IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Vanderlinden v. Vanderlinden, 2007 NSSC 80

Date:20070314
Docket: 1201-060469
Registry: Halifax

Between:

James Frederick Vanderlinden

Petitioner

v.

Diane Michelle Vanderlinden

Respondent

Judge:	The Honourable Justice Douglas C. Campbell
Heard:	August 28, 2007 & October 26, 2007, in Halifax, Nova Scotia
Counsel:	Ritchie Wheeler, for the petitioner Marion Mancini, for the respondent

By the Court:

[1] This matter is a divorce proceeding in which the preliminary issue is whether or not the parties' Separation Agreement can be set aside as the husband requests and if so what corollary relief or *Matrimonial Property Act* relief should be directed. There are other minor issues that will be mentioned below.

BACKGROUND:

[2] The parties began a common-law relationship in August of 1998 and married in July of 2000. They separated in July of 2005. They have one child born April 17, 2001.

[3] Apart from the husband's pension through the military, the parties had very little by way of assets but had accumulated substantial debts totalling just under $60,000.00.

[4] Prior to the marriage and the common-law relationship, the wife had attended college in Cape Breton and had incurred student loan debt for those costs. The evidence is a bit vague as to the exact amount but it is clear that the amount

was in the area of $15,000.00 or $16,000.00. Early in the relationship, the couple lived in New Brunswick and the wife attended university there for a year during which she incurred a second student loan in a similar amount.

[5] The separation was emotionally charged for both of the spouses, exacerbated by the fact that the husband had begun an affair with another woman and had decided to terminate the marriage relationship. As that development unfolded, and with the couple having moved to the Halifax area, the wife had made plans to take a one year course at Compu College to improve her skills for purposes of entering the workforce. Her course was to begin in September 2005. To pay the tuition costs, the wife incurred additional student loan debt in the order of $15,850.00.

[6] With very little time between the decision to separate and the commencement of that college year and with little or no money available for legal fees, the wife initiated an intense program to negotiate and finalize a Separation Agreement.

[7] The wife had a general understanding that she may be entitled to spousal support and she obtained a one time consultation with a lawyer to learn about her

rights. In that session, the lawyer made the calculations for spousal support pursuant to the Spousal Support Advisory Guidelines (hereinafter “the Advisory Guidelines”). She also learned of the presumptive rule of obtaining an equal division of matrimonial assets and debts.

[8] She may have had some understanding that the Advisory Guidelines are not binding on the court yet at the same time had the impression and subsequently proceeded on the basis that these guidelines represented her entitlement. She saw them as software that the court uses in dealing with spousal support claims. The husband had some form of consultation with a lawyer but the details are unclear.

[9] The parties, without lawyers, began face to face negotiations which were driven by concepts presented by the wife to the husband.

[10] Partly because of the wife’s intended return to school and consequent lack of significant income, she wanted to have an arrangement that would relieve her of her share of the parties’ debt load. She was willing to trade spousal support entitlement for that relief.

[11] At or about the same time, the husband arranged a consolidation loan at a financial institution by which he consolidated the Compu College tuition debt, the car loan and the computer loan for a total of approximately $25,000.00. This happened after the separation date.

[12] The wife reckoned that the entire debt load represented matrimonial debts and were therefore equally shareable between the parties even though something in the order of $16,000.00 in student loan debts was incurred by her prior to the relationship and that almost the same amount was incurred post-separation for the Compu College debt.

[13] The wife then calculated the mid-point of both the amount of spousal support and the duration over which it would be paid pursuant to the Advisory Guidelines. The total monthly entitlement multiplied by the number of months of its duration, came to $71,400.00. She then proposed to her husband that although the Advisory Guidelines would “entitle” her to $1100.00 per month for slightly over five years, she would accept $600.00 per month for three years in exchange for the husband assuming the entire debt load of the parties. While there is an immaterial mistake in her math because she misunderstood the value of some of

the debts, she then calculated her compromised spousal support ($600.00 per month x 36 months) at 21,600.00 which when subtracted from what she believed to be her entitlement to $71,400.00 along with the subtraction of her half of the debt load would leave a balance outstanding payable by the husband to her of $13,800.00 She proposed that he would repay that sum at $115.00 per month commencing with the month after the initial spousal support would end. It would take ten years to retire that amount.

[14] In presenting this proposal to her husband, the wife described it as a compromise relative to what the court would do in terms of her entitlement to spousal support. She confirmed in cross examination that she did not tell her husband that she had learned from her one time lawyer consult that the Advisory Guidelines are not binding on the court.

[15] The husband indicated that he agreed to this arrangement motivated by a strong desire to “do the right thing” for his wife and daughter. He indicated that he was overwhelmed with guilt as a result of the marriage having ended coincident with his extra-marital affair and he felt very concerned about his daughter’s welfare. He indicated that he was paying little or no attention to his own interests

and had not attempted to appreciate the implications in respect of this arrangement from the point of view of his monthly cash flow.

[16] The parties met with a lawyer who was acting in the capacity of a mediator. The lawyer testified that there was very little mediation to be done because the parties came to the first session with their Agreement (above described) already worked out. The main task for the mediator was to draft the Agreement in legal form. This was done over a matter of days after which it was signed by both of the parties.

[17] At the time of the Agreement, the debts consisted of the above noted consolidation loan (which included the Compu College tuition bill), the pre-marital student loan from Cape Breton, the student loan from New Brunswick, a Visa bill, an overdraft and possibly a military loan, the grand total of which is just under $60,000.00.

[18] The husband seeks to set aside the Agreement and to substitute in the Corollary Relief Judgement an arrangement whereby the wife would take charge of her two student loans (which are currently in the hands of a collection agency). The

total is in the high $20,000.00 range. In addition, he proposes that he would continue to pay the agreed $600.00 per month for the balance of the agreed three year term but he seeks to be relieved from the agreed obligation to pay the above mentioned lump sum of $13,800.00 at $115.00 per month commencing in September 2008. He would continue to accept responsibility for the consolidation loan which included the Compu College tuition. His request that he be permitted to change the provision in the Agreement for life insurance so that he would name the child as beneficiary through a trustee rather than naming the respondent is conceded as is his request for clarity that he may obtain further life insurance for his present family without contravening the terms of the Agreement. There is a clause in the Agreement that requires him to keep the former family vehicle insured and available to be shared with the wife. He seeks to delete this term.

FIRST ISSUE:

[19] The first issue is whether the separation Agreement should be set aside as requested by the husband.

[20] The leading decision with respect to the setting aside of Separation Agreements is *Miglin v. Miglin* [2003] 1 S.C.R. 303. In that case, the Agreement contained a spousal support waiver and the wife sought to set it aside in order to seek spousal support.

[21] The Supreme Court reviewed sections 15.2(4) and 15.2(6) of the *Divorce Act*, R. S. 1985, c. 3 (2nd Supp.) (hereinafter the "*Divorce Act*") which state the following:

> 15.2(4) "In making an order under subsection (1) [that is spousal support] ..., 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;
>
> (C)any order, agreement or arrangement relating to support of either spouse.

> 15.2(6) An order made under subsection (1) ... that provides for the support of a spouse should:
>
> (A) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (B) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (C)relieve any economic hardships of the spouses arising from the breakdown of the marriage; and
>
> (D) insofar as practicable promote the economic self sufficiency of each spouse within a reasonable period of time."

[22] At paragraph 54, the court acknowledged the court's intention to promote settlement in divorce matters and commented on the importance of Separation Agreements being generally honoured by the courts. It stated:

> "Without some degree of certainty that the agreement will be respected by the court, the parties have little incentive to negotiate a settlement and then to comply with the terms of their undertaking. The policy goal underlying Section 9(2) would then be entirely defeated."

[23] The Supreme Court proposed two stages of analysis to determine the impeachability of a Separation Agreement. The first stage involves an examination of the circumstances surrounding the negotiation and signing of the Agreement.

The court makes it clear that, while this stage involves an analysis of whether any of the principles of contract law by which contracts can be set aside apply, there is a lower threshold. If the court is satisfied that the conditions under which the Agreement was negotiated were not appropriate, it can set the Agreement aside. In the second stage, the court examined whether there has been "substantial compliance" with the principles of the *Divorce Act*.

[24] In *Day v. Day* [2006] N.S.J. No. 135, Warner J. noted that when the issue relates to the *Matrimonial Property Act* stage 2 must be redefined. This is so for two reasons. First, if the provision being impeached is a *Matrimonial Property Act* form of relief, the stage two inquiry must relate to that Act and not the *Divorce Act*. Second, the *Matrimonial Property Act* has a particular provision in Section 29 that allows the court to set aside the Agreement if it is satisfied "that any term of the contract or agreement is unconscionable, unduly harsh on one party or fraudulent..." That is different from the substantial compliance test.

[25] In the case at bar, the definition of stage two is blurred by the facts of the case. The parties, in approaching their Agreement, recognized on the one hand an obligation by the wife to share in the debt load and, on the other hand, an

entitlement by the wife to spousal support. They agreed to a trade off of her debt assumption against a portion of her spousal support entitlement. Therefore, to some extent, stage two involves an assessment of whether there has been substantial compliance with the *Divorce Act* and whether the unconscionability test in the *Matrimonial Property Act* has been met from the totality of this trade off.

[26] In the end, the Supreme Court refused to set aside the Agreement, thereby cementing the policy that to do so will be the exception rather than the rule.

STAGE ONE OF *MIGLIN* TEST:

[27] It was argued by counsel for the husband that the husband's overwhelming sense of guilt arising from his having terminated the marriage in the face of a new relationship and from the position that that left his wife and child in, is a factor surrounding the signing of the Agreement that has relevance. He concedes that this factor alone might not cause the Agreement to be set aside but he contends that when it is added to the other circumstances including the speed and intensity of the negotiations, the lack of legal advice, the presentation by the wife of the Advisory Guidelines calculations representing her entitlement and her lack of disclosure that

the Advisory Guidelines are not binding on the court add up to the type of inappropriate circumstances contemplated in *Miglin*.

[28] The setting aside of a Separation Agreement based on stage one principles is a very difficult area and will depend very highly on the facts from case to case. It involves an assessment of the extent of the inappropriateness of those circumstances. All of those facts have to be balanced against the need for courts to recognize the sanctity of negotiated agreements in family law cases along with the fact that each of the parties has a responsibility to become informed about the legal principles involved and the parties' respective rights and obligations. It is not sufficient for an Agreement to be set aside simply because one party made a bad bargain.

[29] If I was convinced that the Agreement should not be set aside on stage one grounds, I would be required to move on to stage two. While it would normally make sense to deal with stage one first and then move to stage two if necessary, there would appear to me to be no prohibition in dealing with stage two first. I say this because, if it comes to pass that the Agreement is set aside based on stage two it does not matter whether I would have also done so under stage one.

[30] I have concluded that, on the facts of this case, the stage one argument poses a grey area. If I had been forced to answer the question, I might have been persuaded to set the Agreement aside at that stage; however, it is not necessary for me to make that judgement call and I prefer not to do so in the face of such a borderline set of facts. I can afford this luxury because I have decided to set aside the Agreement under stage two analysis.

STAGE TWO OF *MIGLIN* TEST:

[31] As stated above, on the facts of this case it appears necessary to analyze whether there has been substantial compliance with both the *Divorce Act* and whether pursuant to the *Matrimonial Property Act*, the contract is unconscionable or unduly harsh.

[32] The scheme of the negotiated Agreement is that the Advisory Guidelines were sought to be precisely complied with by way of a combination of assigning debts to the husband that would otherwise belong to the wife and by the payment

of two sets of fixed term spousal support amounts at levels sufficiently less than the Advisory Guidelines to justify the extra debts assumed by the husband.

[33] It is important to note however that the Advisory Guidelines are not part of or connected to the *Divorce Act* (in the same way, for example that the Child Support Guidelines are regulations passed pursuant to the *Divorce Act*) and are therefore not law. Furthermore, compliance with the Advisory Guidelines does not satisfy the test for substantial compliance with the terms of the *Divorce Act*.

[34] The Advisory Guidelines are a mathematical formula that is designed to provide a tool for lawyers and judges to quantify a spousal support claim once entitlement is established. The mathematical formula is most easily understood by referring to the spousal support formula in childless marriages. As I understand it, the computerized formula for those cases involving child support have the same general mechanics but the mathematics are so complicated that the calculation requires the assistance of a computer program. The computer program recognizes the tax free status of child support and calculates the excess of available funds after child support is accounted for along with those differences in tax treatment.

Accordingly, a discussion of the Advisory Guidelines is best done by reference to the no child spousal support formula.

[35] Simplified, the formula is as follows: the difference in total incomes of the spouses is multiplied by the length of the marriage. The product so achieved is then multiplied by a factor of 1.5%. The result represents the low end of the range for spousal support. That same product is also multiplied by 2%. That result is the end of the range of spousal support amounts. An amount within this range is chosen.

[36] It follows from that fact that, the outcome is very significantly a mathematical function of the length of the marriage. In other words, the longer the marriage lasted the larger the spousal support would be.

[37] While length of the marriage is a very important factor in determining the duration of spousal support it has only indirect significance for the process of quantifying support.

[38] There can be many short marriages in which the recipient spouse deserves more support than one in a long marriage. Sometimes short marriages are second

marriages late in life when job re-entry is not possible. Sometimes in a short first marriage at a young age, the recipient needs high support in order to retrain for example. Sometimes long marriages have allowed the parties to become debt free, thereby lowering the recipient's needs. If two couples have the same income differential and a marriage of the same length, but one couple enjoys very high incomes and the other couple has low incomes, the Advisory Guidelines would suggest identical spousal support. That would be odd.

[39] While it has become common place to approach the quantification of spousal support by reference to the four objectives for spousal support outlined in the *Divorce Act* and quoted above, several points must be remembered. Those objectives are very much in competition with each other. The self sufficiency goal might produce a need for short term but large support while recognizing the disadvantages of the breakup could demand long term support, but not necessarily as large.

[40] The fundamental statutory basis by which support is to be quantified in the *Divorce Act* is found in section 15.2(4) quoted above which requires the court to take into consideration the "condition, means, needs and other circumstances of

each spouse...” It is from this section of the *Divorce Act* that the age old test of “need versus ability to pay” spousal support was born. That section in the *Divorce Act* continues to exist and continues to be the foundation for the quantification process. While the same section requires the court to take into account “the length of time the spouses cohabited”, there is no direct correlation between marital length and quantity of support which is the foundation of the Advisory Guidelines. Marriage break up is not a tort.

DIVORCE ACT COMPLIANCE:

[41] It follows that my analysis of whether or not the Agreement exhibits “substantial compliance” with the *Divorce Act* must start with whether or not its outcome appropriately balances the concepts of “need” and “ability to pay”. In quantifying spousal support in compliance with the *Divorce Act*, I find that reference to the Advisory Guidelines is not helpful because it fails to address need and ability to pay, fails to address the objectives of the *Divorce Act* enunciated in section 15.2(6) of the *Divorce Act*, and relies too much on the length of the marriage.

[42] The concepts of “need” and “ability to pay” are very elastic and must be stretched to fit the facts of a case. The recipient spouse in a high income marriage would be able to establish that her need is at a higher level than a party in a low income relationship. Items that might be a luxury for the latter couple might well be part of the need in the former example.

[43] Practically, spousal support must be quantified as the lessor of need and ability. If need is high and ability is low, the award must be driven by ability. By contrast, if need is low and ability is high, need will govern.

[44] Unfortunately, the Advisory Guidelines have, in some cases, built up unrealistic expectations by parties and their advisors. The case at bar is a classic example where the Advisory Guidelines built expectations to the point where the settlement was negotiated with the exclusive goal of satisfying the quantity of support that would come from the Advisory Guidelines.

[45] The Advisory Guidelines are actually quite complicated although they are presented as being relatively simple and the computer software assists in promoting that mistaken belief. For example, there are a number of exceptional

situations which dictate that the Advisory Guidelines cannot be applied at all. One such exception covers the situation where the debt load of the parties exceeds the values of their assets. The Advisory Guidelines specifically exclude such insolvent couples from its operation. I would have thought that the existence of heavy debt load (whether it amounts to insolvency or not) would always have an impact unless the parties can easily remove their debt position by the sale of assets or by way of bankruptcy. In the present case, bankruptcy would not have been of assistance because the two student loans being paid for pursuant to the Agreement by the husband were in the name of the wife. His bankruptcy would therefore not clear off that debt. Furthermore, his father co-signed the consolidation loan. To rid himself of that debt by bankruptcy would drastically affect the husband in a negative way.

[46] Obviously the parties, who were representing themselves, were not aware that the Advisory Guidelines had no application in their case and one would speculate as to whether the lawyer consulted by the wife was aware of that fact. Because of their complexity, the Advisory Guidelines are a dangerous tool in the hands of self-represented parties not trained in the law. That lack of understanding drove the parties to an Agreement which I have concluded was not even remotely affordable by the husband.

SECTION 29 OF THE MATRIMONIAL PROPERTY ACT*:*

[47] To the extent that part of the Agreement sought to be impeached involves the assignment of matrimonial debt, I must look to section 29 of the *Matrimonial Property Act* which allows the setting aside when the Agreement is unduly harsh on one party or unconscionable (it was conceded that it was not fraudulent).

[48] There is, in my opinion, a harshness from the point of view of the husband because of a number of unjustified assumptions made in the wife's design of the settlement, including her starting point that the Advisory Guidelines calculates her entitlement. For example, as to the portion of the spousal support claim that was satisfied by debt assumption, the husband was "paying" with non-tax deductible dollars for an obligation that he owed in tax deductible dollars. While I was not given evidence as to the after tax cost of his support dollars, it is obvious from his level of income that spousal support would have saved him roughly 37% in tax. Accordingly, the bargain he made was to pay $1.00 for every 63¢ that he owed. In addition, he was not only taking over the obligation to repay the principle but also an obligation to pay interest over a long period of years given his inability to pay

out the debt in lump sum or even quickly. In combination, those two facts made the debt assumption a significantly imbalanced way to honour a portion of his spousal support obligation.

[49] Looking it at is from the point of view of the *Matrimonial Property Act*, there was absolutely nothing on the facts of the case that would justify any noticeable departure from an equal sharing of those debts that would be considered matrimonial debts. It is appreciated that the 100% assumption of debt was rationalized on the basis that it was satisfying a portion of the obligation for spousal support which in turn was quantified by reference to the Advisory Guidelines. For reasons that I will explain below, I have concluded that spousal support at that level and for the duration so calculated cannot be justified because they exceed the husband's ability to pay, thereby failing substantial compliance with the *Divorce Act.*

[50] An additional aspect of hardship in the Agreement comes from the fact that both the pre-marital student loan and the post-separation student loans were treated as matrimonial and therefore shareable debts.

[51] There is no definition of “matrimonial debts” in the *Matrimonial Property Act*. However, as I have stated in previous cases, it is my opinion that the reference in the *Matrimonial Property Act* to “matrimonial assets” must be interpreted as being the matrimonial assets as valued net of their debts. A debt would qualify as being matrimonial if it was spent toward a purpose that is family related.

[52] In the vast majority of cases involving equal division of matrimonial assets, one party assumes more than 50% of the debt and the equalization payment is calculated to make their overall division, net of debts, to be equal. In those majority cases where the debts are unequally assigned it follows that the pure assets are necessarily unequally divided in order to create an overall equal division of their net worth. If it is not true that the term “matrimonial assets” was meant to be the assets valued net of their debts, the absurdity would emerge that in all those countless cases where the net worth is equalized there would have been an unequal division of the pure assets - the exact opposite of the presumption in the statute.

[53] Just as post-separation matrimonial assets are excluded from the definition under section 4 of the *Matrimonial Property Act*, the post-separation tuition debt which approached $16,000.00 is not a matrimonial debt. If anything, it could be

seen as lump sum maintenance designed to meet the husband's spousal support obligation in light of the wife's plan of returning to school to pursue the goal of self sufficiency as invited by the *Divorce Act.* It follows that the assumption of that debt by the husband goes some significant distance toward fulfilling his spousal support obligation after a five year marriage.

[54] While I have no difficulty concluding that student loan debts can be part of the net matrimonial assets of a couple and subject to a presumptive rule of equal division, I would have declined to have ordered a sharing of the pre-marital student loans on the basis of Section 13 of the Act. While student loans do not carry an offsetting tangible family asset, they are incurred to promote family purposes and, therefore, can meet the implied definition of matrimonial debt. With regard to the premarital student loans, however, there could not be said to have been a family related purpose since the family did not yet exist and therefore I would have made an unequal division by assigning it entirely to the wife.

[55] If this had been a simple matter of interpreting s. 29 of the *Matrimonial Property Act*, I would have, for the above reasons, concluded that the 100% assumption of debt by the husband, including debt that I would not have classified

as equally shareable, would have rendered the Separation Agreement unconscionable and unduly harsh, justifying its setting aside.

[56] The reality, however, is that assumption of all the debt, including that which I would have determined not to be shareable, was the way that the parties attempted to meet a portion of the husband's spousal support obligation. It follows that the analysis of "substantial compliance" under the *Divorce Act* is required. The real question, then, is whether the Agreement, in its totality, represents a substantial balance of the means and needs of the parties respectively, and whether, in doing so, it meets the enumerated objectives expressed in the *Divorce Act*. The parties separated in July of 2005 and the Agreement was executed in late August 2005. The husband filed an affidavit sworn on February 15, 2006 to which was attached three pay stubs. All his source deductions come from his mid-month pay cheque, but the net pays tend to be the same for both mid-month and end of the month. The pay stub closest to the date of signing the Agreement was the end of October, but it is unhelpful because it does not show any source deductions. The question of substantial compliance with the *Divorce Act* is best approached by analysing the disposable income left to the husband after meeting the obligations he assumed in the Separation Agreement. The mid-November pay stub indicates

that his net pay was $1,086.85 and that that same net pay was duplicated at the end of the month, indicating, therefore, an actual monthly take-home pay of $2,172.00. However, included in his source deductions was an allotment to the Toronto-Dominion Bank of $790.00 which was used to pay the above noted consolidation loan and one or two other small bills. Accordingly, this amount is part of his take home pay, adjusting it to a total of $2,962.00.

[57] The evidence indicated that the Agreement obliges the husband to pay the monthly installments on the student loan (but he was not paying any more than the interest), the consolidation loan, the spousal support of $600.00, the child support of $450.00 (which later increased to $523.00), a pre-school bill, an overdraft and a VISA account. The total of these installments is $2,165.00, without making any payment towards the principal of the student loans. When these Separation Agreement driven payments are deducted from the husband's adjusted net pay, he would have $797.00 on which to live. I was not sure whether the tax savings arising from the spousal support was reflected in his source deductions. Further, I was not given tax calculations to quantify those savings but for my own purposes I have estimated that they are likely to be just above $200.00 per month. Therefore, if the tax savings are not reflected in his pay stub he would have approximately

$997.00 from which to meet all of his living expenses without making any progress towards the reduction of the student loans which are quite substantial.

[58] I would conclude that the totality of the Separation Agreement causes the husband to pay substantially more than his ability would dictate; that the *Divorce Act* has not, therefore, been substantially complied with. I note that the Agreement very efficiently promotes the self sufficiency of the wife, thereby meeting that objective of the *Divorce Act*, but it fails to meet the economic disadvantages facing the husband as a result of the marriage breakdown. The husband's take-home pay has increased, to some extent, since the Separation Agreement, but so also has his child support obligation increased. In analysing whether or not the Agreement can be set aside, the circumstances at play at the time of the Agreement must dictate whether or not substantial compliance with principles of the *Divorce Act* has been had.

[59] The above analysis of disposable income available after payment of support and debt obligations might be questioned on the basis that a payor's obligation for child and spousal support ranks in priority to his obligations to his creditors.

Bankruptcy is often offered as a solution to his cashflow shortage. I have given two reasons above to explain why bankruptcy would not assist.

[60] The husband does not have a direct legal responsibility to assume the wife's share of this debt load. He was to do so under the negotiated Agreement in order to meet the wife's goal of returning to school without debt load so as to pursue her objective of self sufficiency. She cannot expect both to be relieved of her debts and then argue that his voluntary assumption of them cannot factor into his inability to pay a given level of spousal support.

SECOND ISSUE: RELIEF SOUGHT BY THE HUSBAND:

[61] It has been conceded that the Agreement can be amended to reflect that the prescribed life insurance shall name the child as beneficiary through the trustee and that the husband is free to obtain additional life insurance for his present family without contravening the terms of the Separation Agreement.

[62] The husband further seeks to be relieved of his obligation to maintain the family car and its insurance and to permit the wife's shared access to the vehicle. The car was in poor repair and the insurance costs were excessive and given the size of the husband's disposable income after meeting the Separation Agreement obligations, he was not able to keep the car on the road. Accordingly, he was not able to comply with the clause in the Agreement to that effect. I have concluded that he was forced to that position, that had exhausted all possibilities of borrowing from friends and relatives and of reducing his living expenses, and that accordingly it was excessive to have expected him to meet that obligation. Accordingly the Corollary Relief Judgment shall relieve him of that obligation.

[63] The balance of the relief sought by the husband is actually quite minimal. He seeks to be relieved of the student loan payments for those loans occurred early in and before the relationship. This is a mere $250.00 per month, although some additional provision needs ultimately to be made for the retirement of the principal. It is quite timely that the wife is expecting to complete her Compu-College course next month and is very hopeful of gainful employment after a short work term. It, therefore, is particularly timely that she would assume her earlier student loan

debts at this point in time. It will have meant that the husband has carried her through her retraining both by way of paying her tuition bill and by stalling her creditors on the earlier student loans.

[64] It is particularly noteworthy that the husband does not seek to reduce the agreed $600.00 per month for the balance of its three-year term. This will mean that after the wife enters the workforce (if she does so as expected), she will continue to receive $600.00 per month for what might turn out to be more than a year until August of 2008.

[65] Relief from those loans is the bare minimum that could be done to provide the husband with some modest relief from the unconscionable provisions of the settlement. I will, therefore, direct that effective May 1, 2006 the husband shall not be responsible for the payment of the two student loans incurred as a result of the Cape Breton and New Brunswick academic pursuits by the wife.

[66] The husband seeks to be relieved of the lump sum payment of $13,800.00, which the wife calculated to be the unaccounted for portion of her spousal support entitlement to be payable at $115.00 per month over ten years, starting at the end

of the first term of spousal support. I have concluded, by implication above, that the spousal support obligation of $1,100.00, calculated by reference to the mid-point of the range produced by the Advisory Guidelines is unreasonable and that it dramatically exceeds the husband's ability to pay and that it interferes with the objectives of the *Divorce Act*. Accordingly I accept the husband's request in this regard.

[67] The effect of my decision is that the wife will have been supported to the extent of $600.00 per month in spousal support throughout the course of her Compu-College studies and for approximately a year or more thereafter, in the context of very optimistic job prospects for her. In addition, she will have had her tuition fully paid for by the husband and she will have, at the husband's expense, a deferral of her obligation with respect to her earlier student loans, to May 1, 2007, after which her assumption of those debts seems reasonable and timely. She will have been relieved of all of the debts that I would have seen to be equally shareable and will be left responsible only for those debts that I would have found to be not matrimonial or, alternatively, not shareable by virtue of the terms of s. 13 of the *Matrimonial Property Act*. She will have shared in the husband's pension for the married years and she would have given up any claim in a vehicle of relatively low

value. She will have received appropriate Table amount child support, adjusted voluntarily by the husband when his income increased, and the support amounts would have been protected by life insurance. All of that is in the context of a five year marriage, plus two years of common-law relationship. On balance, I have concluded that this arrangement is a reasonable one, especially in light of all the circumstances, including the partial implementation of the Separation Agreement to date.

THE DIVORCE:

[68] I find all procedural and jurisdictional matters and the grounds for divorce have been proven and accordingly I will grant the divorce judgment. I would direct that counsel for the Petitioner would draft the Corollary Relief Judgement and Divorce Judgment for the consent of counsel for the Respondent and to send it directly to my attention, reminding me of its history.

COSTS:

[69] I had the impression at the trial that neither party was seeking costs. In the event that I am wrong, I would indicate that if either party wishes to be heard on costs, that party shall approach the Scheduler within three weeks of the date of this decision for a one-half hour appearance on my docket for a subsequent date and to notify me of that fact by letter.

J. S. C. (F. D.)

Halifax, Nova Scotia