr. McNeill’s methodology included an “add back” of the Petitioner’s housing deduction in order that the gross income

figure could be fairly compared with equivalent Canadian earnings where there was no such deduction. The end result of this approach is that the Petitioner is treated as though he is a Canadian citizen who has to pay for his own housing costs. This methodology also makes it inappropriate to impute income based upon the payment of a housing benefit.

[78] All the Petitioner's sources of cash and non-cash compensation were reviewed with the Respondent in her oral evidence and are found in the contracts provided by the Petitioner's employer. For example, the vehicle benefit is found at **Exhibit 9B, Tab 3 - page 4, Tab 4 - page 4, and Tab 5 – page 2** and the housing benefit is found at **Exhibit 9B, Tab 2 – page 2, Tab 3 – page 3, Tab 4 – page 3 and Tab 5 – page 2.**

[79] In Mr. McNeill's Addendum, he was asked to project the Petitioner's 2009 equivalent gross Canadian taxable income. He did so by using the pay information provided by the employer for January of 2009 and taking into account that the Petitioner's base pay increased in 2009 to $11,250.00 per month from his 2008 base pay of $10,417.00 per month. On this basis, it was Mr. McNeill's opinion that

the Petitioner's projected 2009 equivalent Canadian gross taxable income was **$473,000.00**.

Imputing Additional Income

[80] Mr. McNeill's opinion provides the Court with a figure which essentially converts the Petitioner's cash compensation to the Canadian equivalent. These calculations and the resulting opinion do not account for the fact that the Petitioner has non-cash compensation as well. Non-cash compensation includes items such as provision of a vehicle in the host country, enhanced vacation entitlement, coverage for vacation expenses, and coverage of educational expenses for dependant children. For a convenient listing of the Petitioner's non-cash compensation, the Respondent refers to **Exhibit 9B, Tab 9, page 3** (all of which were available in subsequent contracts). All of these benefits increase the Petitioner's standard of living as he was not required to pay for his own vehicle or for his children's education expenses in after tax Canadian dollars.

[81] The Petitioner obtains a significant benefit by not having to obtain a vehicle, pay or maintain it in the host country. In the event that he was working in Canada and had to pay for a vehicle and maintain it, the Respondent submits that the before

tax dollars he would have to earn to pay for this benefit would be in the range of **$1,600.00** per month or **$19,200.00** per year.

[82] Further in 2004, the Petitioner had the benefit of a vacation/field break with a value of **$15,300.00USD (Exhibit 9B, Tab 9, page 3)**. Such benefits were available under subsequent contracts. The Respondent submits that the Petitioner should have an additional **$25,000.00** per year imputed to him to account for this benefit.

[83] The Respondent acknowledges that the burden of proof is upon her to establish that income should be imputed to the Petitioner. This burden requires proof on a balance of probabilities.

[84] Moreover, the case law is clear that the discretionary authority to impute income for support purposes must be exercised judicially and not arbitrarily. There must be a rational and solid evidentiary foundation in order to impute income. (**Coadic** v. **Coadic**, 2005 NSSC 291 (CanLII) and **Marshall** v. **Marshall**, 2008 NSSC 11 (CanLII)).

[85] The Court finds that the Respondent has discharged the burden of proof upon her and in this regard the Court fully accepts the opinion of Mr. MacNeill which provides the Court with a rational and solid evidentiary foundation to imput income.

[86] The Court, thus, finds that the average of the Petitioner's income over the three (3) years should be used as his base income, which is $471,000.00 (Canadian). To this imputed income further income should be imputed and added to account for the vehicle and vacation benefit.

[87] Accordingly the total income imputed to the Petitioner for child and spousal support purposes is set at $515,200.00 (Canadian). [471,000.00 + 19,200.00 +25,000.00]

[88] **ISSUE 4 (a & b) Child Support and Section 7 Expenses** The relevant portions of the child support guidelines are as follows:

Child the age of majority or over

(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is:

(a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(b) if the Court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

Applicable table

(3) The applicable table is

(b) if the spouse against whom an order is sought resides outside of Canada, or if the residence of that spouse is unknown, the table for the province where the other spouse ordinarily resides at the time the application for the child support order or for a variation order in respect of a child support order is made or the amount is to be recalculated under section 25.1 of the *Act.*

Incomes over $150,000

4. Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is

(a) the amount determined under section 3; or

(b) if the Court considers that amount to be inappropriate,

(i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;

(ii) in respect of the balance of the spouse's income, the amount that the Court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

(iii) the amount, if any, determined under section 7.

Medical and dental insurance

6. In making a child support order, where medical or dental insurance coverage for the child is available to either spouse through his or her employer or otherwise at a reasonable rate, the Court may order that coverage be acquired or continued.

Special or extraordinary expenses

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 reasonable 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:

(c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(e) expenses for post-secondary education;

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 deduction from the expense, the contribution, if any, from the child.

Subsidies, tax deductions, etc

(3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the Court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

[89] Having imputed a gross income to the Petitioner in the amount of $515,200.00 (Canadian) per year, the resulting child support payment for two (2) children pursuant to the *Child Support Guidelines* is $6,001.00 per month or $72,012.00 annually.

[90] The Respondent acknowledges that for payor with income over $150,000.00 the table amount of support is not always appropriate as referenced in Section 4. The Court is also mindful of the fact that the children of the marriage in this case are both over the age of majority but continue to be dependent due to post secondary education and also on going health issues for the daughter, Aryelle.

[91] The Supreme Court of Canada case **Frances v Baker** (1999), 177 DCR(4th)1, 50RFL (4th) 228 (SCC) dictates that the explicit wording of Section 4(b)(1) does not permit a departure from to set table amount based upon the first $150,000.00 or the payor's income. For that portion of the support award attributable to income over $150,000.00 the Court has discretion to increase or decrease.

[92] Thus, at a minimum this Court must order a table amount of $913.00 per month for two (2) children based upon $150,000.00 per year.

[93] Currently the Petitioner pays $3,000.00 per month for the support of his two (2) children. The Respondent requests that amount be increased to, not to the maximum, but to $4,000.00 per month which amount will meet the reasonable needs of the children.

[94] The Court accepts this submission as being both fair and reasonable in the circumstances as it will provide the children with a standard of living commensurate with the Petitioner's income.

[95] The Petitioner will thus pay the amount of $4,000.00 per month for the support of the two (2) children commencing on the 1st day of March 2009 and payable each and every month thereafter until otherwise ordered by a Court of competent jurisdiction. I would request that the Respondent register this Order with Maintenance Enforcement Program and have them pursue the matter of arrears accumulated to date.

[96] **4 (b) SECTION 7 EXPENSES**

Medical Coverage

The Petitioner currently has a mandatory medical plan that is available to cover the Respondent and the children of the marriage (**Exhibit 9B, Tab 5-p. 3, section 11).** The Petitioner had the Respondent removed from the medical plan and the coverage for the children had lapsed causing considerable hardship, especially for his daughter, Aryelle.

[97] The Respondent seeks and will be granted an Order requiring the Petitioner to maintain his employment medical plan for the benefit of his wife and children for so long as he is able to do so. The Order shall provide that the Petitioner is

required to do whatever is necessary to maintain that coverage failing which his employer shall deal with the children or the Respondent directly to provide whatever information or documentation is necessary to maintain the coverage. The authority for such an Order is found at section 6 of the *Federal Child Support Guidelines*.

[98] In the event the Petitioner is not able to reinstate medical coverage, the Court will order that the Petitioner will be responsible for any and all medical costs for the children, so long as they remain children of the marriage, and upon being informed of the relevant medical costs requiring payment.

[99] **POST-SECONDARY EXPENSES**

The evidence adduced in this matter established that the Petitioner's contract of employment provides him with a benefit related to his dependant children's educational expenses. This benefit is not mentioned in his February 12th, 2004 contract (Exhibit 9B, Tab 2) but it is contained in subsequent contracts beginning with his December 2004, contract (Exhibit 9B, Tab 3 - page 4, section 8(d)), his April 17th contract (Exhibit 9B, Tab 4 - page 4, section 7 (d)) and finally his January 9th, 2007 contract (Exhibit 9B, Tab 5 - page 3, section 10).

[100] As it is apparent that the Petitioner can be reimbursed for post secondary education costs pursuant to his contract of employment, it is not unreasonable for the Petitioner to accrue those special expenses for his children.

[101] Also given the fact the Respondent did not seek the maximum amount of child support pursuant the Guidelines, this affords the Petitioner the present ability to assume any such expense, whether or not there is any cost incurred by him to receive this benefit.

[102] The Court will further order in this regard that the Respondent and/or the children may deal directly with the Petitioner's employer to submit expenses for reimbursement in the event of default by the Petitioner.

[103] **Issue 4 (c)** - Currently the Petitioner pays the Respondent $7000.00 per month pursuant to the Interim Consent Order, which includes both child and spousal support. As of the date of trial he is in arrears of $6,674.71. An Order requiring payment of same forthwith shall issue.

[104] **Issue 5 - Spousal Support** - The Respondent is seeking spousal support from the Petitioner in accordance with his income on an indefinite basis.

[105] The authority for an Order of spousal support is found in section 15 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

[106] Section 15.2 (4) (a) - (c), (5) & (6) (a) -(d) of the *Divorce Act, supra*, requires the Court to consider the condition, means and circumstances of each spouse and provides that a spousal support order should address four statutory objectives:

> 15.2 (1) Spousal support order - A Court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the Court thinks reasonable for the support of the other spouse.
>
> (4) Factors - 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.

(6) Objectives of spousal support order - 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 an 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.

[107] The words of Justice McLaughlin in **Bracklow** [1999] S.C.J. No. 14 at paras. 30-31 are instructive:

(30) The mutual obligation theory of marriage and divorce, by contrast, posits marriage as a union that creates interdependencies that cannot be easily unravelled. These interdependencies in turn create expectations and obligations that the law recognizes and enforces...

(31) The mutual obligation view of marriage also serves certain policy ends and social values. First, it recognizes the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingles and impossible to disentangle neatly. When this happens, it is not unfair to ask the

> partners to continue to support each other (although perhaps not indefinitely). Second, it recognizes the artificiality of assuming that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of marriage to the absolute independence status of single life, indicating the potential necessity to continue support, even after the marital "break". Finally, it places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls.

[108] Justice L'Heureux- Dube in **Moge v. Moge** [1992] 3 S.C.R. 813, [1992] S.C.J. No. 107 directed that spousal support must strive to achieve some equitable sharing upon the dissolution of the marriage. At paragraph 73, she stated:

> "The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the *Act* promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse."

[109] The Respondent testified about the nature of her marriage to the Petitioner and the Respective Roles and Responsibilities therein. It was the Respondent's evidence that her marriage was a long term traditional one where the Petitioner was the sole provider and she cared for the household and was primarily responsible for the children. Her evidence in this regard was uncontested and was corroborated by the Petitioner's resume (**Exhibit 9B, Tab 1)** which documented employment in the Middle East, Scotland, Albert, British Columbia, the North Sea and the

Beaufort Sea during the period of the marriage. The evidence from the Petitioner's employment contracts established that he has recently worked in India and Kuwait.

[110] At the present time, the Petitioner is employed in a secure capacity with considerable benefits available to him. The Petitioner's present employment status was only possible with the support of the Respondent during the period of the marriage. The Petitioner accumulated experience and seniority in his industry that now demands significant remuneration which the Court has set at $515,200.00 per year. He is at a significant advantage at this point relative the Respondent. He gained such an advantage by and with the complete and total support of the Respondent who gave up her own career aspirations so that she could be available at all times to care for the Petitioner, the children and the home.

[111] By contrast, the Respondent is significantly disadvantaged by the breakdown of the marriage. She gave evidence that she is not presently employed. She has been out of the workforce for most of her adult life. Since separation, she has been struggling to cope with the breakdown of her long term marriage which has aggravated medical problems. Moreover, since Aryelle's accident in August of 2005, she has required her mother to be there for her to see her through extensive

medical treatment. This support will be necessary yet on an indefinite basis, especially given the absence of any meaningful contact with the Petitioner.

[112] The Respondent submits that it is also important to consider the Marriage Contract between the parties dated June 7th, 2001 (**Exhibit 9B, Tab 24**). This contract acknowledged that there was a mutual agreement for the Respondent to remain at home with the children and a corresponding responsibility to maintain her standard of living.

[113] The Respondent is clearly entitled to spousal support from the Petitioner. Given the length of the marriage and the significant disadvantage she is under presently, she should be entitled to support on an indefinite basis.

[114] As noted above, it is the Respondent's submission supported by the documentary evidence and expert opinion that the Respondent's Canadian equivalent gross taxable income is in the range of $515,200.00. The Respondent currently has no other source of income other than the support she receives from the Petitioner in the amount of $7000.00 per month. The current support payment is entirely non-taxable to the Respondent but she anticipates that any new Order

that specifies the amount of spousal support payable will be taxable to her notwithstanding that the Petitioner likely doesn't pay Canadian income tax or receive a deduction for the payment of spousal support.

[115] The Court is provided with calculations made pursuant to the *Spousal Support Advisory Guidelines* ("SSAG") and assume that Petitioner's income is $515,000.00 per annum and that he pays child support in the amount of $4,000.00 per month. The calculations show a range of spousal support from a low of $13,393.00 to a high of $15,818.00 per month. The median amount would be $14,605.00.

[116] The calculations however provide a caution where the payor's annual gross income exceeds the "ceiling" of $350,000.00. The ceiling is the income level for the paying spouse above which any formula gives way to discretion. The authors of the SSAG suggest (2) two approaches in such a case, first, a "minimum plus" formula or second a "pure discretion" approach. Both approaches permit the Court the use of considerable discretion in setting the appropriate amount of support.

[117] The Court was provided with calculations assuming that the Petitioner paid $4,000.00 per month in child support and had an income of $350,000.00 per year. This indicates a range of spousal support from a low of $7,982.00 per month to a high of $9,524.00 per month on an indefinite basis. The Respondent's submits that it is reasonable in this case to adopt a "minimum plus" formula such that the ranges form the base amount of spousal support payable. The median of this range is $8,752.00 per month. Added to the minimum quantum would be an amount in the discretion of the Court that would be fair and appropriate and reflect the objectives of the legislation.

[118] The Court notes the Respondent is not seeking the maximum amount of spousal support suggested by the SSAG. Rather, she seeks an amount that considers the Petitioner's responsibility to his children as a priority to her support but also recognizes his means, her need and the standard of living that she is entitled to given the long-term traditional nature of this marriage. The Court is also mindful that the parties' agreement that the Respondent stay at home has resulted in a complete loss of her career potential with consequent security and pension benefits. This is a considerable financial loss to the Respondent and she must be compensated.

[119] The Petitioner currently pays $7,000.00 per month which to date has been non-taxable. Once the Corollary Judgment is issued, she will pay tax on any spousal awarded and this must be considered.

[120] In this regard the Respondent has requested the Court to exercise its discretion in applying the minimum plus Formula pursuant to the SSAG and order spousal support in the amount of $14,500.00 per month.

[121] In consideration of all of the circumstances inclusive of the SSAG calculation and being mindful of the need to ensure payment of child support is given priority and also to the discretion the Court has in this regard I am of the opinion that a fit and proper award of spousal support in this instance is payment of $12,000.00 per month, which is calculated by averaging the midrange figures of $14,605.00 and $8,752.00, rounded off to the nearest thousand . Payment will commence March 1, 2009 and continue on a monthly basis thereafter for an indefinite period. I would request that the Respondent register this Order with the Maintenance Enforcement Program and have them pursue the matter of arrears accumulated to date.

[122] The SSAG calculation provided to the Court for consideration are attached hereto and marked schedule A & B.

[123] **Issue 6 - Division of Assets** - The Respondents submits that the parties had the following assets and debts at separation. The subsequent "notes" are counsel's submissions.

TABLE OF ASSETS AND DEBTS NEIL AND SHIRLEY SLATER			
Asset	**Value**	**Wife**	**Husband**
Matrimonial Home**Note 1**	$226,889.00	$226,889.00	$0.00
Adjacent Lot**Note 2**	$91,720.00	$91,720.00	$0.00
Contents of Home**Note 3**	$10,545.00	$10,545.00	$0.00
1998 Ford (Husband)**Note 4**	$4,000.00	$00.00	$4,000.00
1985 Cougar (Husband)	Nominal	$0.00	$0.00
1976 MGB (Husband)	$4,000.00	$00.00	$4,000.00
Fishing Boat (Wife)**Note 5**	$2,000.00	$2,000.00	$0.00
Sea Doo (Wife)	$2,500.00	$2,500.00	$0.00
RRSP (Wife/Spousal)Bank of Montreal Acct. No. 00019928112 **Note 6**	$18,221.61	$18,221.61	$0.00

RRSP (Husband)Bank of Montreal Acct. No. 00008158158 **Note 7**	Unknown	$0.00	Unknown
Joint Chequing Account Bank of Montreal Acct. No. 27383025-335 **Note 8**	$3,953.55	$3,953.55	$0.00
Joint Savings Account Bank of Montreal Acct. No. 2738-5068-662 **Note 9**	$2,417.09	$2,417.09	$0.00
Joint US Account Bank of Montreal Acct. No. 0019 4602 –331 **Note 10**	$190.00 (USD)	$190.00(UDS)	$0.00
Business Current Account (Husband)Bank of Montreal Acct. No. 0019 1-35 117 **Note 11**	$5,040.90	$0.00	$5,040.90
4EverSports Shares **Note 12**	$5,000.00	$0.00	$5,000.00
Spirit World Shares **Note 13**	$28,336.00	$0.00	$28,336.00
Pension Plan (Husband) **Note 14**	Unknown	$0.00	Unknown
401K Plan (Husband) **Note 15**	Unknown	$0.00	Unknown
Weatherford International Share Option Plan (Husband)Account No.	Unknown	$0.00	Unknown

850778931 **Note 16**			
Great West Life (Husband)Cash Surrender Value **Note 17**	Unknown	$0.00	Unknown
Weatherford International – Company Life Insurance (Husband)Cash Surrender Value	Unknown	$0.00	Unknown
Total Assets	**Unknown**	**$358,436.25**	**Unknown**
DEBTS	**BALANCE**	**WIFE**	**HUSBAND**
Mortgage Bank of Montreal Acct. No. 2738500498 **Note 18**	$115,834.14	$115,834.14	$0.00
Line of Credit Bank of MontrealAcct. No. 915-2273-8302-5355 **Note 19**	$6,441.78	$6,441.78	$0.00
Visa (W)Royal Bank **Note 20**	$6,284.98	$6,284.98	$0.00
Total Debts	**$128,560.90**	**$128,560.90**	**$0.00**
Equity	**Unknown**	**$229,875.35**	**Unknown**

Note 1: The matrimonial home was appraised at $245,000.00. See Schedule A to Statement of Property of the Respondent. After deduction of notional disposition costs of $18,111.00, the value of the home is $226,889.00 for division purposes.

Note 2: The adjacent lot of vacant land was appraised at $100,000.00. See Schedule B of the Statement of Property of the Respondent. After deduction of notional disposition costs of $8,280.00, the value of the land is $91,720.00.

Note 3: The Respondent has possession of the contents. See Schedule C of the Statement of Property of the Respondent. From the total value of $12,260.00, those items belonging to the children have been deducted for a net value of $10, 545.00.

Note 4: This remains in Husband's name but is in Wife's possession. The value is taken from the Respondent's Statement of Property, p. 2. The Wife is asking for an Order transferring ownership of these vehicles to Aryelle and the MGB to Cruise as promised by the Petitioner. These vehicles now only have a nominal value.

Note 5: The fishing boat was sold by the Wife after it had been out of the water for two years.

Note 6: The Respondent has a spousal RRSP account with the Bank of Montreal, Acct. No. 199928112. The present amount of the RRSP is $30,369.36 (as of Jan. 4, 2008). From this value, notional deregistration has been subtracted resulting in a net value for division purposes of $18,221.61.

Note 7: The Petitioner had an RRSP account with the Bank of Montreal, Account No. 008158158. The Respondent will introduce evidence that these RRSP's were worth $11,980.86 at November 8th, 2004. No current value has been provided. In response to a subpoena, the Respondent has discovered that these RRSP's were deregistered in 2006.

Note 8: The parties had a joint chequing account with Bank of Montreal, Acct. No. 27383025-335. The value of the account is taken from a statement for the period ending September 10th, 2004, and an entry for September 1st, 2004 on p. 2 of the statement.

Note 9: The parties had a joint savings account with the Bank of Montreal, Acct. No. 27385068-662. The value of the account is taken from a bank printout showing the balance on September 1st, 2004.

Note 10: The parties had a joint US funds account with the Bank of Montreal, Acct. No. 0019-4602-331. This account was used for the deposit of the Petitioner's pay. The value for division purposes is obtained from p. 2 of the Petitioner's Statement of Property.

Note 11: The Petitioner incorporated a company called Neil Slater Incorporated. The Respondent was and remains Vice President of the Company. The owner of the account is Neil Slater. This account was not disclosed in the Petitioner's Statement of Property. The value for division purposes is taken from a Bank of Montreal Statement for Acct. No. 00191035-117 for the period ending March 31st, 2004. The Petitioner has made no other disclosure with respect to this account or the company.

Note 12: The value of these shares has been taken from the Petitioner's Statement of Property, p. 2.

Note 13: The value for this asset has been taken from the Petitioner's Statement of Property, p. 2.

Note 14: The Petitioner disclosed a p. 2 of his Statement of Property that he had a pension asset. He has made no further disclosure with respect to this asset.

Note 15: The Petitioner has made contributions to a 401K plan. This was not disclosed on the Petitioner's Statement of Property. The Respondent will lead evidence in the form of pay statements that a 401K plan existed and that the Petitioner was making contributions to the plan. Moreover, the Petitioner's employment contract dating to November 18th, 2004, indicates that he would be eligible to continue to participate in the retirement plan.

Note 16: The Petitioner did not disclose any interest on a stock option plan in his Statement of Property. The Respondent will adduce evidence that the Petitioner has such an account, and that it has generated significant income in the period 2005-2007.

Note 17: The Petitioner indicated in his Statement of Property at p. 2 that he had two insurers, one through his company and with Great West Life. No disclosure has been provided with respect to the cash surrender value of these policies. The Respondent will lead evidence to show that at October 2001, his Great West Life policy had a cash surrender value of $6,383.90.

Note 18: The parties have a mortgage with the Bank of Montreal encumbering the matrimonial home. The Respondent always ensured payment of the mortgage but since separation, she has paid the mortgage out of the money provided by the Petitioner. The mortgage balance shown is taken from a Bank of Montreal statement dated November 4, 2004.

Note 19: The parties had a Line of Credit with the Bank of Montreal, Acct. No. 9105-2220-3633-2741. The balance owing on separation comes from a Bank of Montreal Statement to September 8, 2004.

Note 20: The Respondent had a Royal Bank Visa on the date of separation. She has introduced a statement from the Royal Bank confirming that the Visa balance was $6,284.98 on September 2nd, 2004. (September 17th balance of $6,385.94 less entries for September 17th of $100.96 = balance of $6,284.98).

[124] The Petitioner has not disclosed all of his assets to the Respondent. He should not benefit from his lack of disclosure. The Court can and will draw an adverse influence against the Petitioner based upon the Court's finding and conclusion that the Petitioner did not adequately disclose his assets to the Respondent.

[125] The following is a list of the material information that the Court finds was not disclosed:

(a) Non-compliance with the Notice to Produce dated June 2nd, 2005 (Exhibit 9A, Tab 9);

(b) Non-compliance with the Notice to Produce dated April 8th, 2008 (**Exhibit 9A, Tabs 2-13**);

(c) Non-disclosure of income information from 2004 onward (evidence obtained by way of subpoena on employer and found at (**Exhibit 9B, Tabs 2-13**);

> (d) Non-disclosure of the existence of a bank account in the name of Neil Slater Incorporated, which as of March 2004 had a balance of $5,040.90 (**Exhibit 9B, Tabs 15 and 15**);
>
> (e) Non-disclosure of the separation date value or current value of his pension. The evidence at trial will show a value in 2001 of approximately $81,000.00 (**Exhibit 9B, Tab 19**);
>
> (f) Non -disclosure of the existence of a 401K plan but such a plan existed and the Petitioner made contributions (**Exhibit 9B, Tab 17**);
>
> (g) Non-disclosure of participation in a Stock Option Plan with Weatherford International. The Petitioner does have such a plan and it has generated significant income to him in the period 2005-2007 and apparently generates dividends on an annual basis (**Exhibit 9B, Tab 13**);
>
> (h) Inaccurate disclosure of the value of his RRSP account with the Bank of Montreal and non-disclosure of the fact that he deregistered the RRSP's in 2006. (**Exhibit 14**); and
>
> (i) Non-disclosure of the cash surrender value of his insurance policies. The evidence at trial proved that one of the policies had a cash surrender value of $6,383.90 (**Exhibit 9B, Tab 18**).

[126] In **Cunha v Cunha** 1994 Carswells BC 509, Fraser J made the following comments regarding non-disclosure:

> (8) I am satisfied and I find that he has not made adequate disclosure of his financial dealings, both before and after separation. Much of the evidence before me is only before me because of the tireless struggle by Ms. Peters, counsel for Ms. Cunha, to locate assets. I agree with Ms.

Peters that we can have no confidence that we now know everything that there is to know.

(9) Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets that they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done. Non-disclosure has the tendency to deprive children of the proper support.

(10) It is not enough to respond to non-disclosure by an award of costs. Nor is it enough, in a case like this one to deal only with what is known. Either of these approaches, or both together, may still reward the non-disclosing litigant for his conduct, depending whether his concealment has been successful.

(11) I conclude that where there has been a concealment of assets, it ordinarily should be held that the concealment is ongoing, that there are assets still undisclosed, and that the division of assets should be effected accordingly. I am not sure whether it is of a consequence whether this is characterized as an assumption, a rebuttable presumption or an inference of fact. The result is the same. Such a holding may be avoided if the trial judge is satisfied by the conclusion of the trial that full disclosure has by then been made.

(12) Not only is it a matter of doing justice in any particular case, it is also a matter of general interest. The system should not give offence to the honourable litigant by treating the dishonourable litigant the same.

(13) Once non-disclosure at any stage has been established, the onus of satisfying the Court that afterwards there has been full disclosure should be on the non-disclosing party. If by the end of the trial, the Court is satisfied that full disclosure finally has been made, an award of costs only might be the appropriate penalty.

> (14) My approach in this case has been based on the principles that I have just articulated. I am not satisfied that Mr. Cunha has disclosed his assets. The origin of some of the assets uncovered is unknown. Were they the descendents of family assets which were dissipated? We do not know. Certainly Mrs. Cunha does not know. Mr. Cunha managed the family finances from the marriage in 1972 until the separation of 1991; she was not involved, except to sign whatever papers he told her to sign.
>
> (15) I conclude that I must infer that he has control and possession of family assets of which I have no knowledge. The proper working inference, in my view, is that the value of the undisclosed assets is at least equal to the value of the disclosed assets.

[127] The decision of Fraser J. in **Cunha v Cunha** was adopted in **Kiamanesh v Kiamanesh** 2004 CarswellBC 1993. In that case, the Husband failed to make proper financial disclosure and was ordered to transfer all Canadian assets to the Wife to assure an equal division. The reasoning in **Cunha** was also relied on by Wells J. of the Newfoundland Unified Family Court in **Chandra v Chandra** 2000 CarswellNfld 354. At paragraph 115, Wells J. stated:

> "It has been found by Canadian courts that when considering the division of matrimonial assets there are occasions when the level of disclosure falls below the standard required in order to accomplish an equitable division according to law. In such cases when disclosure has been non-existent or incomplete, the court have restored to inferences drawn from known facts, to arrive at conclusions and findings with respect to non-disclosed or concealed facts. Failing to draw such inferences would be to permit failure to disclose, to accomplish its purposes."

[128] As stated above, I am satisfied that the Petitioner has grossly violated his disclosure requirements and has done so in an attempt to hide assets from the Respondent and the Court to his potential benefit.

[129] The Respondent has no confidence that she has an accurate picture of all of the assets that the Petitioner has accumulated over the years. The Court similarly lacks confidence in this regard due to the repeated non-disclosure by the Petitioner.

[130] The Petitioner was well aware of this proceeding and elected, not to attend and participate. His decision not to attend is without explanation. The Court has no option but draw an adverse inference and finds that the Petitioner believes he is beyond the reach of this Court and that he can benefit from his non-appearance. I cannot allow this to occur as noted in the case law above cited.

[131] As a result it is ordered that the Respondent shall retain the matrimonial home; the adjacent property; the home contents; the bank

account balances; vehicles; boats, sea-doo and spousal RRSP and all assets so identified shall be conveyed into the Respondent's name alone, with no further claim from the Petitioner.

[132] The Court will order that the 1998 Ford F150 truck be conveyed directly to the child, Aryelle, as it is now in her possession. The 1976 MGB shall be conveyed to the child, Cruise.

[133] All remaining bank balances currently accessed by the Respondent shall not be subject to any division and shall be the sole property of the Respondent.

[134] Further orders will issue to authorize and empower the Sheriff to execute any and all property and vehicle conveyances referred to above in the event that the Petitioner fails to do so within 30 days of the issuance of this Court order.

[135] The Court will further state that it finds the above property division to be fair and equitable given the extreme circumstances of non-disclosures in this case.

[136] And if I am not correct in that assertion I find in the Respondent is entitled to an unequal division of assets pursuant to Section 13 of the *Matrimonial Property Act*, RSNS1989, c. 275 and in particular sub-sections (d); (e); (f); (g); (I) and (l).

[137] In the Court's view it would be unconscionable to require any equalization be paid to the Petitioner based upon the "known" assets only. It is very likely the Petitioner has other non-disclosed assets and I have therefore drawn an adverse inference against him to permit an equitable result for the Respondent.

[138] **Issue 7 - Incidental Relief -** The Respondent seeks an Order for various forms of incidental relief.

[139] First she seeks an Order requiring that the Respondent secure her spousal support payment by way of a beneficiary designation on his employment life insurance policy. The second request is that the Petitioner provide a payment to serve as security for support. The former request would provide security in the event of the Petitioner's death. The latter provides security in the event that the Petitioner decides not to cooperate with the Order of the Canadian Courts.

[140] The authority for the Order sought is found in Section 15.2 of the *Divorce Act, supra*. This section and a request for security were discussed by Kelly J. In **Murphy v Murphy** 2002 CarswellNS 156 (N.S.S.C.) beginning at para. 32:

> **Security for Arrears and Future Payments**
>
> [32] ... I come to the issue of security as advanced by Ms. Murphy. Mr. Murphy has admitted that he has repeatedly neglected to comply with his support obligations in relation to his former spouse. Arrears continue to accrue even now. With this in mind, it seems clear that an order for security is appropriate in this case.
>
> [33] The relevant statutory authority for such an order can be found in section 15.2 of the *Divorce Act* (R.S. 1985, c. 3), which reads in part as follows:

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

(2) Where an application is made under subsection (1), the Court may, on application by either or both spouses, make an Interim Order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the Court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

(3) The Court may make an order under subsection (1) or an Interim Order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

While this section makes no explicit mention of life insurance policies, it gives the Court a fairly broad authority to tailor appropriate support and security regimes based on a case-by-case analysis.

[34] In a number of reported cases courts have ordered payors under spousal support orders to designate the payee as beneficiary to their life insurance policies. One such authority is **Henry v. Henry**, [1998] N.B.J. No. 450, in which Athey j. of the Court of the Queen's Bench, faced with a similar situation, stated at para. 39:

I order Mr. Henry to designate Ms. Henry beneficiary of not less than 75% of the proceeds of his life insurance through employment as long as he has an obligation to contribute to her support. If requested by Ms. Henry he shall periodically provide her with proof of her designation as beneficiary.

Indeed, it seems clear from my review of the case law that orders of this nature have begun to be granted on a fairly routine basis. In Freedman et al., *Financial Principles of Family Law* (Toronto: Carswell, 2001, release 2), at 30.1 (b), the authors state unequivocally:

Life insurance can provide security for divorce settlements. To secure future payments of I) and equalizing payment or ii) spousal and child support, the recipient spouse may require that he or she be designated as the beneficiary of the payor-spouse's life insurance policy.

There seems considerable authority for the author's assertion in Canadian jurisprudence. See **Taylor v Taylor**, [2001] O.J. No. 835; **Hopkins v Hopkins**, [2001] O.J. No. 4248; **Maveety v Maveety**, [2001] O.J. No. 3982 and **Bursey v Bursey**, [1993] N.B.J. No. 635 among many others.

[35] While it was not cited by either party to this matter, I find Hood, J.'s decision in **Crouse v Crouse**, [2001] N.S.J. No. 252, to be compelling and significantly is on point. That case involved a long tradtional marriage, in which the wife had forgone employment opportunities early on and with the consent of her husband in order to provide full-time care to their children. At the time of trial, Mr. Crouse had failed to voluntarily pay any of the support payments owing under an Interim Order. In dealing with Ms. Crouse's request for security in the form of a beneficial interest in Mr. Crouse's life insurance policy, Hood J. wrote, at paragraphs 28 and 29:

[28] I order that the spousal support be secured by a beneficiary designation in favour of Catherine Crouse on Ross Crouse's group life policy through his employment in the amount of $100,000.00. That beneficiary designation shall continue as long as spousal support continues to be paid.

[29] In the event the group policy, for whatever reason, does not continue, Ross Crouse shall continue to provide security for spousal support by beneficiary designation on another life insurance policy. He shall provide annually proof of such insurance to Catherine Crouse.

> Mr. Crouse appealed the decision on a variety of grounds, but his appeal was eventually dismissed when he failed to provide security for costs as ordered by the Court of Appeal ([2002] N.S.J. No. 31). Admittedly, Ms. Crouse's employment prospects after the marriage were hampered by illness, however, I do not find this to be adequate grounds for distinguishing the case. Security should be granted in any case of this nature when it is found, for whatever reason, to be legitimately and reasonable warranted under the circumstances. Mr. Crouse has persistently neglected his responsibilities to Ms. Crouse, and it is not unreasonable to expect that he might continue to do so. Therefore, security in the form of an irrevocable designation of Ms. Crouse as beneficiary of Mr. Crouse's life insurance policy is reasonably warranted and will be ordered.

[141] I find that security is reasonably warranted in the present case. The Petitioner is no longer a resident of Canada and after this proceeding has concluded, he will not likely have any assets in Canada. His employer and pension plans are in the US, he has divested Canadian assets, and he has been resistant to the payment of court ordered support under the Interim Order.

[142] As a result the Orders requested by the Respondent in this regard are supportable and necessary in these circumstances and the order will thus issue. In addition the Respondent shall be permitted to contact the Petitioner's insurance directly to ensure compliance with the security obligation.

[143] **CONCLUSION**

(a) The divorce is granted;

(b) The Respondent shall have the sole care, control and custody of the children of the marriage;

(c) The Petitioner shall exercise access to the children, subject to the wishes of the children;

(d) The Petitioner's income is imputed to be $515,200.00 (Canadian Funds);

(e) Child support is ordered to be $4,000.00 per month commencing March 1, 2009 and payable each and every month thereafter until otherwise ordered by a Court of competent jurisdiction;

(f) Section 7 expenses ordered as per Part 4(b) of this judgment;

(g) Spousal support is ordered to be $12,000.00 per month commencing March 1, 2009 and payable each and every month thereafter until otherwise ordered by a Court of competent jurisdiction;

(h) Outstanding arrears due and payable as of February 12, 2009 are set at $6,674.71;

(i) Retroactive child support arrears accumulated pursuant to this judgment shall be calculated effective, March 1, 2009;

(j) Retroactive spousal support arrears accumulated pursuant to this judgment shall be calculated effective, March 1, 2009;

(k) Division of assets as per Part 6 of this judgment;

(l) Security for payment Orders granted as per Part 7 of this judgment.

[144] I will afford counsel for the Respondent the opportunity to make submissions as to costs. Upon Receipt of Notice in this regard with supporting documentation the Court will schedule a hearing.

____

J.