IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: J.E.M. v. L.G. M., 2007 NSSC 52

Date: 20070216
Docket: 1201-059851, SFH D 040623
Registry: Halifax

Between:

M. (J. E.)

Petitioner

v.

M. (L. G.)

Respondent

Revised Decision:	The original decision has been corrected according to the erratum released on January 27, 2010. The text of the erratum is appended to this revised decision.
Judge:	The Honourable Justice Beryl MacDonald
Heard:	September 5 & 6, 2006 and November 29, 2006, in Halifax, Nova Scotia
Written Decision:	February 16, 2007
Counsel:	Deborah Conrad, counsel for the Petitioner Lynn Reierson, counsel for the Respondent

By the Court:

[1] This is a divorce proceeding in which both parties are seeking a divorce and a determination of :

a) separation date

b) parenting arrangements

d) child support - table and section 7 expenses

e) division of matrimonial property

f) spousal support

g) life insurance and medical coverage

h) costs

[2] To provide privacy to the parties, rather than use their names I will refer to the Petitioner as the wife and to the Respondent as the husband. I have used the last digits of investment numbers to assist in their identification for division. In preparing this decision I have reviewed all of the affidavit evidence filed by the parties, their oral testimony and the exhibits filed during the hearing.

DIVORCE

[3] I am satisfied that all jurisdictional requirements of the Divorce Act have been met and that there is no possibility of reconciliation. I am further satisfied that there has been a permanent breakdown of this marriage by reason of the parties having lived and continuing to live separate and apart from one another for a period in excess of one year from the commencement date of this proceeding. A Divorce Judgment will be issued with effective date to be the date of this decision.

SEPARATION DATE

[4] In her Petition for Divorce the wife considered the separation date to be July 6, 2005, the date she signed that Petition. The husband's initial Answer filed in this proceeding did not dispute that separation date. In his Amended Answer the husband stated that the date of separation was August 1, 2000. He alleges there has been no sexual relationship with the wife for 10 years. They did not participate in joint social ventures and there was little communication between them except for the day-to-day scheduling issues relating to the children's activities. The husband considered his marital relationship with the wife to have ended when the wife, in August 2000, removed money from a joint account and placed it in her separate personal account.

[5] The end of a marriage is not determined solely by establishing when the sexual relationship between the parties terminated although this may be an important factor. In *T.W. Hainsworth, Divorce Act Manual,(2000 Canada Law Book*), the author says at p.8-8:

> A cessation of sexual intercourse coupled with the fact that the husband and wife may occupy separate bedrooms is not, in itself, proof that they are living separate and apart but merely evidence bearing upon this issue.....

[6] The whole of the evidence describing the marital relationship must be examined to determine when the matrimonial relationship ceased to exist. In *McKenna v. McKenna (1974), 19 R.F.L. 357, (N.S. C.A.),* MacKeigan,C.J.N.S. quoted at p. 358 from the trial judge's decision:

> In determining whether a marriage exists the court must give greater weight to those matters that should be peculiar to a husband and wife relationship, i.e., sexual relations, joint social ventures, communication and discussion of family problems, etc., then to the performance or nonperformance by the wife, for example, of the meal preparation and laundering, pass that can be done by any maid or housekeeper.

[7] In this decision Chief Justice MacKeigan also referred with approval to the definition of "living apart" given in *B.(J.) v. B. (A.W.) (1958), 13 D.L.R. (2d) 218 (Ont.C.A.) at p. 358:*

> These words refer not to a place but a state of things; not to a life apart in the physical sense, as exemplified by residence in separate structures, but rather to leading a life of withdrawal from the joint matrimonial relationship embraced in the term >cohabitation.

[8] In *Raymond v. Raymond, 1997 CarswellNB 449 (Q.B.),* the husband and wife lived in separate bedrooms, never attempted counselling and did their communicating through their children. At paragraph 21 Justice Graser comments:

> The parties shared the marital home and all its contents throughout the years. Although their communication was minimal they did communicate through the children. They did eat with the children on occasion. And they seem to have gone out of their way to make sure that the children came first prior to their own personal needs or desires. There was never a separation agreement, neither one ever consulted counsel, neither ever expressed an intention to terminate the marriage or finalize the separation in any way until 1996. I think one can take note of the fact that many people because of varying circumstances live unhappy, non-communicative and non-conjugal lives. However, to accept the submission that these parties have been legally separated since 1981 while at the same time living in the same house and successfully raising five children; and where neither party took any action or any active steps whatsoever to inform the other that it is over; where they shared many of the expenses of the home, food and clothing and for some years a bank account, would in my view be to take the interpretation of the law to a level that could lead to preposterous consequences. This was a terrible marriage however it did encompass the responsibilities of raising five children and all the consequences attendant thereto, of keeping a home, paying bills, and looking after their needs. It would indeed be a stretch to find this strange living arrangement to be of a nature that would allow a Court to find that the separation took place in 1981.

[9] The Husband suggests that separation occurred in August 2000 when his wife transferred $15,000.00 out of their joint banking account into her own personal account. The wife admits she did transfer money but she disputes the amount involved. The husband acknowledged that the wife was the recipient of $20,000.00 on or about March 2000 either as a gift from her father or as an inheritance from her grandmother passed on by her father. The details are unclear and are not significant to this decision. The wife is not seeking an unequal division in respect to this money. The gift, when received, was immediately placed into the parties' joint account. The husband testified that when he discovered the transfer out of the joint account he told the wife they were "finished" and what she had

done was " the last straw". He says she admitted removing $15,000 from the joint savings account. He acknowledged that the removal was to purchase a G.I.C. with a one year maturity date. At maturity, on August 2, 2001, the capital and interest would return to the joint account. Exhibit 24 confirms that upon maturity the amount invested in the G.I.C. was deposited into the joint account. On August 7, 2001 this amount plus an additional $100.00 was transferred out of the joint bank account but there is no paper trail to explain who transferred that money nor where the money then went.

[10] The wife admits that she withdrew $10,000 from the joint bank account for her own use. She considered this to be her money because of the gift she had received from her father. She recalled $5,000.00 of the money she received from her father being used to pay for the construction of the car port. The balance remained in the account until she withdrew $10,000.00. She has no documents to support her version of events but she did provide evidence that at one point her personal banking account contained the sum of $10,000.00.

[11] The evidence is clear that the husband handled all of the family finances. He insisted that any money to which the wife was entitled was to be administered by him. After the wife removed money from the joint bank account, he became suspicious of her and feared she would take more money from that account and others .

[12] In his affidavit sworn March 22, 2006, the husband , at paragraph 49 states:

> In general, the separation of our respective financial affairs commenced on August 1, 2000, when the Petitioner unilaterally removed $15,000.00 from our joint ..... savings account. The Petitioner indicated at the time that the $20,000 received from her father was "just for her" and that was why she was withdrawing the money. I was responsible for ensuring our family's financial obligations were met and I was concerned that the Petitioner would remove further funds from our joint accounts and thereby limit my ability to pay our regular bills and family expenses.

He mentions nothing in this affidavit about telling the wife that their marriage was over. She denies he said this to her. She took money out of the account because she wanted to have some money of her own for her use personally and for the children.

He examined every purchase she made on the credit cards and although theoretically she had the use of the joint accounts she testified:

> I never had access to any accounts, joint accounts, even though in theory I was allowed, you know it was our names on it but I was never allowed to access it, after 1995, right, when I was home.

[13] I believe her. The husband testified that he wanted her to put everything on credit cards because:

> ...they didn't have to be paid off for 30 days so it was like getting money for free during that period.

[14] In August 2000, after the wife withdrew money from the joint account the husband removed $69,000.00 from that same account and placed it in an account in his name alone. By the end of 2000, little money remained in the joint accounts. The husband had removed all of the money in those accounts into accounts and investments in his name alone. To gain full control over the family investments he frequently signed the wife's signature when it was required. He acknowledged having done so but suggests his action was known and consented to by the wife. The wife disputes this but given the husband's total control over the couples finances, I expect he believed he had her consent to do as he pleased. By January 1, 2001 his pay was going into his sole ownership chequing account and not into the joint account. By November 2002, the husband had cut off the wife's use of the family credit cards. He did continue to pay all the household accounts, purchase food and pay other necessary expenses but he was extremely frugal as is evidenced by the financial assets accumulated by this family. On a very modest income these assets could only have been accumulated by living in a financially restrictive environment.

[15] I do not accept that the husband separated from the wife on August 1, 2000 because she withdrew money from the joint account. They had a disagreement about the removal of money from the account but neither was contemplating marital separation at that time. I do accept that the husband was determined to maintain control over the family finances and he took steps, after the wife showed some independence, to transfer significant funds into his sole ownership accounts to prevent her access to that money.

[16] The husband also suggests the separation date should be August 2000 or possibly November 2002 based on the following:

- The parties have not slept together since their son's birth.

- By November 2002 all their financial affairs were separate.

- They did not socialize together.

- They rarely ate together.

- The last marriage counselling was in 2002.

- They rarely communicated.

[17] The wife's response is:

- The husband chose not to sleep in the master bedroom and he chose not to have a sexual relationship.

- Their financial affairs were separate because he wanted to control their financial affairs and he was suspicious of her. She had only removed some money she thought was hers to do with as she pleased. In doing so she was not motivated by any consideration suggesting she was "separating" from the marital relationship.

- They rarely socialized before August 2000. Their lives totally revolved around the children's activities. Nothing changed in this pattern after August 2000.

- They ate together as much after 2000 as they did before. She prepared the majority of the meals for him. He may or may not eat with her and the children.

- They spoke with one another as often after as they did before 2000. Their communication did revolve around issues effecting the children. There were

> discussions about money. She wanted to talk about their relationship. She wanted to improve it but he wouldn't listen. She sought help from various community agencies in an effort to bring her concerns about their relationship to his attention with the hope he would respond and their marriage become happier. These efforts continued on her part until her decision to file for divorce.

- He never told her he was separating from her.

[18] In paragraph 11 of the husband's affidavit sworn March 22, 2006 the husband states:

> This practise of sleeping separately began shortly after Alex's birth, when the Petitioner came down with pneumonia and used to sleep downstairs in a rocker as it assisted with her breathing. Later we moved the rocker into the master bedroom for the Petitioner's convenience and I began to sleep downstairs. Later, after a washing machine was installed in the master bedroom, also for the Petitioner's convenience, I found the smell of detergent and bleach disturbing and spent more nights sleeping downstairs. The Petitioner and I also have very different housekeeping 'styles' which also contributed to my discomfort in the master bedroom. When our marital difficulties increased I began sleeping downstairs every night.

[19] In paragraph 12 he says:

> .....I have attempted to ensure that the children do not observe me sleeping on the couch by going to bed after them and getting up before they do. This arrangement has become routine over the years and, although there is some tension and stress in dealing between myself and the Petitioner, it is an arrangement under which our children have continued to thrive.....

[20] The husband did not want the children to know their parents were not sleeping together. I take from this he didn't want them to know their parent's were separated. Indeed the evidence is clear that no one after 2000 until July 2005 knew these parties were separated. I do not consider the husband's decision not to sleep in the master bedroom and engage in a sexual relationship with the wife to be evidence of their separation. Their communication and other difficulties are evidence of unhappiness. The husband himself sent the wife articles from the newspaper one published May 13, 2002 entitled "Divorce Exacts Heavy Toll, Study Says" and another published December 7,2002 entitled " Dad Vows to Fight

Tooth and Nail for Kids, Home". In doing so he appears as the person who feared his wife would leave him. On July 31, 2005 he wrote a letter to his wife in which he states, "It is still difficult for me to think about what is happening, because it hurts so much."

[21] The husband has not satisfied me on a balance of probabilities that these parties were separated or should be considered separated prior to July 2005.

PARENTING PLAN

[22] The sole and guiding principle to follow when adjudicating custody and access disputes is to determine what is in the best interest of the child or children involved. Several cases provide guidance to the court in applying this principle: See for instance *Foley v. Foley (1993) 124 N.S.R. (2d) 198 (N.S.S.C); Abdo v. Abdo (1993) 126 N.S.R. (2d)1 (N.S.C.A)*. Particularly useful is the comment in Dixon v. Hinsley (2001), 22 R.F.L. (5th) 55 (Ont. C.J.), at p. 72:

> "The best interests" of the child is regarded as an all embracing concept. It encompasses the physical, emotional, intellectual and moral well-being of the child. The court must look not only at the child's day to day needs but also to his or her longer term growth and development."

What is in the child's best interests must be examined from the perspective of the child's need with an examination of the ability and willingness of each parent to meet those needs. Each parent's plan for the child must be examined carefully in light of the child's needs. Custody is not always awarded to the parent who has "cooked the most meals, driven the most miles, attended the most concerts or cheered the loudest at their achievement..." (*Gillis v. Gillis* (1995), 145 N.S.R. (2d) 241 (N.S. S.C.) at p. 259.

[23] In *Gillis v. Gillis (1995) Carswell N.S. 517* the court determined that conflict between parents does not necessarily mean they cannot be awarded joint custody if there is sufficient indication of their ability to place the needs of the child before personal needs and to cooperate on issues of vital importance to the child. The role

of the court is not to determine which parent is better but to decide which plan for the child's care will best meet the child's developmental, educational, health and social needs.

[24] There are two children of this relationship, a daughter who is 14 and a son soon to be 12. The husband agrees that the children should be in the wife's primary care. The wife wants sole custody and the husband seeks joint custody. These children are adolescents. Both parents have been able, under adverse and unusual circumstances to communicate sufficiently to permit the children to live enriched lives. The wife supported her son's need to have friends at their home and she supplied snacks and other food over the husband's objections. The husband is a driving force behind his son's success in hockey. The wife is sensitive towards her daughter's apparent lack of concern about appearance while the husband is more critical. Their parenting approaches are very different but the children have not been harmed by this difference.

[25] These children are successful in school. The wife is concerned about the husband's disagreements with her about the doctor who should treat the children, about how often they should go to the dentist, and about whether their daughter should have glasses. The husband does, on occasion, consider himself more knowledgeable than some professionals but I am not satisfied that his interventions, or lack of intervention, posed any safety or health risk to the children. However, he has interfered when one would have expected he would not. Regular visits to the dentist are an appropriate precautionary measure and as a primary care parent the wife will have every right to arrange these appointments. She will not need the husband's consent. She will not need his consent to attend to the children's health needs, nor to have them fitted with glasses should these be required to correct a sight deficiency.

[26] The wife is concerned that her son disrespects her and is modelling her husband's behaviour in this regard. She would like the entire family to seek out counselling to deal with this and other issues. Counselling can always provide assistance to families experiencing divorce. However, I am not satisfied that the difficulties the wife has described represent typical responses of her son. The stress under which this family lived may be a contributing factor.

[27] On the evidence before me I am not satisfied that the conflict that has arisen between the husband and wife will continue and will be of such intensity to justify

a finding that it is not in the best interest of these children to place them in the joint custody of their parents. I do think it is important that the husband understand joint custody does not mean he can direct the wife in how she parents the children day to day. Nor can she direct how he parents the children when they are in his care. Joint custody means that each parent has the right to participate in the significant decisions affecting the children's lives. For example, if a child has educational difficulties, is he or she to be tutored or attend a special educational program? If a child has a health problem, does he or she undergo an operation? If a child is to attend college or university how is this to be paid for and, specific to this case, if the parties son is to stay in hockey how will this be accomplished and what involvement will each parent have? If parents cannot jointly make these decisions the courts are called upon to intervene. If decision making in the child's best interest constantly requires court intervention, the provisions for custody may be changed.

[28] These parents have made important decisions affecting their children under strenuous circumstances for both. While they may not always have agreed I expect they will now be able to focus on what is in the children's best interest and jointly make the decisions required of them.

[29] While I am convinced these parents can parent their children jointly, I am concerned about how they are to speak to one another about transportation requirements and other issues of importance to the children. In respect to transportation, the wife does not want the husband making these arrangements through the children. This is a reasonable request. As a result the husband and the wife must determine the extracurricular and sports activities in which the children are to participate and obtain schedules so they can decide who will be transporting which child to each event. If a change is required the parents must contact one another to discuss the necessary revisions. This might require an early morning, lunch, dinner or late evening phone call between them. The wife requested that the husband not contact the children during these hours but since this is when the wife herself is most likely to be available she may have to accept calls from the husband at these times to discuss a change to preciously arranged scheduling. She will have to accept calls to discuss other issues of importance to the children.

[30] The husband is to have significant contact with the children. He should continue to attend and be involved with them at sporting and other events. The children are free to call him at any time. He wishes to call them daily. It is not clear

why he would find it necessary to call them daily and I suggest there is no need for him to do so. Some parents consider it necessary that they call a child to say goodnight every night. Some parents find this intrusive particularly since the right to call often leads to allegations of failure to follow the order every time a call is not answered, even when there may be a justifiable reason for the failure to answer the call. Saying goodnight over the phone may be more important for younger children who see a parent infrequently than it is for adolescent children. If the husband must speak to the children directly he should not call early in the morning or late in the evening. Given that these children often are involved in activities in the evenings likely the best time to reach them is at noon or during dinner and the wife should not interfere with this. I am not satisfied that it is in the children's best interest to have the court specify a specific time when the husband may call them. With the direction I have given I do hope this will not become a continuing irritant between the parties.

[31] These children will be in the primary care of the wife. The husband proposed a detailed schedule outlining when the children would be in his care. The wife was not in complete agreement with his proposal. She suggested some changes that, in some situations, would increase the husband's parenting time. The reality is that both proposals are premature since the husband does not have an adequate residence to accommodate the children overnight. To the date of the hearing the husband was essentially living in the matrimonial home during the week and in an apartment on the weekend. It is inappropriate for him to continue to live in the matrimonial home. The wife will have exclusive possession and he is to move into his apartment.

[32] The husband's apartment has one bedroom. While possibly he and his son can sleep in the bedroom with his daughter on a couch in the living room this is not a comfortable arrangement. I am hesitant to order specific detailed parenting arrangements under these circumstances. However, both parties have agreed the husband should have overnight weekend access every second weekend. The wife suggests Friday after school until Sunday at 4:00 p.m. The husband suggests Saturday at 10:00 a.m. until Sunday at 5 p.m. Given the circumstances I have described, and as long as they continue, Saturday at 10:00 a.m. until Sunday at 4:00 p.m. is appropriate, as is a provision that the children be in the husband's care every Wednesday from after school until 9:00 p.m. He shall have additional access at reasonable times upon reasonable notice. This will require him to discuss his

plans for the children's care with the wife who is not to deny his reasonable requests. The husband shall transport the children for all times when they are to be in his care. I will retain jurisdiction to hear further submissions about when the children will be in the husband's care if the parties cannot agree about what is appropriate when their living circumstances are stable.

CHILD SUPPORT

[33] In 2005 the husband received a one time retroactive payment of salary. This resulted from a contract agreement negotiated between his union and the federal government. The retroactive payment covered a salary adjustment for the years 2003 and 2004 but was reported on his 2005 Income Tax Return, the year in which the payment was made. As a result the husband's 2005 annual income as reported on line 150 of his income tax return is not an accurate reflection of his likely 2006 total income. I accept the husband's calculation of his 2006 total income at $56,694.00. Table Guideline support for two children based on this total income less his union dues of $700.00 per year is $796.00 per month. This amount shall be paid by the husband to the wife through the Maintenance Enforcement Program as she has requested.

[34] The wife seeks additional child support pursuant to section 7 of the Federal Child Support Guidelines for extracurricular activities and for child care when she obtains employment. The husband agrees there should be a payment pursuant to this section and argues that it should include the cost of his health and dental insurance covering the children and that it should be shared proportional to the parties incomes which in this case will include the wife's spousal support.

[35] Pursuant to section 7 a court may order a parent "...to provide for an amount to cover all or any portion of ... " child care expenses, that portion of the medical and dental insurance premiums attributable to the child, health related expenses that exceed insurance reimbursement by at least $100.00 annually and extraordinary expenses for extracurricular activities. In considering these expenses the court is to take into account the "necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to he means of the spouses and those of the child and to the family's spending pattern prior to the separation." A definition of extraordinary extracurricular expenses has been provided in the guidelines. It requires the court to examine the expense in light of

the requesting parent's income, including the amount received pursuant to the guideline table, and in certain other circumstances other additional factors such as the number of activities in which the child is enrolled, the overall cost of those activities and the special needs and talents of the child. Finally in determining the amount of an expense 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."

[36] While section 7 does state that the guiding principle is that these expenses are to be shared proportional to income the court may order a parent to pay all or any portion of such an expense.

[37] The husband has always paid for the children's sports and other activities. The wife had little income to contribute to these expenses. The cost of the daughter's activities is modest. The son's hockey expense is considerable. Both parents want their children to continue to in their present activities. Neither has suggested they are unnecessary. Until the wife has additional income, she cannot contribute to these expenses. Presently she has an income from investments of $290.00 per month. She will have the $796.00 per month table guideline child support. She will receive approximately $622.00 per month from the child tax and G.S.T. credits. She will receive spousal support but not in a sufficient amount to meet her household budget for necessities. Nothing remains to contribute to section 7 expenses. If these children are to remain in their activities, they will have to be paid for by the husband. Employment by the wife will be a change in circumstances entitling both she and the husband to apply for contribution to these and other expenses, such as necessary child care and the cost of maintaining the health and dental plan.

DIVISION OF MATRIMONIAL PROPERTY

CLASSIFICATION

[38] Sec. 4 (1) of the ***Matrimonial Property Act*** defines all real and personal property acquired by either or both spouses before or during their marriage as matrimonial assets with the exception of certain enumerated exemptions. None of the exemptions are relevant to this case. The majority of the assets acquired by these parties were acquired during the marriage.

[39] Some portion of the husband's severance entitlement and pension was acquired previous to the marriage. The wife is not seeking a division of the husband's pre marital pension credits. She does seek to divide the entire severance pay entitlement to the date of separation. The parties were married for 18 years. They are raising two children. The wife has been out of the workforce since the birth of the youngest child. I do not consider it unfair or unconscionable to divide the entire severance pay entitlement to the date of separation. The family home, personal bank accounts, RRSPs, the furniture and household effects, and vehicles, are, in this case, all matrimonial assets.

VALUATION

[40] The ***Matrimonial Property Act*** does not specify the date or time upon which an asset is to be valued for the purpose of division. This is to be determined in the discretion of the trial judge. (*Lynk v. Lynk* (1989), 92 N.S.R. (2d. 1); *Reardon v. Smith* (1999), 9 R.F.L. (5th 83)) I adopt the statement of Justice Daley of the Family Court in his capacity as a referee in *MacDonald v. MacDonald*, [1991] N.S.J. No. 639, August 23, 1991:

> The key in valuating the matrimonial property is an orderly and equitable settlement of the spousal affairs, and whatever the date has to be to accomplish this purpose, it is the proper date.

[41] In general it is considered equitable to value RRSP accounts and investments in corporations to the date of the actual cash in, transfer, or rollover between the parties (division date) after taking tax consequences and disposition costs into consideration. Bank accounts, motor vehicles, furniture, household contents, recreational vehicles, boats and other types of assets which may be used by one party to the exclusion of the other, and thereby depreciate in value, are generally most equitably valued to the date of separation. . (*Simmons v. Simmons [2001] N.S.J. No.* 276)

[42] However, there are other factors that affect the decision about the appropriate valuation date for a particular asset. For example, an asset existing upon separation that may have been ordinarily valued at its division date, may no longer exist at the trial date and may have been consumed partially or entirely to the advantage of one party to the proceeding. Had the asset been divided at the date

of separation the parties would have had equal access to its then existing value. Further post separation investments may have been made increasing the value of an asset. The separation date value is, in these circumstances, often the appropriate value to use for division purposes.

[43] Both the husband and the wife have used or transformed some of their assets since separation. Contributions have been made by the husband to his RRSPs since the separation date. For these reasons and to provide an equitable division of these assets, I have chosen values for the matrimonial assets at or near the date of separation in July 2005. These values have been obtained from the wife's Statement of Property sworn July 6, 2005 and Tab 6 attached to her Updated Statement of Property sworn August 28, 2006. This family has no debt.

[44] The assets considered consist of assets that will attract income tax and those that will not. (see Table 1 and Table 2 attached) The wife requested that the taxable assets assets be divided at their gross value and a spousal rollover be ordered to effect equalization. The husband made submissions that his severance pay should be discounted for tax but said nothing about the RRSP's . Neither made submissions about the appropriate discount rate to be applied.

[45] The husband has some liquidity. In one of his bank accounts to the date of the hearing he maintained the sum of approximately $62,000.00. His severance pay can, when payable, be placed into an RRSP rather than be paid out in after tax dollars. Under these circumstances I consider it appropriate to divide the taxable and non taxable assets separately. The taxable assets shall be equalized by way of a spousal rollover. In accordance with the figures provided in Table 1 the wife is required to roll over into the husband's RRSP the sum of $28,182.34. Table 2, the division of non taxable assets, requires the husband to give the sum of $49,491.95 to the wife to equalize those assets.

[46] The matrimonial home, the husband's pension and the air mile points are not included in the Table calculations.

[47] The wife has requested an statutory division of the husband's pension credits from the date of the marriage to the date of separation. The husband's pension is to be equally divided as requested by the wife.

[48] The husband has 97 air mile points. No information has been provided about whether and how these points may be divided. If they are divisible they shall be equally divided. If they are not divisible and because I have no evidence of their value, they shall remain in the ownership of the husband without adjustment.

[49] The husband requests that the matrimonial home be sold if the wife cannot purchase his interest in the home. The wife requests exclusive possession of the home until the youngest child reaches age 17 or completes grade 12. This request, if granted, would be an unequal division of property. [*Jenkins v. Jenkins [1991] N.S.J. No. 340 (N.S.S.C.); Dennis-Fisher v. Fisher [1994] N.S.J. No. 259 (N.S. C.A.)]*

[50] There is no agreement between the parties about the value of the matrimonial home. The husband produced an appraisal valuing the property at $270,000.00. The wife produced pictures (Exhibit # 36 and 37) clearly showing what I consider to be significant mold in the bedroom ceilings and substantial water leakage in the sun room. The husband minimizes these defects. The wife also described problems with the electric boiler that heats the house. It is in need of repair or replacement. The relay sticks. The husband hits it with a piece of wood to reset the temperature when it overheats. The husband admits that the electric boiler, which provides both heat and hot water to the house, has a controller inside that sticks. This means the heat stays on and won't shut off. By tapping it he can unstick the controller. He suggests he could not afford to replace the broiler at $2,600.00 especially considering the problem can be dealt with merely by tapping the broiler to loosen the contact. He testified that the controller rarely sticks and recalled this happening only once last winter. The wife's evidence is that this is a frequent problem. Whether a frequent problem or not, I consider this a serious problem that should be repaired. It is unclear from the appraisal whether the appraiser took any note of the mould in the bedroom ceilings or was informed about the boiler problem. The appraisal did mention the water damage to the sun room. If the wife was seeking to set off the husband's interest in the matrimonial home against other assets the question I have about the value of the home may have become relevant. She has not sought this remedy. However, the remedy she has sought must be justified.

[51] The wife has presented an unrealistic Statement of Expenses after taking into account her present unemployment, her limited income and the gross income of the husband. If she is to remain in the matrimonial home she will need to reduce

these expenses significantly. There will be no money to repair the defects she has described unless she resorts to capital. After reducing her expenditures for food, toiletries and household supplies, clothing, dry-cleaning, drugs, dental, glasses, Christmas, birthdays, newspapers, entertainment and eliminating expenses for charitable donations and holidays her total expenditures might be reduced to $2,400.00 per month. Of these only $599.00 relate directly to the house. It is extremely unlikely she will be able to find adequate shelter for herself and the children for this amount. She will need time to get into the workforce. Her present income from investments is approximately $291.00 per month. She will receive approximately $622.00 per month for the child tax and GST credit. She will receive $796.00 per month as child support but she will need an additional $691.00 per month to meet a $2,400.00 per month budget. Not all of this shortfall can come from the husband. In the short term the wife may be required to resort to capital until she has found employment. Under these circumstances it is appropriate that the wife have exclusive possession of the matrimonial home.

[52] I am not satisfied that the wife should have exclusive possession for as long as she has requested. The husband should not be prevented from realizing his equity in the matrimonial home for a longer period than is reasonably necessary. The wife will need time to organize her financial affairs and to find employment. She will need time to seek alternative accommodation taking into account her income and the amount she will receive from the sale of the home. One year should be sufficient for this purpose. The matrimonial home shall be placed on the market for sale on March 1, 2008. If the parties cannot agree on the terms of the sale, including the listing price and value range of offers that shall be accepted by both, either may return to this court, upon application for a ruling in respect to this matter. The parties shall equally divide the proceeds of this sale after deduction of real estate fees and other costs of sale.

SPOUSAL SUPPORT

[53] The wife's entitlement to receive spousal support has not been seriously questioned. The husband acknowledges that she has not worked since their son was born. In his affidavit sworn March 22, 2006 in paragraph 6 he says:

> After (son) was born, the Petitioner took advantage of maternity leave and did not return to work outside the home thereafter. I did not advise the Petitioner to

> stay at home and raise the children, although I was comfortable with her doing so while the children were young.

[54] The wife testified that the husband did encourage her to remain at home. He found the nannies they previously employed to be expensive. After the decision to remain at home after her son's birth, neither she nor the husband discussed her return to work. They did discuss how much money she should ask her mother to give her monthly for some assistance she provided personally to her mother. At some point the wife's mother was providing her with $300.00 per month. The wife spent this money on food for the family, for gas when she used her mother's car, for the purchase of household items and clothing for herself and the children. The husband wanted her to give him this money for the other household bills but she did not do so. Her present budget does not contemplate receiving money from her mother. Her mother has no obligation to support the wife.

[55] Based upon my previous calculations the wife appears to require the sum of $691.00 per month to meet her modest budget. She will need somewhat more than this to meet her income tax obligation as well.

[56] I have reviewed the financial information the husband has provided and note that he pays $575.00 for the rent of his apartment. His rent includes underground parking, heat and water. I have estimated his expenses for clothing, food, electricity, laundry, operation of the motor vehicle, insurances, activities with the children, and for their extracurricular activities , to be $1,000.00 per month for a total monthly budget of $1,575. The husband's counsel has provided a calculation from the Child View computer program suggesting the husband will have a net disposable income of $2,075 after paying child support at the level of $805 per month and spousal support of $450.00 per month. The calculation suggests the wife will have a net disposable income of $2,186. These are after tax calculations and they also take into account the husband's mandatory employment deductions. The wife's income used in the calculation is overstated. Divorce Mate calculations with the child support at $796.00 per month using the income figures I have for each parent suggest the husband's net disposable income will be $1,733.00 and the wife's $2,213.00 if spousal support is $450.00 per month.

[57] The spousal support guidelines suggest a range of spousal support in this situation from a low of $499.00 per month to a high of $763.00 per month.

[58] After reviewing all of these circumstances and calculations I have determined that the husband is to pay spousal support to the wife through the Maintenance Enforcement Program in the amount of $550.00 per month commencing March 1, 2007.

[59] So that the projected net disposable incomes will be realized, the wife will need to apply for the child tax and GST credits to be based on her present expected income and the husband will need to file a request to have less income tax deducted from each pay statement.

LIFE INSURANCE AND MEDICAL COVERAGE

[60] The husband is to continue to maintain the wife and children on his medical plan and if this plan includes dental benefits those also are to continue. He also is to maintain the wife and children as his beneficiaries on his life insurance policies for as long as he pays spousal or child support or both. These provisions are subject to the rules and regulations of the medical plan and insurance providers. If according to their rules and regulations the wife and children at any time are not eligible to be covered under these plans, the husband shall be relieved of this obligation upon providing the wife written confirmation from the plan providers with an explanation why coverage is not available.

COSTS

[61] Neither party has spoken to the issue of costs. If costs are requested written submissions are to be provided to this court by the wife, with a copy to the husband on or before March 15, 2007. The husband's submissions are to be provided, to this court with a copy to the wife, within 10 days of the receipt of the wife's submissions. If the wife has raised an issue in her submissions not considered in the husband's submissions he may file a further submission addressing those issues within 5 days of receiving the wife's submissions.

[62] Counsel for the wife is requested to prepare the order reflecting this decision.

_____

Beryl MacDonald, J.

See Table 1 and Table 2 - attached

TABLE 1 DIVISION OF TAXABLE ASSETS			
Description	Value	Ownership	
		Husband	Wife
Severance Pay	$26,861.11	$26,861.11	
RRSP #...38	$29,146.17		$29,146.17
RRSP #...78	$5,063.29		$5,063.29
RRSP #...691	$31,161.23	$31,161.23	
RRSP (Scotia MacLeod)	$83,035.00		$83,035.00
RRSP's # 57, 79, 999, 68, 91	$2,857.44	$2,857.44	
TOTALS	$178,124.24	$60,879.78	$117,244.46
Equal Division $178,124.24 ÷ 2 = $89,062.12			
Wife to rollover to Husband RRSP's to value of $28,182.34			

TABLE 2 DIVISION OF NON-TAXABLE ASSETS			
Description	Value	Ownership	
		Husband	Wife
Chevrolet	$5000.00	$5000.00	
Furniture & Appliances	$4000.00		$4000.00
PC Savings #...500	$106,855.90	$106,855.90	
PC Savings #...99	$10,187.46		$10,187.46
PC Chequing #...33	$2,058.32	$2,058.32	
PC Chequing #...89	$211.09		$211.09
Scotian Gain Plan	$531.78		$531.78
TOTALS	$128,844.55	$113,914.22	$14,930.33
Equal Division $128,844.55 ÷ 2 = $64,422.28			
Husband is to pay wife $49,491.95			

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: J.E.M. v. L.G. M., 2007 NSSC 52

Date: 20070216
Docket: 1201-059851, SFH D 040623
Registry: Halifax

Between:

M. (J. E.)

Petitioner

v.

M. (L. G.)

Respondent

Revised Decision:	The text of the original decision has been corrected according to the attached erratum dated January 27, 2010.
Judge:	The Honourable Justice Beryl MacDonald
Heard:	September 5 & 6, 2006 and November 29, 2006, in Halifax, Nova Scotia
Written Decision:	February 16, 2007
Counsel:	Deborah Conrad, counsel for the Petitioner Lynn Reierson, counsel for the Respondent

Erratum

[1] Delete the section of paragraph 22 which reads:

> Particularly useful is the discussion about this principle found in *Dixon v. Hinsley (2001) 22 R.F.L. (5th) 55 (ONT. C.J), p. 72:*
>
> the "best interests" of the child is regarded as an all embracing concept. It encompasses the physical, emotional, intellectual, and moral well being of the child. The court must look not only at the child's day to day needs but also to his or her longer term growth and development ... What is in the child's best interests must be examined from the perspective of the child's need with an examination of the ability and willingness of each parent to meet those needs. Each parent's plan for the child must be examined carefully in light of the child's needs. Custody is not always awarded to the parent who has "cooked the most meals, driven the most miles, attended the most concerts or cheered the loudest of their achievement.

[2] Replace that section with:

> Particularly useful is the comment in Dixon v. Hinsley (2001), 22 R.F.L. (5th) 55 (Ont. C.J.), at p. 72:
>
> "The best interests" of the child is regarded as an all embracing concept. It encompasses the physical, emotional, intellectual and moral well-being of the child. The court must look not only at the child's day to day needs but also to his or her longer term growth and development."
>
> What is in the child's best interests must be examined from the perspective of the child's need with an examination of the ability and willingness of each parent to meet those needs. Each parent's plan for the child must be examined carefully in light of the child's needs. Custody is not always awarded to the parent who has "cooked the most meals, driven the most miles, attended the most concerts or cheered the loudest at their achievement..." (*Gillis v. Gillis* (1995), 145 N.S.R. (2d) 241 (N.S. S.C.) at p. 259.