IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Whalen v. Whalen., 2010 NSSC 432

Date: 20101122
Docket: 1201-063785
Registry: Halifax

Between:

David James Whalen

Petitioner

and

Cheryl Ann Whalen

Respondent

Judge: Justice Lawrence I. O'Neil

Heard: September 23 and 24, 2010, in Halifax, Nova Scotia

Counsel: Michele Cleary, for the Petitioner
Paula Condran, for the Respondent

By the Court:

Introduction

[1] The parties began living together in May 1993; their only child was born January 27, 1995. They married April 8, 1996 and separated on November 27, 2008.

[2] Mr. Whalen has re-partnered; Ms. Whalen has not. He retired from the Canadian military in February 2007 (Exhibit 11 para. 10). He currently works as a consultant on a full time basis. He has pension income and employment income of approximately $70,000. Ms. Whalen works in the hospitality industry at the Halifax airport as a hostess/waitress and bartender. She declares that she earns approximately $24,700 per year including tips, the amount of which is in dispute. The parties agree that she is entitled to one half of Mr. Whalen's pension benefit earned by him while they lived together. They disagree on whether her share should also include one half of the pension entitlement earned before cohabitation.

[3] The parties agree on the scheduling of parenting time. They disagree on whether the schedule has resulted in Mr. Whalen having "a right of access to, or has physical custody" of their son (soon to be sixteen), for not less than 40 percent of the time over the course of a year. There is no dispute, however, that both parents have responsibility for their son, for significant periods of time.

[4] This is a final divorce trial.

[5] Evidence in this matter was heard on September 23 and 24, 2010. The only witnesses were the parties themselves. Many of the issues had been resolved prior to the hearing. The court was asked to rule on the following:

1. Whether a divorce should issue.

2. Whether the parenting time enjoyed by the parties meets the definition of shared parenting as that term is used in s. 9 of the *Federal Child Support Guidelines, SOR/97-175.*

3. Whether Mr. Whalen's pension entitlement earned prior to his cohabitation with Ms. Whalen is divisible; a period of approximately eight years commencing October 1985 and ending May 31, 1993.

4. The quantum of child support and the contribution to s.7 expenses by each party.

5. The quantum of spousal support payable, if any.

6. The timing and related arrangements for the sale of the parties' former matrimonial home.

Divorce

[6] I am satisfied that the parties were lawfully married as testified to and as stated in the Petition for Divorce (Exhibit 1).

[7] The parties have been residents of Nova Scotia for more than one year; in fact they have resided in Nova Scotia for more than twenty years. There are no bars to the divorce. There is no prospect for reconciliation. They have been living separate and apart since November 2008.

[8] A Divorce Judgment will therefore issue as requested on the basis of a permanent breakdown of the marriage.

Shared Parenting

[9] Section 9 of the *Federal Child Support Guidelines supra*, as amended, hereinafter also referred to as the *Guidelines*, provides as follows:

> Shared custody
>
> 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.

[10] An interim order dated September 29, 2009 outlined a parenting schedule that had the child with Mr. Whalen from Monday after school until Thursday before school. The remaining time he was to be in the care of his mother. That parenting arrangement evolved into the schedule agreed to at a settlement

conference held on December 4, 2009 and continued on January 6, 2010. The changes made following the settlement conference are outlined in clause 1 of Schedule 1 to Ms. Whalen's pre-hearing brief and in Mr. Whalen's affidavit at paragraph 9-12, filed August 6, 2010, being Exhibit 3.

[11] The schedule is based on the Respondent's work schedule of 3 mornings followed by 3 evenings, followed by 3 days off and the Petitioner's schedule of working Monday to Friday one week and Monday to Thursday on the alternate week.

[12] The facts in this case have some similarity to ones I found to exist in *MacInnis v. Kennedy*, [2010] N.S.J. No. 452 (2010 NSSC 318). In that case, I found that a shared parenting arrangement did not exist. For the reasons that follow, I have come to a different conclusion, herein.

[13] Mr. Whalen has detailed records of the time he spent with his son. His percentage calculations do not fail to credit Ms. Whalen on the same basis as he credits himself. That was an error in the Applicant's calculation in *MacInnis v. Kennedy supra*. In fact, herein, the Respondent more or less accepts the data offered by Mr. Whalen. However, the Respondent argues that this data yields a different result. She argues that Mr. Whalen has responsibility for the subject child slightly more than 38 percent of the time, i.e. 38.5 percent. Consequently she argues , he is not in a shared parenting arrangement.

[14] Mr. Whalen testified that the Respondent's calculation is not based on a full year. He says his calculations reflect the period beginning in August 2009 and ending in August 2010. He says the Respondent's calculation reflects the period following December 2009. The Respondent responds that the current allocation of parenting time began in December 2009 and December is therefore the appropriate starting date for the calculation.

[15] The question of whether the percentage of shared custody enjoyed by each parent should be determined by counting hours or days is relevant to the court's determination herein. The parties appear to accept that counting hours is appropriate. (see Mr. Whalen's affidavit, Exhibit 3 at Exhibit 'B' and Ms. Whalen's pre-hearing brief).

[16] The difficult issue of how hours spent in school are attributed was commented on in *Torrone v. Torrone* (2010), 2010 ONSC 661, 2010 CarswellOnt 382. In that case, the court held that the time should be attributable to the parent responsible for the child when the child is in school. In *B. (T.E.). v. S. (R.D.I.)* 2007 BCPC 56, the court held that where the period in school begins and ends during a parent's access period, the school time is credited to that parent.

[17] Justice Ferguson in *Torrone v. Torrone*, 2010 ONSC 661 reviewed a number of cases that dealt with how time spent with each parent is to be calculated. She referred to the Ontario Court of Appeal decision in *Froom v. Froom* [2005] O.J. No. 507; 194 O.A.C. 227 which stands for the preposition that there is no one method for determining the percentage of parenting time spent with a parent, whether it should be measured in hours or days.

[18] Justice Ferguson also commented on how a child's in-school hours are to be counted. In *Torrone*, Justice Ferguson was being asked by the Respondent to have Thursday "in school" hours attributed to him, since he was responsible for the child after school. For a number of reasons, she decided to attribute the Thursday "in school" hours to the mother. She went on to calculate the father's parenting time as 37 percent of the total. Her reasons for doing so included the following:

> (i) in school time should be credited to the parent responsible for the child while the child is in school;
>
> (ii) the court should begin with a presumption that the primary residential parent has the responsibility;
>
> (iii) the Respondent has had limited or not contact with the school;
>
> (iv) the Respondent's access is stated to begin after school;

[19] Dyer Prov. Ct. J. in *T.E.B. v. R.D.I.S.*, 2007 BCPC 56 commented on the issue as follows:

> 38 I do not agree with his method of calculation set out in Exhibit 5. The authorities as to how school time should be treated are far from being in agreement on principle in my view. Some say school time does not accrue to the benefit of the non-custodial parent, for example, deGoede v. deGoede, [1999] B.C.J. No. 330, February 3, 1999, Courtenay Registry D4928, a decision of Master Horn of the Supreme Court of British Columbia, submitted by counsel for the wife.

39 In that case it appears the mother had sole custody of the two children and would therefore be solely legally responsible for them when at school subject to any joint guardianship rights the father might have had. I do not see that Master Horn made any findings of fact on the above two points.

40 In the case at bar, both parents legally have equal responsibility for their children when at school, in my view. The father cannot be called a non-custodial parent as in deGoede, supra.

41 I think the proper approach to a decision on the 60/40 split issue is as per the case of Berry v. Hart, 2003 BCCA 659 as described in the Annotated Family Practice, 2006-07 at p. 22 as follows:

> The 40 per cent threshold in s. 9 if approached with a slavish accounting of small units of time, aggravates the financial incentive and disincentive inherent in an increase of a child's time with the minority time parent. In determining whether the threshold is met, the question is whether the paying parent spends such a sizeable percentage of time with the children that on a reasonable view of the evidence and considering the advantage that may accrue to a child in spending the occasional additional day/hour with one parent, one can reasonably say that 40 per cent or more level is achieved. The court may assess child/parent time as meeting the s. 9 criteria without a tight accounting. The assessment should be made in the broader context of the parenting arrangement. Simply finding that an access regime comes within s. 9 does not compel an automatic reduction in child support. In this case the dispute was over whether one parent spent 41 per cent or 39.37 per cent of the time with the children.

42 deGoude, supra can be distinguished and I do not therefore follow it. I prefer Mr. Thorsteinsson's approach in para. 32 of his written submission, however I do not exactly accept it as correct either, notwithstanding his apparent reliance on deGoude, supra.

43 Accepting that the father has 110 hours over the two-week access regime, it seems to me counsel accepts that every first Friday school hours unlike in deGoude, supra are to the account of the father in this case. In any event, this seems to be in accordance with the Cross v. Cross, [1997] B.C.J. No. 1741, July 22, 1997, Nanaimo Registry 5920/10926, a decision of Mr. Justice Meiklem referred to in deGoude at para. 6, and as well the case of H. v. H., 2003 BCSC 479 as described again in the above Annotated Family Practice at p. 22 as follows:

> Where a parent exercising access has joint custody and guardianship and the children's school attendance begins and ends during the access period, the access parent has a "right of access to" or "physical custody of" the children during attendance at school. These school or daytime hours should be included in the access parent's calculation of time under s. 9.

> However, if the access period ends at the time when the parent drops the child at school or day care, parent control passes to the other parent and school or day care time is not included in the access parent's calculation of time.
>
> 44 I follow H. v. H., Cross v. Cross and Berry v. Hart, supra in making the following calculation and using a 365-day year.

[20] In *Rush v. Rush*, 2002 PESCTD 22, Jenkins, J. found shared parenting did not exist:

. . . . .

> 14. I have decided that the shared custody rule does not apply here. The father testified he is on the road, mostly out-of-province, approximately 280 days of the year. That amounts to over three-quarters of the time. During his absences, involving the prescribed periods when the children are in his care, they are cared for by his common-law partner Gillian Wood. That may well be satisfactory for the parties from a custody vantage point. However, for purposes of consideration of the s. 9 threshold, I am not inclined to add credit for time spent in the father's home beyond the agreed times when it is not shown the father is physically present for a lot of the time either prescribed by the agreement or beyond. Secondly, in accordance with the mother's submission, the agreement is specific regarding time spent in each parent's care, and in this case some weight should be placed on the need for structure in the children's living arrangements.

. . . . .

[21] Herein, on most Mondays, Mr. Whalen drops his son off at his mother's an hour or so before school and the son goes to school from that location. This is the arrangement, even on those days when Mr. Whalen will be picking his son up after school.

[22] These parties have a parenting arrangement that is more or less working for their son. He is almost sixteen years old and more than six feet in stature. He is apparently a talented hockey player. He is moving freely between the residences, and using the court order as a guide.

[23] It would be contrary to the positive parenting arrangement the parties have achieved to credit "in school" hours to Ms. Whalen because the child changes/showers at her place before going to school, even after spending the night at his father's. I am satisfied that this "Monday" school time should be treated as

neutral or it should be attributed to Mr. Whalen. The result is that Mr. Whalen's parenting time exceeds 40% and he is in a shared parenting arrangement as defined by s.9 of the *Guidelines*.

[24] To illustrate how crediting Mr. Whalen with additional parenting time impacts on the calculation of his parenting time, one need only examine the accounting for the week-end (Thursday - Monday) of March 11-15, 2010 and April 8-12, 2010.

[25] At Exhibit "B" to his affidavit (Exhibit 3), Mr. Whalen credits himself with parenting time of 85.5 hours for each of these week-ends. He credits himself with Friday in school hours but not Monday's in school hours. It would be a fiction to credit Ms. Whalen with Monday's "in school" hours and not Mr. Whalen. Their son is in the joint custody of these parents and I find each accepts responsibility for him while he is at school.

[26] I am of the view that given the age of this child, the particular circumstances of these parents, some school time should be neutral or to Mr. Whalen's credit. Ryan's father lives in Dartmouth; his mother lives in Lower Sackville. Ryan prefers to change at his mother's, Monday morning before going to school. In my view, given his age, this time in his mother's home should not change the nature of his Monday school time. That time should be to the credit of Mr. Whalen or viewed as neutral.

[27] I agree that given the parties' structured parenting arrangement with provision for morning and evening access periods, counting hours to determine a parenting percentage is preferred.

[28] Mr. Whalen testified that he frequently spends time with his son during the week at his extra curricular activities and this is not noted on the data shown on Exhibit B to Exhibit 3.

[29] The parties have achieved a structured parenting arrangement that reflects their work obligations. It is to their credit that they appear to have been able to do so.

[30] Mr. Whalen has their son with him for most weekends, often for the period beginning Thursday after school until Monday morning. The weekend parenting

time is qualitatively different than a week day when the child is in school. As stated, some school time might be characterized as neutral.

[31] Herein Mr. Whalen credits himself with one half hour of parenting time on January 15, 2010, because he participated in a couple of telephone calls relevant to the care of his son. This entry highlights the extent to which parenting arrangements can become an accounting exercise when child support is impacted.

[32] My comments in *MacInnis v. Kennedy supra*, at paragraph 25 are on point:

> 25 The court must also be cautious when assessing how credit for parenting time can be lost. Structure and predictability are generally in the best interests of post divorce families when children are involved. The court must be mindful not to sanction calculations that provide an incentive for a primary care parent to not permit the other parent to spend quality time with a child and it must be careful not to sanction a parenting approach that rewards parents for "exploiting" a cooperative parent.

[33] By way of *obiter*, I am also persuaded that the parents should equally share special occasions and school break time with their son. The schedule flowing from the settlement conference did not address this issue and the parties did not ask that I deal with the issue.

[34] As stated, I am satisfied that the data offered by Mr. Whalen and reflecting his parenting time over the past twelve months is accurate and that he is primarily responsible for Ryan more than 40 percent of the time as he testified to. In addition, I am satisfied that he spends additional time with his son.

[35] I need not rule whether I have discretion to find some time, such as weekend time is to be weighted more. To the extent that some school time might be counted as neutral this may be possible. For example, should both parents in a joint custody situation be credited with parenting time when a child is in school? If a case for having some parenting time classified as neutral exists, this is one of them. The parties' son is sixteen years old. He is an active teenager and very active in hockey. His father is very involved in supporting this activity for him. He is with his father most week ends and in school for a significant part of his mother's parenting time. To credit Monday school time to the mother as her parenting time and then to use that as the basis for concluding the parties do not have shared parenting is to deny an important reality. The Monday "in school" time is neutral

time or attributable to Mr. Whalen. Either classification results in an increase in parenting time attributable to Mr. Whalen.

[36] Clearly these parents both spend considerable time with their son. They have organized their parenting time around their work schedules quite successfully. It is clear that both of these parents have significant costs associated with their parenting of Ryan. Section 9 of the *Guidelines* is meant to recognize this financial reality.

Date of Pension Division

[37] The Respondent's compensation flowing from a division of the Applicant's pension for the period May 31, 1993 to November 27, 2008 is approximately $172,469.58 (Exhibit 2 at tab 4). The Petitioner began receiving pension income in 2008; it amounts to $23,584.80 gross (paragraph 7 of Exhibit 3). His retirement from the armed forces pre dated his separation from the Respondent.

Pension entitlement earned prior to the parties' cohabitation

[38] The pension entitlement is a divisible asset pursuant to the provisions of the *Matrimonial Property Act*, R.S.N.S. 1989, c.275. (see *Morash v. Morash*, 2004 NSCA 20 and *Clark v. Clark* [1990] 2 S.C.R. 795).

[39] Justice Legere Sers in *Verdun v. Dorrance*, 2006 NSSC 305 was asked to rule whether pre-cohabitation pension accumulation was divisible upon divorce. The Petitioner had earned a pension entitlement as a member of the Canadian Navy. The Respondent was his second wife. The pre-cohabitation accumulation of pension was cashed in during his first marriage but bought back under a 14 year payment plan, nine years of which over lapped his period of marriage to the Respondent. The Petitioner paid $59.69 monthly from his pay from January 1, 1985 to December 31, 1999 to buy back his period of service from September 11, 1975 to June 18, 1981. He separated from his first spouse in 1987, two years after the buy back terms had been concluded.

[40] Justice Legere Sers addressed the status of pre-cohabitation pension entitlement under Nova Scotia law and compared our state of the law to that of the other Provinces. She also examined the impact of the *Pension Benefits Standards Act*, 1985, c. 32 (2nd Supp.) on the division of the military pension in question.

[41] Ultimately, Justice Legere Sers divided the pre-cohabitation pension equally.

[42] Justice Legere Sers' following observations are worth repeating. At paragraphs 174-185 she wrote:

> 174 In his annotation to Carswell's (reporting on Morash) Professor Thompson notes that:
>
> > "the MPA has not been touched since its initial passage in 1980, while the 1988 and 2001 amendments to the PPA would express the most recent intent of the legislature."
>
> 175 If our legislative scheme is different, then it is up to the legislature to address whether it ought to be changed.
>
> 176 It is up to the legislature to revisit the Matrimonial Property Act, to determine as a matter of policy whether pre-marital contributions to pension plans ought to be one of the exempted assets in the scheme of assets listed under s. 4(1), or whether the legislature intends to create a policy for Nova Scotians that differs from the legislative scheme throughout Canada.
>
> 177 The presumption in favour of inclusion of pre-cohabitation contributions, particularly in multiple marriages, creates the potential to lower the bar under s. 13 particularly where inclusion does not result from the express or implied intent of the parties but by law. It opens the prospect of litigation with respect to pensions with pre-marital contributions.
>
> 178 If perception and practice reject the inclusion of some pre-cohabitation assets, this creates the possibility of a preference for unequal divisions with respect to pre-cohabitation pension contributions on the basis of a perception of unfairness.
>
> 179 However, in Morash, Bateman, J. at paragraph 23 of the decision addresses this fairness factor when she said:
>
> > "The presumed equal division of matrimonial assets recognizes marriage as a partnership with each spouse contributing in different ways. A measuring of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Matrimonial assets may be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable." (My emphasis)
>
> 180 She concluded:

> "... [t]he issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair." (S.B.M. v. N.M.B., [2003] B.C.J. No. 1142; 183 B.C.A.C. 76; 301 W.A.C. 76; 14 B.C.L.R. (4th) 90 (C.A.), per Donald J.A., at para. 23). Absent a factual context supporting unequal division, the court is not free to exclude from division assets acquired by one party prior to marriage."

181 If the practice prior to Morash were to exclude pre-marital/cohabitation pension contributions, the scheme of the Act would allow for an application by the spouse wanting to include those contributions under a s. 13 application.

182 Sec. 13 address the very subject of pension benefits and contributions by s. 13(l):

> "13(l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;

and provides for a broad-based attack on all s. 13 enumerated subsections which would address the historical concern out of which this legislation arose; that in long term, traditional marriages, disadvantaged spouses, then largely women who were traditionally homemakers, were prejudiced by the division of assets by ownership, on dissolution of the marriage.

183 After the Matrimonial Property Act, more so than after Morash, the broad inclusion of all assets, except for those delineated, makes the argument for exclusion far more difficult and constrained to the s. 13 factors and more focussed on the role that the parties play during the marriage.

184 Morash then only recognizes that the absence of a specific exclusion for pre-marital contributions to pension under s. 4(1). This may result in the proliferation of litigation, likely because the complexity of pension division as an example was not contemplated at the time of the drafting of the legislation.

185 The Pension Benefits Division Act leaves the litigants to look to the other assets to achieve the appropriate court-ordered division if it exceeds 50 percent or, in the absence of other assets, leaves the litigant without practical remedy.

[43] Ms. Whelan’s share of the pension is presumptively one half of the entire pension entitlement.

Unequal Division

[44] Mr. Whalen entered the Canadian Forces in October 1985 and retired in 2007. He and Ms. Whalen began cohabiting in May 31, 1993; married April 8, 1996 and separated November 27, 2008. Ms. Whalen seeks a division of his 'military' pension earned between October 1985 and November 27, 2008.

[45] As stated, Mr. Whelan is agreeable to dividing his pension entitlement equally for the period they lived together. He argues, however, that to divide pension entitlement earned prior to May 1993 would be unfair.

[46] He asks the court to exercise its discretion under s.13 of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 and urges the court to conclude that "the division of matrimonial assets in equal shares would be unfair or unconscionable" taking into account the factors enumerated in s.13. I have considered all of these factors. Of these factors only (e), the date and manner of acquisition of the pre-cohabitation pension entitlement is potentially helpful for the Applicant, given the evidence presented.

[47] The Petitioner has not met the burden on him to establish that such a result would be unfair or unconscionable as that language is used in s.13 of the *Matrimonial Property Act*. Other than the mere fact of the asset being acquired prior to cohabitation, there is nothing noteworthy about the manner of acquisition of this part of the pension. This was a medium to long term relationship and this weighs in favour of equal division, when the court is called upon to consider whether equal division of an asset would be unfair or unconsionable.

[48] I do not have the value of the compensation payable to Ms. Whelan as a result of my ruling. I anticipate that it will be significantly higher than $172, 469.58, which is the value of one half of the pension earned between 1995 - 2007 (see Exhibit 9 at page 5). Nor do I know the extent to which my ruling will impact on Mr. Whalen's pension income, but it will presumably reduce it. My decision on the division of Mr. Whalen's pension will impact on my ruling on child and spousal support. I have therefore ruled on that issue first.

Double Recovery - Pension Income

[49] The Supreme Court of Canada in *Boston v. Boston*, 2001 SCC 43 considered the issue of double recovery of the pension benefits of a spouse.

[50] The majority beginning at paragraph 34-37 defined the double recovery problems as follows:

> 34 The term "double recovery" is used to describe the situation where a pension, once equalized as property, is also treated as income from which the pension-holding spouse (here the husband) must make spousal support payments. Expressed another way, upon marriage dissolution the payee spouse (here the wife) receives assets and an equalization payment that take into account the capital value of the husband's future pension income. If she later shares in the pension income as spousal support when the pension is in pay after [page429] the husband has retired, the wife can be said to be recovering twice from the pension: first at the time of the equalization of assets and again as support from the pension income.
>
> 35 Double recovery appears inherently unfair in cases where, to a large extent, the division or equalization of assets has addressed the compensation required. In equalizing the spouses' net family properties, the husband or wife as the case may be must include the future right to the pension income as "property" on his or her side of the ledger. This means that the pension-holder must, on separation or divorce, transfer real assets of equal value to the pension to the other spouse in order to retain the pension under the property accounting.
>
> 36 The pension-holder cannot divide the actual pension as it cannot be accessed until retirement. The pension entitlement cannot be sold or transferred. The apparent unfairness arises when the other spouse receives support payments from the pension income after the pension-holder retires. Professor James G. McLeod stated in his annotation to Shadbolt v. Shadbolt (1997), 32 R.F.L. (4th) 253, at p. 253: "Put another way, [the pension-holding] spouse receives nothing in return for the real assets transferred to his or her partner in order to retain his or her pension under the property accounting."
>
> 37 The double recovery issue here arises if the wife is permitted to seek further support from her former husband where the ability to pay support is determined by including the same pension, the value of which was previously used to determine the value of the husband's net family property, and to calculate the equalization payment owing to the wife. It is this issue which remains unsettled.

Imputed Gratuity Income

[51] Section 19 of the *Guidelines* provides the court with authority to impute income in a range of circumstances.

[52] Justice Forgeron in *Marshall v. Marshall*, 2008 NSSC 11 provides a helpful summary of the state of the law on this issue. At paragraph 17-18 she wrote:

> 17 The discretionary authority found in section 19 of the Guidelines must be exercised judicially in accordance with the rules of reason and justice - not arbitrarily. There must be a rational and solid evidentiary foundation in order to impute income in keeping with the case law which has developed. The burden of proof is upon Ms. Marshall and it is proof on the balance of probabilities: Coadic v. Coadic (2005), 237 N.S.R. (2d) 362 (SC).
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> 18 In reviewing the factors to be considered when a party has requested imputation, the court stated at paras. 14 to 16 of Coadic:
>
> > [14] In making my determination as to the amount of income to be attributed to Mr. Coadic, I am not restricted to the actual income which he earned or earns, rather I am permitted to review Mr. Coadic's income earning capacity having regard to his age, health, education, skills and employment history.
> >
> > [15] In Saunders-Robert v. Robert, [2002] N.W.T.J. No. 9, 2002 CarswellNWT 10 (S.C.), Richard, J., stated at para. 25:
> >
> > > "[25] When imputing income, it is an individual's earning capacity which must be considered, taking into account the individual's age, state of health, education, skills and employment history. In the circumstances of the respondent, in my view it would not be unreasonable to impute, at a minimum, one-half of the income that the respondent earned in 1995 and 1996, say $50,000. I note that the respondent's present income, according to his own evidence, is approximately $42,500.00."
> >
> > [16] In R.C. v. A.I., [2001] O.J. No. 1053, 2001 CarswellOnt 1143 (Sup. Ct.), Blishen, J., reviewed the principle that income is based upon the amount of income which a parent could earn if working to his/her capacity and further adopted the factors to be applied when imputing income as proposed by Martinson, J., in Hanson v. Hanson, [1999] B.C.J. No. 2532 (S.C.). Blishen, J., stated at paras. 79 to 80:
> >
> > > "[79] By imputing income, the court is able to give effect to the legal obligation on all parents to earn what they have the capacity

to earn in order to meet their ongoing legal obligation to support their children. Therefore, it is important to consider not only the actual amount of income earned by a parent, but the amount of income they could earn if working to capacity (Van Gool v. Van Gool (1998), 166 D.L.R. (4th) 528).

"[80] In Hanson v. Hanson, [1999] B.C.J. No. 2532, Madam Justice Martinson of the British Columbia Supreme Court, outlined the principles which should be considered when determining capacity to earn an income as follows:

> '1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para. 30).
>
> '2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
>
> '3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
>
> '4. Persistence in unremunerative employment may entitle the court to impute income.
>
> '5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> '6. As a general rule, a parent cannot avoid child support obligations by a self- induced reduction of income.'"

[53] Mr. Whalen believes that Ms. Whalen's gratuity income approximates $15,000 per year. He testified and offered as evidence in support of his claim, notebook entries detailing her gratuity income and purportedly made by Ms. Whalen.

[54] This document is Exhibit "C" to Exhibit 3 ; Mr. Whalen's affidavit filed August 6, 2010. He denies creating the entries.

[55] In response, Ms. Whalen testified that the entries were not all created by her. She confirmed that the pages are, in fact , from a notebook she kept to record her gratuity income. She confirmed that much of the information recorded was recorded by her, such as the month, the day and some of the amounts. She testified that she entered some of the amounts representing the daily gratuities, but not all of them. Other than taking issue with the amounts for a particular day, she was unable to identify which entries she did not make.

[56] I am satisfied on a balance of probabilities that the notebook entries were created by Ms. Whalen and reflect her gratuity income for the period identified. It is impossible to know her gratuity income. However, I am satisfied that $1,000 per month on average is a reasonable amount to impute to her. Given that she claims less than this amount on her tax return, this is a significant increase in her income. In 2009 she claimed gratuity income of $6,000 following an adjustment (see Exhibit 17). Exhibit 17, her statement of income filed in August 2010 declares a monthly gratuity income of $482.72. I am prepared to gross up her income to $1,200 per month for purposes of child and spousal support calculations. I am persuaded that the notebook entries correctly capture her gratuity income for the identified days in October 2008.

[57] On the basis of gratuity income of $482.72 per month she declares a gross annual income of $24,694 (exhibit 16 at para. 36 and exhibit 17). I will add an additional amount of gratuity income representing the difference between what I am imputing and that which she declares. That is $1,200- $482.72= $727. 28. Over the year this represents additional income of 12 * $727.28 = $8,727.36. Her annual income is therefore approximately $24,694 + $8,727.36 = $33,421.36. I have grossed up her gratuity income to reflect the fact that a significant portion of her gratuity income will remain tax free.

Child Support/Special Expenses

[58] Since separation Mr. Whelan has paid between $1,200 and $1,500 per month as combined child and spousal support. This amount is paid indirectly in the form of payments on accounts for which the parties are liable. A number of these are related to the home solely occupied by the Respondent including the mortgage, tax and insurance accounts. The parties are not seeking a retroactive calculation of child or spousal support.

[59] Section 9 of the "*Guidelines*" does not eliminate a requirement that child support be paid by parents in a shared parenting arrangement. The section authorizes the court to order the table amount or an amount other than that set out in the tables.

[60] The Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 SCC 63, identified the simple set-off amount as the preferable starting point for determining child support in a shared parenting situation. Section 9(a) - (c) of the *Guidelines*, reproduced *supra* at paragraph 9, must be the considerations of the court when determining the amount of child support in a shared parenting situation. I must consider the amount of child support set out in the tables for each spouse; the increased costs that shared parenting typically creates and the circumstances of each spouse and the child.

[61] When commenting on s.9, the court stated at paragraph 27:

> 27 The three factors structure the exercise of the discretion. These criteria are conjunctive: none of them should prevail (see Wensley, at p. 90; Payne and Payne, at p. 254; Jamieson v. Jamieson, [2003] N.B.J. No. 67 (QL), 2003 NBQB 74, at para. 24). Consideration should be given to the overall situation of shared custody and the costs related to the arrangement while paying attention to the needs, resources and situation of parents and any child. This will allow sufficient flexibility to ensure that the economic reality and particular circumstances of each family are properly accounted for. It is meant to ensure a fair level of child support.

[62] I conclude that on the facts before me the set off amount is the appropriate quantum of child support to be paid by Mr. Whalen, the higher income earner.

[63] I find that for child support purposes, Mr. Whalen's income should include his pension income and Ms. Whalen's income should be grossed up to reflect her receipt of benefits from the same pension entitlement; even if she chooses not to

access that benefit. I am satisfied that the result is that Mr. Whalen should pay child support in the amount of $115. Note his pension income will decrease by dividing the eight years that were in dispute.

[64] By way of *obiter*, assuming the parties will equally share the benefit of Mr. Whalen's pension, and were I not to consider pension income for the purpose of arriving at a set off amount, Mr. Whalen's income would be $46,000 and Ms. Whalen's income approximately $33,421.36. The set off amount is $400 - $295 = $105. This would be Mr. Whalen's child support obligation. Mr. Whalen's total income including his pension income is approximately $70,008 ($46,500 + $23,584). Ms. Whalen's total income, after attribution of the same amount of pension income is $57,005.36 ($33,421.36 + $23,584). When pension income is considered, the set off amount is $115 ($609 - $494).

[65] However, Mr. Whalen's pension income may decrease as a result of this ruling. A recalculation of the child support set off may therefore be required. Consequently, I am ordering a set off amount that reflects only the parties employment income. That amount is $105.

[66] The parties are to share special expenses proportionately to their gross incomes as provided by s.7 of the Guidelines. I set the total annual obligation at $2,400, based on the limited evidence presented. The parties are to proportionately share this expense.

Spousal Support

[67] As determined *supra*, Ms. Whelan has an income of approximately $33,421.36, consisting of her hourly wages or salary as the case may be and her grossed up gratuity income. She asks that when determining her entitlement and her quantum of spousal support I consider Mr. Whelan's pension income but disregard the income earning potential of her one half share of his pension. Mr. Whelan submits that his ongoing earnings from employment are approximately $46,500. He argues that after the payment of a child support set off, in a shared parenting arrangement, the parties are in comparable financial circumstances. He submits that the modest income of his partner does not impact on this determination. Her statement of income (exhibit 7) shows a monthly income of $500 spousal support.

[68] I have considered the principles governing the award of spousal support established by the Supreme Court in *Moge v. Moge* [1992] S.C.J. No. 107 and *Bracklow v. Bracklow* [1999] S.C.J. No. 14.

[69] Ms. Whalen's entitlement to spousal support at the time of the parties' separation was not at issue. It is submitted that spousal support is no longer needed and therefore her period of entitlement has ended. The focus of Mr. Whalen's argument is the duration of the spousal support obligation. He also argues in the alternative that if the entitlement continues, the quantum of spousal support should be very small given the parties' comparable income levels.

[70] I am not prepared to terminate the entitlement to spousal support.

[71] Ms. Whalen and Mr. Whalen separated less than two years ago after a period of cohabitation of almost fifteen years. The relationship is in the medium to long term range. The parties were inter dependent economically and accepted an economic obligation to each other. Ms. Whalen is still in the initial phase of re establishing herself in the work force and demonstrating economic self sufficiency. She continues to share responsbiility for the care of their teenage son. In my view, the termination of the spousal support entitlement is premature.

[72] For the purpose of determining the quantum of spousal support, I will not consider the pension entitlement of Mr. Whalen. The parties have employment income of $46,500 and $33,421,36, with Mr. Whelan having the higher income. When Mr. Whalen's child support set off is considered, the parties have after tax incomes that are closer than that.

[73] Ms. Whalen has employment related income of more than $33,000 and she has the opportunity to realize income from her share of Mr. Whalen's pension. She is entitled to one half the value of the pension. Mr. Whalen will be paying a small set off amount of child support. This will further reduce his income when the parties relative income levels are compared. Mr. Whalen has substantial indebtedness.

[74] Considering the condition, means, needs and other circumstances of each spouse, only a nominal amount of spousal support is payable by Mr. Whalen. I order that he pay $50 per month in spousal support. The obligation shall be reviewable after January 1, 2012.

Sale of the Matrimonial Home

[75] The parties have agreed to sell the matrimonial home as soon as possible. The Respondent asks that the court order that any closing date be forty-five days after the conclusion of the agreement to sell the home. This is to permit her additional time to move out of the home. Mr. Whalen suggests thirty days.

[76] I direct that Ms. Whalen be given a minimum of thirty days notice and that the parties seek to negotiate a closing date thirty days after an agreement to sell is concluded. Mr. Whalen has been carrying all of the costs of the home for almost two years. It is important that the parties move on. Significant preparation can be done in anticipation of a move. Ms. Whalen's need to move is not a surprise and one month's notice is sufficient to permit her to do so.

[77] Until the sale of the home, Mr. Whalen will continue to be responsible for the cost of carrying the home on the same basis as he has been, an arrangement the parties agreed to. However, in the event that Ms. Whalen is in receipt of her share of Mr. Whalen's pension before the closing, Ms. Whalen will be responsible for the costs of carrying the home, provided she continues to live in the home. If neither party lives in the home, they shall equally share the cost of carrying the home.

[78] The parties also agree to equally share the cost of readying the home for sale. I am not directing that those costs be incurred nor that one or the other pay them pending a sale of the home. If they can not resolve those issues, they will presumably have to accept a lower sale price for the home and sell it 'as is'.

[79] Any child and spousal support obligation of the Petitioner will be directed to the cost of carrying the home until the home is sold or until Ms. Whalen assumes the cost of carrying the home. Beginning on the 15th of the month, following the closing of the sale, the payments will be made directly to the Respondent.

[80] In conclusion:

1. The Divorce will issue on the basis of a breakdown of the marriage within the meaning of s.8 of the *Divorce Act*, S.C. 1985, c.3 (2nd Supp.).

2. The parties are in a shared parenting arrangement. Mr. Whalen shall pay a child support set-off of $105 per month, commencing on the 15th day of the month following the closing of the sale of the matrimonial home. The parties shall proportionately share the annual special expenses of their son, which are set at $2,400.

3. Mr. Whalen's pension entitlement is equally divisible from the date of his entitlement in 1985, forward.

4. Spousal support of $50 per month is payable commencing on the 15th day of the month following the sale of the matrimonial home. The spousal support obligation and quantum will be reviewable after January 1, 2012.

5. The matrimonial home is to be listed for sale with a view to closing a sale thirty days after an agreement to sell the home is reached, or within such other period as the parties agree.

J.