SUPREME COURT OF NOVA SCOTIA
Citation: Fleckney v. Fleckney, 2011 NSSC 253

Date: 20110627
Docket: 1201-064526
Registry: Halifax

Between:

Brian Joseph Fleckney

Applicant

and

Darlene Marie Fleckney

Respondent

Judge: Justice Carole A. Beaton

Date of Hearing: May 5 & 6, 2011

Date of Decision: June 27, 2011

Counsel: M. Jane Lenehan, Counsel for Brian J. Fleckney
Michele J. Cleary, Counsel for Darlene M. Fleckney

By the Court:

Introduction

[1] The parties were married in June,1984 and separated in November, 2009. The Petition for Divorce was filed in April 2010. The Divorce Judgment was issued on May 5th, the same date the issues arising in this hearing came before the Court.

[2] The Petitioner is employed as a firefighter and the Respondent as a real estate agent. The parties two children are grown and independent.

[3] It is apparent from all of the evidence before me and the submissions made by counsel on behalf of each party that they are agreed with respect to the following matters, which agreement will be reflected in the Corollary Relief Judgment that issues as a result of this decision:

1. The employment pension in the name of the Petitioner will be equally divided between the parties, at source, as of the date of separation.

2. Subject to the financial impact this decision may have upon the Petitioner, he will retain the matrimonial home and pay to the Respondent her equal interest in that asset. The Petitioner will have 30 days from the date of this decision to determine whether he can organize his affairs to effect to the same, or in the alternative whether it will be necessary to sell the matrimonial home and have the net proceeds of the sale, after expenses and retirement of the mortgage, divided equally between the parties.

3. Each party will be responsible for their respective debts incurred in their respective names following the date of separation.

4. The RRSP held in the name of the Respondent shall be divided equally between the parties by a spousal rollover, or in the alternative and dependent upon the financial consequences of this decision for either party, an equalization payment, less 30% to allow for tax consequences, may be effected if the parties agree.

[4] The parties provided two days of evidence on two issues:

(i) Has the Respondent established a claim for unequal division of certain matrimonial assets (and debts) in her favour?

(ii) Is the Respondent entitled to spousal support from the Petitioner? If so, in what amount?

Issue No. 1 - Unequal Division

[5] As to the overall issue of unequal division, the following specific assets and debts came under scrutiny on questions such as categorization (matrimonial or non-matrimonial) or value. As the evidence and position of the parties varied depending upon the particular item, I will address each separately in arriving at an overall determination on the question of unequal division. Those assets or debts are:

A. The matrimonial home

B. Household items
C. Vehicles
D. Health/medical and life insurance
E. Severance pay
F. Account receivable
G. 2009 Income Tax refund
H. IPC Account, Line of Credit and Visa

A. The Matrimonial Home

[6] The parties disagree as to:

(i) the date of valuation of the matrimonial home;

(ii) the market value of the matrimonial home; and

(iii) whether disposition costs should be attributed in calculating value.

(i) The date of valuation

[7] The Respondent relies on the decision in *Simmons v. Simmons*, 196 N.S.R.(2d) 140 as support for her position that the date of division of the asset by the court is the appropriate date to use for the purposes of calculating her interest in the matrimonial home, particularly in light of the benefit to the Petitioner of having had exclusive possession of the home after separation.

[8] At paragraph 49 of *Simmons (supra)*, Campbell, J. noted as follows:

> . . . In some cases, responsibility for mortgage installments is taken on in exchange for the other spouse paying various other debts. Furthermore, while the occupier spouse pays the mortgage the other spouse usually pays rent. It occurs to me that until the entire asset and support issues are resolved, the somewhat separate finances of the divorcing couple continues to be sufficiently intermingled so as to require the conclusion that typically the division date is the appropriate valuation date for the mortgage so that both spouses have a share in the pay down. (emphasis added)

[9] In contrast, the Petitioner argues that the Court should rely on the approach set out in *Ezurike v. Ezurike* 2007 NSSC 5 and value the assets as of the date of separation. At paragraph 35 of that decision, Dellapinna, J. noted:

> On the date of separation there was a mortgage securing 99 Nappan Drive. Attached to the Respondent's Statement of Property sworn May 16, 2005, is a mortgage information statement showing the balance outstanding as of February 9, 2005 (approximately four months after the date of separation) as being $44,182.98. The statement also shows that the total monthly payments come to $221.82 of which $160.00 per month is for principal and interest (the remaining being for taxes and a life insurance premium). Since the date of separation only the Respondent has been making the monthly payments owed on the mortgage. In the absence of any other evidence, I estimate the mortgage balance as of the date of separation as being $44,300.00 and find that to be a matrimonial debt. (emphasis added)

[10] The Petitioner argues that the distinction between *Ezurike (supra)* and *Simmons (supra)* can be found in this: *Simmons (supra)* concerned parties living one in a mortgage free home, and the other in a mortgaged home, and the instant case is quite different because, as in *Ezurike (supra)*, only one party, in this case the Petitioner, was paying on the mortgage while living in the home, while concurrently servicing other matrimonial debt of the parties.

[11] In the Respondent's evidence there was reference to her sharing a $1,500 rent obligation with her sister for several months following the separation, and that she had incurred the cost of damage deposits for two successive apartments, however there was no detail as to the actual timing and total of any such expenses incurred by the Respondent (e.g. rents, damage deposits, relocation costs) for the period after the parties separated in November 2009 but prior to her purchase of a home in February 2011.

[12] At page 3, paragraph 17 of the *Simmons [supra]* decision, Campbell, J. discussed six guiding principles that influence the identification of a valuation date:

> (1) . . . This notion of excluding post-separation acquisitions identifies the intention of the legislature to recognize the matrimonial assets and debts as of the separation date. Post-separation changes in value that derive from consumption or market forces should logically be shared; those that are later earned or injected by individual effort or investment should not.
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> (2) . . . If a transaction can be characterized as a plan to rearrange the separation date asset and debt mix, subject to an expressed or implied intention to account for these changes at trial, the fact that they did not exist at the time of the separation would not disqualify these post-separation assets and debts from being valued and divided, but only

to the extent that they replace separation date assets and debts or funded the parties' transition.

(3) When separation date assets or debts no longer exist at trial date and have not been replaced by substitute assets or debts, their separation date value should be accounted for. In the case of assets, an exception would be where the liquidation had a mutually beneficial purpose, such as funding the parties' transitional financial needs. In the case of debts, an exception would be that debt pay down was funded by the liquidation of a matrimonial asset or was intermingled with a child/spousal support regime.

(4) If it were possible to actually divide assets on the very day separation occurs, the outcome would be ideal because the parties would then be equally exposed to subsequent factors that affect value and each would be in charge of his or her ownership choices. However, delay between separation date and division date and the consequent affect on value is inevitable. The choice of valuation date should normally be one by which the spouses would be equally affected by that inevitable post-separation delay in finalizing the division.

(5) Neither spouse can complain that an earlier division would have allowed a more remunerative outcome because they must both accept the accounting delay and its consequence (except of course where there was an impoverishment of assets by one spouse but that would be remedied by a section 13(a) unequal division).

(6) There must be a recognition that valuation is an imprecise science in the case of many types of assets. The parties should be encouraged not to spend lawyer time and valuator time for appraisals as of a precise date when an appraisal in reasonable proximity of the valuation date is likely to be relatively reliable and is available.

[13] In the instant case, the Petitioner continued to reside in the matrimonial home following the date of separation and he continued to pay the property taxes and pay down the mortgage. He had the benefit of living in the home during that period, while the Petitioner lived elsewhere. He was not paying spousal support to the Respondent during that post-separation period (the Respondent abandoned an interim application for support in the summer of 2010), although he was also servicing other matrimonial debt to the benefit of both parties. Further, as is supported by the evidence of two real estate appraisers each qualified as experts at trial, the value of the matrimonial home increased post separation, a benefit which will accrue to both parties as discussed later in this decision.

[14] Bearing in mind the principles referred to in *Simmons (supra)* above, I am satisfied the appropriate date to identify for purposes of calculating the mortgage debt associated with the matrimonial home is the date of separation. That figure is easily ascertained. The Petitioner's Statement of Property (Exhibit 8) established the balance of the mortgage at November 30, 2009 at $180,958.27. I am persuaded this is the amount of debt attributable equally to the parties, which would result (notionally) in $90,475.20 of debt to be assumed by each. In my view the Respondent should not be entitled to benefit from mortgage payments made by the Petitioner after the date of separation by having the separation date mortgage balance ignored. To do so would be to allow the Respondent to realize a "windfall" in that the Petitioner alone would have paid down on that debt post separation, with no contributions from the Respondent. The Petitioner had both the benefits and costs associated with living in the home and the Respondent had the benefit and costs of other accommodations. The balance of the mortgage as of the end of November, 2009, being within days of the parties' separation, is clearly identifiable.

(ii) The market value

[15] The Petitioner commissioned an independent appraisal of the matrimonial home prepared by Mr. E.A. (Bud) Malay in February 2010, at which time Mr. Malay valued the matrimonial home at $299,000. In Mr. Malay's evidence at trial, he revised that figure to $308,000 to reflect an increased value in the property between the date of his report (February 2010) and the state of the market at the date of the hearing (May 2011).

[16] On behalf of the Respondent, appraiser Ms. Cherie Gaudet testified the value of the property was $318,000 as of January, 2011, some eleven months after the date of Mr. Malay's appraisal.

[17] It is a challenge for the Court to extrapolate the subtleties that might account for the $10,000 difference between the two valuations. Ms. Gaudet testified the difference between the two was found in the passage of time between Mr. Malay's report and hers, and also by the fact that Mr. Malay had viewed the orientation of the home on a corner lot as a detriment to value, an opinion which she did not share, as she saw the lot orientation relative to the street to be a favourable characteristic.

[18] The Petitioner argued an alternate explanation could be found in Mr. Malay's use of the comparator property at 6 Clipper Court which Ms. Gaudet testified was a sale that had never occurred. Ms. Gaudet was not cross examined by the Petitioner and so her evidence remained unchallenged or unimpeached in any way. The Respondent herself later conceded during cross examination that the property at 5 Clipper Court had indeed sold in November 2009, and that it was likely merely a typographical error on the part of Mr. Malay to have identified a comparator property used in his report as number 6 Clipper Court instead of 5 Clipper Court. This evidence called into question Ms. Gaudet's adamancy about the absence of sales in the vicinity of Clipper Court which ironically is apparently the very same street upon which she herself resides.

[19] Given this difficulty with the evidence of Ms. Gaudet, and given that the orientation of the lot on a corner is apparently a subjective matter which could be seen as a benefit (as per Ms. Gaudet) or a detraction (as per Mr. Malay), the appropriate way to resolve this differential between "duelling experts" as to the value of the property is to accept the mid point between the two values as being a reasonable figure that allows for and reflects the differences between the two opinions.

[20] In *Mason v. Mason* 2009 NSSC 46 Ferguson, J. noted the Court's capacity to assign values to matrimonial property and matrimonial debt:

> 46 The parties have provided information in relation to their assets and liabilities in the form of Statements of Property and oral testimony - not all of which has been consistent. Further, there is disagreement as to what items should be considered matrimonial property and matrimonial debt. Still, further, the parties disagree as to the value that should be assigned to such items.
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> 47 Justice Hallett, in *Gomez-Morales v. Gomez-Morales* (1990) 100 N.S.R. (2d) 137 spoke to these issues and stated at p. 12:
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> > While one attempts to make the calculations with as much accuracy as possible, the basis of such calculations are generally estimates of value by experts. As a consequence, even as a general rule, a Court's division of property is, at best, an estimate of what is fair in the circumstances applying the criteria of the matrimonial property legislation. Furthermore, the Courts are regularly called upon in assessing damages arising out of personal injuries or death to fix amounts involving numerous contingencies and there is no reason why the Court should not do so in determining fair values in matrimonial property cases.

[21] Accordingly, I am satisfied that the appropriate valuation of the matrimonial home is $313,000. This is consistent with the first principle articulated by Campbell, J. in *Simmons (Supra)* (see paragraph 12 above), that the parties should share equally in the increased value of the asset which occurred post separation.

(iii) Disposition costs

[22] The Petitioner submitted notional disposition costs consisting of a real estate commission of 5% of value plus legal fees of $500 must be considered in calculating the payment to the Respondent representing her equal interest in the equity in the matrimonial home. The Respondent objected to the calculation of disposal costs, arguing that to do so would be "unfair" as no actual sale or disposition is taking place, and therefore, that she is being unfairly deprived of one-half of such deemed costs. While the Respondent is entitled to her own view, nonetheless it is a well settled practise in this Court to employ this approach, and I see no compelling reason to deviate from it in this case.

[23] Accordingly, I find the matrimonial home to be valued at $313,000, less a 5% real estate commission ($15,650 and HST of $2,347.50) and legal fees ($500 and HST of $75.00). The total deemed disposition costs are $18,572.

[24] In summary, the total value in the matrimonial home available for equal division is $313,000 less $18,572.00 disposition costs, less a mortgage balance of $180,958 which equates to $113,469.50 or $56,734.75 in favour of each party.

B. Household Items

[25] It was stated by counsel for the Respondent at the outset of the hearing that the parties were not in agreement on the Petitioner's proposal to credit the Respondent with $2,000 representing her share of the appliances that will remain in the matrimonial home. Not having heard any subsequent objection by the Respondent nor any evidence or argument by the Respondent as to what, if any, other method or valuation would properly represent an interest by the Respondent in those items, the Court agrees that it is appropriate for the Respondent to receive from the Petitioner $2,000 to retire her interest in those items.

C. Vehicles

[26] The Petitioner has retained since separation the 2007 Hyundai Santa Fe vehicle purchased by the parties during the marriage. The Petitioner gave evidence that the value of this vehicle was approximately $14,000, as that was the amount a dealership (unidentified) offered (at a date unknown) when he inquired about trading the vehicle. The vehicle is the subject of an outstanding loan to the Bank of Montreal which had a balance of $21,807.96 at February 1st, 2010. The Petitioner testified the loan payments are $425 per month and there are 3 ½ years remaining on the loan. He stated he made a decision not to trade the vehicle because to do so would in effect be a "negative financing" exercise on his part.

[27] The Respondent did not offer any evidence to challenge the values put forward by the Petitioner as to the Hyundai vehicle retained by him other than to indicate in her Statement of Property (Exhibit No. 25) that the vehicle had a value of $24,000 as of an unknown date. Accordingly, the Court accepts the evidence of the Petitioner that the debt associated with the vehicle is an amount equal to or greater than its current value, and therefore no adjustment or equalization shall be made to the Respondent for the Santa Fe vehicle retained by the Petitioner.

[28] At the outset of the hearing the Respondent suggested it was agreeable that each party would retain their respective vehicle and the debt/lease associated thereto without further claim or equalization. The Petitioner did not agree, however ultimately there was very little evidence on the point other than that of the Petitioner as discussed immediately above, and no further submissions on the matter. Accordingly, on the whole of the evidence before me it is appropriate that each party retain the vehicle currently in their possession and any debt associated therewith.

D. Health/Medical and Life Insurance

[29] The Respondent seeks to continue to be named on the medical/health insurance held by the Petitioner through his employment, owing both to her own medical history and her current financial circumstances as one who is self-employed, which she stated makes the cost of equivalent coverage prohibitive for her to purchase. The Petitioner took the position each party should be responsible for their own health coverage, subject to him being prepared to have the Respondent remain on his medical plan for the next two years because his daughter would also be named on the same plan. (I have inferred this means he will pay a fixed rate for family coverage, which could include a spouse). It remains unclear

whether the Petitioner's health coverage might permit him to continue to carry the Respondent on that plan after divorce, however given her ongoing health concerns as the Respondent testified to them, it would seem appropriate that insofar as the Petitioner is able to name the Respondent under his policy he should continue to do so and bear that cost. In the event the Petitioner should in future have another spouse - it is presumed that any policy would only permit him to name one spouse - then there may be consequences of a financial nature for the Respondent in future. Any cost to the Petitioner of providing coverage to the Respondent is to be remembered in the context of the discussion as to spousal support later in this decision.

[30] Regarding life insurance, the Petitioner testified the only life insurance he holds, other than the coverage available to him through employment, is life insurance for the mortgage associated with the matrimonial home. This aspect of the evidence was, for lack of a better word, "fuzzy" and left the Court uncertain as to precisely the nature and amount of coverage enjoyed by the Petitioner. The Petitioner's Statement of Property dated April 29th, 2010 (Exhibit 8) references "Petitioner's employment group policy" identifying the Petitioner as the owner and the Respondent as beneficiary, having a cash surrender value of nil and no face amount listed. I therefore accept there is no life insurance policy per se available for division, but rather only the opportunity for coverage. The coverage the Petitioner enjoys through employment would presumably permit a beneficiary (currently listed as the Respondent) to realize some unknown amount on the demise of the Petitioner. It is appropriate that the Petitioner continue to name the Respondent as beneficiary on the life insurance he has through employment for as long as that plan permits or until such time as his spousal support obligations, as discussed elsewhere herein have ceased, whichever shall first occur. In that way the spousal support obligations of the Petitioner to the Respondent will be to some extent protected for the Respondent.

E. Severance Pay

[31] The Respondent seeks a division of any severance pay which the Petitioner might realize from his long standing employment as a firefighter. The Petitioner testified there is no severance pay cash amount available to him; instead, at retirement he will receive time in lieu of pay, to be taken in advance of his actual retirement date. The Respondent testified she believed there was a cash severance award to be realized by the Petitioner in future but could provide no foundation for

her belief. Absent any other evidence to support the Respondent assertion, there is no basis upon which to reject the Petitioner's evidence on the point. I am satisfied there is no such award available for division as an asset of the marriage.

F. Accounts Receivable

[32] The parties were at odds concerning the sum of $2,000 which both identified is owed jointly to them as a result of an informal loan arrangement in favour of the Petitioner's sister made several years ago. The Petitioner testified that if and when he is repaid by his sister, the terms of the loan being unidentified and collection of which he has not pressed, he will then share the repayment equally with the Respondent at that time. The Respondent is entitled to some finality on the point given the parties' newly acquired status as divorced rather than separated. It may be that there will be incentive for the Petitioner to increase his efforts at collection given that I am prepared to credit the Respondent with her one-half interest in the same. The monies were advanced to the Petitioner's sister during the marriage and prior to the date of separation as a mutual decision of the parties. The Petitioner has not argued that future realization of the repayment disqualifies the item as a "matrimonial asset" as per the definition in s.4(1) of the *Matrimonial Property Act*. A simple analogy would be that the loan repayment is future money, due in the same way as a future severance award from employment, and while only collected in future, both parties have an equal interest in the asset at the date of separation. The Petitioner shall pay the Respondent $1,000.00 to retire her interest in the asset.

G. 2009 Income Tax Refund

[33] The parties separated in November 2009; subsequently, the Respondent realized a 2009 taxation year refund of $4,550. In her evidence, the Respondent described that in September 2009, prior to separation, she removed $3,500 from her employment "tax installment account" (monies held by the realty broker to assist her in banking pending tax installment payments) and applied the monies to the parties' line of credit by their mutual decision. Whether that payment came from the Respondent's tax installment account or any other source of revenue realized by either party is ultimately irrelevant - monies earned during the marriage were being applied to matrimonial debt. After separation the Respondent received her 2009 tax refund and replenished her tax installment account. The Respondent submitted the refund is hers alone and is not an asset available for division. With

respect, the Court must disagree. Although collected after the date of separation, the refund reflects a time when the parties were still married; had they remained so, they would have shared equally in the benefit of that refund. The refund cannot be said to fit within any of the exceptions to the definition of "matrimonial asset" in s.4(1) of the *Matrimonial Property Act*. Both the nature and the timing of the "earning" of the asset clearly make it matrimonial in nature and available for equal division. The Respondent shall pay the Petitioner $2,275.00 to retire his interest in that asset.

H. IPC Account, Line of Credit and Visa

[34] It is these assets and debts which formed the heart of the Respondent's position as to unequal division. The thread of the argument was woven through the discussion of each of the IPC account, the line of credit and the Petitioner's Visa account, and so all three are discussed here.

[35] The Petitioner testified that at separation, and to this day, he holds various bank accounts jointly with his elderly mother as he assists her in the day-to-day operation of her finances. In addition, the Petitioner realized a payment of $15,000 in and around the time of separation of the parties, representing a one-time critical illness incident payment through his employment insurance coverage. He deposited those monies into the so-called IPC account along with an additional $15,000 belonging to his mother. The Respondent agreed that the insurance monies are not available for division as they do not constitute a matrimonial asset, but maintained the same IPC account contains not only those insurance funds but also the additional $15,000 which should be available for division.

[36] The Respondent took the position that the circumstances under which the monies were accumulated in the account establish the Petitioner was surreptitiously funnelling monies out of the marriage, in anticipation of or immediately upon separation, for his sole benefit and to deprive the Respondent of monies to which she would otherwise be entitled to an equal share. The Respondent spoke of her many suspicions about the transfer of monies predicated upon her discovery prior to separation (in early 2009) of a deposit slip in the pocket of the Petitioner's clothing while she did laundry. Nonetheless, in her evidence the Respondent agreed with and corroborated the Petitioner's evidence that he had explained to the Respondent upon her discovery of the deposit slip that the existence of the account was because it formed part of his mother's asset pool and that the Respondent then

held telephone conversations with his mother to confirm that he was managing his mother's finances.

[37] In keeping with her assertions about the hiding of money by the Petitioner, the Respondent challenged withdrawals from the parties' line of credit by the Petitioner, and charges to the Petitioner's Visa card. In his evidence, the Petitioner gave a detailed explanation as to the movement of funds among various matrimonial accounts including withdrawals from the line of credit to pay various matrimonial debts, including his Visa bill. The Petitioner also referenced documentary evidence to support the trail of certain withdrawals from the line of credit and/or transfers, and subsequent application of funds to his Visa balance.

[38] The Respondent maintained she should not be equally responsible for the debt representing the parties' line of credit on the basis that the Petitioner was using withdrawals from the line of credit to either funnel cash out of the marriage and into his IPC account or in the alternative to make payments on his Visa account during the late summer and early fall of 2009 when the Visa debt being incurred was not properly a matrimonial debt. The Petitioner suggested to the Court that he was prepared to give the Respondent the benefit of the doubt insofar as he would assume an addition $1,500 from the line of credit balance of $22,115 to insure her against Visa expenditures falling after the date of separation, but otherwise the Visa debt acquired by the Petitioner was "routine" during the last months of the marriage, in the same way as had always been done for various of his expenses (e.g. gas, groceries, etc.). I am satisfied the evidence of the Respondent did not contradict in any way the details regarding the use of the Visa as the Petitioner described it.

[39] While the Respondent may hold her own suspicions or beliefs, there is not sufficient evidence before the Court to persuade me that the Petitioner has been or was at the time of separation, engaged in moving monies out of the marriage such that they would be undetected and/or unavailable for equal division with the Respondent. I am not persuaded the additional $15,000 in the IPC account is anything other than part of the Petitioner's mother's portfolio. Further, I am not persuaded that withdrawals from the line of credit are attributable to anything other than the explanations provided by the Petitioner in his evidence. The Petitioner was able to trace, using the documentary evidence he provided to the Court, the flow of monies as they left the parties' joint line of credit and went to making payments on his Visa. Further, I am not persuaded that the Visa bill being paid

was, on the whole, used for anything more or less than had always been the practise during the marriage.

[40] The Court accepts the Petitioner's evidence that each withdrawal from the line of credit in the period August through December 2009 is associated with the consequent payment of his Visa balance, and additionally the matrimonial home mortgage payment for October 2009. The whole of the evidence is not persuasive of the Respondent's assertion that withdrawals from the line of credit during that period by the Petitioner were untoward, inappropriate or inconsistent with the parties' practices during the marriage such that the Court could be satisfied that it would be inappropriate, absent the Petitioner being prepared to assume an additional $1,500, to divide the line of credit debt of $22,115 other than equally. Since the petitioner has assumed sole responsibility for this debt since separation, the Respondent shall reimburse him one half of that amount, less $1,500, or a total of $9,557.50.

[41] Turning to the specific question of unequal division, the Respondent discussed in her evidence inheritance monies received by her in 2006 following the death of her mother. She testified that she received approximately $60,000, having an after tax value of $46,000 and identified the various items to which those funds were applied: the Petitioner's purchase of a motorcycle, purchase of a family vacation and the retirement of unidentified matrimonial debt of $30,000.

[42] In the absence of any argument on the point, the Court is left to infer that the Respondent's discussion of these inheritance monies in her evidence is also related to her claim for an unequal division of debts.

[43] The injection of the inheritance funds into the marital finances occurred approximately three to four years prior to the date of separation. Those monies came into the marriage presumably as a result of a mutual decision of the parties, or at the very least a decision made by the Respondent since the monies were her inheritance. Once converted to the use of the marriage, the inheritance windfall was no different than any other monies acquired by the parties and used during their lengthy marriage. Section 4(1)(a) of the *Matrimonial Property Act* provides:

> 4 (1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of

> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children; (emphasis added).

[44] I am not prepared to consider this aspect of the Respondent's evidence as supportive of an unequal division of assets, if that was its intended purpose.

[45] The onus rests with the Respondent pursuant to section 13 of the *Matrimonial Property Act*, to satisfy the Court that an equal division of assets would be unfair or unconscionable.

[46] As stated by Gass, J. in *Drozdowski v. Drozdowska* , 2011 NSSC 89:

> [18] The person claiming an unequal division carries a heavy onus of proof in establishing that an equal division would be unfair or unconscionable, according to *Harwood v. Thomas* [1981] N.S.J. No. 6 N.S.S.C.A.D.
>
> [19] A review of the case law suggests that the unequal division cases are only successful where the claims are clearly and unequivocally substantiated.

[47] In my view, for all of the reasons previously set out herein in relation to the discussion of specific assets and debts of the marriage, this is not one of those clear and unequivocal cases that could be said to support a claim for unequal division. There is nothing in the overall structure and function of the finances of the marriage or the conduct of the parties in their matrimonial affairs that could support such a claim.

Issue No. 2 - Spousal Support

[48] The Respondent relies on the case of *Chutter v. Chutter* 2008 BCCA 507, in which the British Columbia Court of Appeal set out a summary of the relevant provisions of the *Divorce Act*, and discussed the leading decisions of the Supreme Court of Canada in *Bracklow v. Bracklow* [1999] 1 S.C.R. 420 and *Moge v. Moge* [1992] 3 S.C.R. 813. Rowles, J.A. on behalf of the Court stated:

> 45 Section 15.2 of the Divorce Act is the main provision governing entitlement to spousal support. Subsection 15.2(6) provides that a spousal support order should meet the following objectives:

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

46 In order to achieve a fair and equitable distribution of resources, all four of these objectives should be examined: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 850-853, 43 R.F.L. (3d) 345. Having regard to these policy objectives, courts must consider the condition, means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4):

(a) The length of time the spouses cohabited;

(b) The functions performed by each spouse during cohabitation; and

(c) Any order, agreement or arrangement relating to support of either spouse.

47 Based on the statutory provisions and the case authorities, the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 R.F.L. (4th) 1).

48 The claim for spousal support in this case was advanced on compensatory and non-compensatory support principles.

49 Although the compensatory and non-compensatory grounds for spousal support are animated by different models of marriage, the case authorities hold that there is no single basis of support or objective under the Divorce Act that supersedes the other, and that many claims involve aspects of both compensatory and non-compensatory principles (*Bracklow*, at para. 27; *Moge*, at 852). A court is not called upon to decide on one basis for support to the exclusion of the other but rather to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (*Bracklow*, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (*Moge*, at 864).

[49] The Respondent argues entitlement to both compensatory and non-compensatory support based on the history of the parties' marriage. The Court accepts the Respondent's evidence that while she pursued employment during the marriage, nonetheless it was always understood that her employment efforts, while supported, were secondary to the parties' goal of emphasizing the Petitioner's career. It was understood that the Petitioner was the primary wage earner and his career goals took precedent over those of the Respondent. It is clear that in the early years of the marriage, when the children were young, the Respondent's employment schedule was organized around and achieved a flexibility needed to allow her to address primary child care responsibilities and maximize her time at home with the children.

[50] The Respondent urges that compensatory support is appropriate given that she had the traditional role of a primary parent and her career was secondary to her husband's primary role as the larger income earner.

[51] In *Chutter, (supra)* at paragraph 50 and 51 the Court noted:

> 50 Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge*, at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:
>
> > The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.
>
> 51 In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in *Moge* at 864, the doctrine of equitable

> sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis added).

[52] In light of that instruction it is necessary to examine where the end of the marriage positions the Respondent economically in comparison to the Petitioner. The Respondent was absent from the work force for a two year period due to illness, but returned to work in 1997, after re-training, as a real estate agent. She was a salaried assistant in a real estate office, with bonuses, until 2001, when she became a full time independent agent working on commission. The Respondent argued that her income as a real estate agent fluctuates greatly year over year but that the figure of $53,000 is an appropriate average annual approximation of her past income and any award should be calculated based on that income, by application of the *Spousal Support Advisory Guidelines* . The Respondent submits that the Applicant's 2010 income (base of $84,770 and overtime of $11,000 for a total of $95,770) and the Respondent's three year average income provide a *Guidelines* range of $1,300 to $1,700 per month and therefore $1,500 per month spousal support is appropriate given that her income earning capability for 2011 remains uncertain. The Respondent objects to the Petitioner's assertion that her projected income for the first half of 2011 is $42,000, and maintains a projected annual income of $53,000 is a more reasonable and fair estimate.

[53] The Respondent further argues that it is unlikely that she will achieve the level of income and/or self sufficiency that the Applicant has enjoyed as a result of the marriage.

[54] The Petitioner does not disagree that the marriage is properly characterized as a long-term relationship, but challenges the Respondent's projected and/or average annual income figures.

[55] The Petitioner argues that the Respondent has the capacity to realize personal benefit from certain employment expenses (i.e. vehicle) which would permit an upward adjustment in her income to reflect those benefits. The Petitioner argues that it is easy to close the gap between the parties' current respective incomes to approximately $10,000, given such personal benefits to the Respondent. The Petitioner submits that assuming the actual gap between the parties is indeed approximately $10,000, then the Respondent can be said to have already achieved self-sufficiency gained during the marriage through the

development of her real estate career, amplified by her ability to earn future income at an unlimited rate, whereas the Petitioner's income-earning power is forever "capped" by his fixed salary with incremental raises.

[56] The Petitioner also argued that the average of his income for the five year period 2006 to 2010 is $82,000 and that his three year average (without overtime) is $83,000. The Petitioner argues that by contrast, taking the same five year period for the Respondent, and even excluding her lowest earning year of 2009 ($20,000) she has an average annual income of $65,000. The Petitioner argues that allowing the Respondent to include the 2009 aberration in her income to calculate an average annual income inappropriately skews the result.

[57] The Petitioner further argues that the court need only look at average incomes if, as the *Spousal Support Advisory Guidelines* note, it is otherwise difficult to easily establish income. The Petitioner's income is easy to establish: it was $87,000 per year as of October 2010, and he does not anticipate working any additional amount of overtime going forward. Further, the Petitioner argues, the Respondent's income in 2010 was $69,000 and included part time work and she used those income figures to secure a mortgage in February 2011. Therefore if the court was to accept that the Respondent is entitled to a total of approximately $18,000 per year in spousal support, as the Respondent argues would be the proper range, the result would be that the Respondent's income would rise to approximately $86,000 per year and the Petitioner's would drop to approximately $69,000, being precisely the reverse of their respective income levels for 2010.

[58] While it is accepted by the Court that this was a long-term marriage in which the economic relationship of the parties became more intertwined over time, nonetheless during the marriage the Respondent was able to re-train, following a period of illness, and began a new career as a real estate agent. While it meant she became self employed, nonetheless it obviously increased her potential earning capacity including future potential. Therefore, while the Respondent's claim for spousal support may have had its genesis in a claim for compensatory support, the circumstances of the marriage are that during the course of the marriage, the Respondent's income earning ability improved through re-training and the assumption of an alternate career. That alternate career has given the Respondent an ability or at least the potential to earn income much closer to the amount earned by the Petitioner, whose employment is "capped" or fixed in each year (excluding overtime) as opposed to the Respondent's "unlimited" capacity to earn income.

While the Respondent may at one point in the marriage have been economically disadvantaged, it is clear that the gap created by that disadvantage has narrowed considerably over time.

[59] The Respondent also claims an entitlement to non-compensatory support. In *Chutter (supra)* the Court noted that:

> 54 Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (*Bracklow*, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (*Bracklow*, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[60] Turning to a non-compensatory support analysis (a “needs versus means” test) the question becomes: what amount of support would be appropriate, given the respective income of the parties, to relieve any economic hardship to the Respondent as a result of the breakdown of the marriage? I agree that the income of the Petitioner is easily determinable; one need only consider the documentation which outlines his 2010 income tax return, and further the historical documentation filed by the Petitioner showing his earnings over the period 2006-2009. The Petitioner’s base salary in 2010 was $85,106 and his evidence establishes that in 2011 his income from employment (not including any overtime hours) will be $87,583.

[61] While it is true the Respondent’s income fluctuates in each year, as evidenced by the history of her earnings over the past several years and inherent in the nature of being self employed, nonetheless the Court must come to some baseline assumptions about the income-earning power of the Respondent in order to assess a reasonable amount of support. In my view, that can be done in this case through consideration of a combination of functions:

(1) Consideration that the Respondent’s most recent three year average salary, excluding from that average the anomalous year of 2009 which the Respondent spoke to in her evidence, during which she earned $20,000 which she described as an unusual year, reflective of the economic conditions of the times.

(2) Consideration that the Respondent's income has increased in each year since she became self-employed with the exception of 2009. She reported income in 2006 of $41,000, in 2007 of $55,000, in 2008 at $60,000 and in 2010 of $68,000 from employment in real estate and not including $11,000 in part time work.

(3) Consideration that the Respondent testified that in the first quarter of 2011 she earned $6,000.

[62] The Petitioner's argument that he and the Respondent are in actuality only about $10,000 apart in their respective incomes is a somewhat attractive one. Historically the Respondent's income has been rising year over year since she joined the real estate profession, with the exception of the 2009 anomalous year.

[63] There is a burden on the Respondent to make all reasonable efforts to achieve a realistic level of self sufficiency and any award of spousal support should not serve as a dis-incentive to the Respondent to maximize her earnings through employment.

[64] Going forward, the question regarding spousal support quantification is how to best allow for the uncertainty of the Respondent's income earning capacity while not necessarily attempting to narrow the gap between the Respondent and the Petitioner to within dollars of one another. It is to be remembered the Respondent has had the financial capacity to purchase a new home and in that respect is on comparable footing with the Petitioner, and she clearly enjoys, independent of the Petitioner, the capacity to earn income. Further, she will have certain health/medical coverage paid for as provided for elsewhere in this decision.

[65] On the basis that the Respondent's 3 year average income, excluding 2009 (for the years 2007, 2008 and 2010) was $61,000 and that the Petitioner's income for 2011 will be $82,583, I have determined the Respondent is entitled to spousal support at the rate of $1,000 per month, however the time frame for such an award should be limited under all of the circumstances. The Petitioner will be required to pay support for a three year period, following which the Respondent shall have the burden of establishing that the obligation of the Petitioner should extend beyond that time. This arrangement will allow the relative circumstances of each party to be equalized insofar as and to the extent that such an equalization might be possible, while at the same time avoiding any undue future reliance on spousal support by the Respondent to the exclusion of her independent earning potential or capacity.

[66] Spousal support shall be payable on the first and 15th of each month in equal installments of $400.00 effective July 1, 2011, continuing to and including the month of June, 2014. The Respondent will be required to provide a copy of her income tax return and Notice of Assessment to the Petitioner no later than June 1 of each year.

[67] The Respondent claimed retroactive support of $500 per month for 2010, based on her actual 2010 income of $79,000. The Petitioner maintained that while he earned $95,770 (including overtime) in 2010, during that period he was also solely responsible for servicing the mortgage on the matrimonial home and the joint line of credit belonging to the parties. (It is to be remembered that the Petitioner's assumption of these obligations has already been considered elsewhere in this decision.) In 2010 both parties earned approximately $11,000 extra income, the Petitioner by working overtime and the Respondent by engaging in a part time job in addition to her employment as a realtor. On that basis, the Petitioner argues he should not be required to pay retroactive support for the 2010 year.

[68] Such a payment would have the effect of increasing the Respondent's income for that period to $85,000, which I note is within $2,000 of the Applicant's 2010 base salary of $87,500. A non-compensatory support payment does not necessarily require a precise equalization of the parties respective financial positions or respective incomes; the real question is what quantum of spousal support would allow the Respondent to achieve a financial footing and lifestyle closer to what she enjoyed when the parties were married? To that end, it would seem that no support need be payable on a retroactive basis given the earnings of the Respondent in 2010 as compared with those of the Applicant. Furthermore, it is important to remember that the history of the litigation between these parties, as confirmed by the Respondent during cross examination, was that she abandoned an interim application for spousal support in the summer of 2010 because her year-to-date income at that time was too high to sustain a claim.

[69] In *Kerr v. Baranow* [2011] S.C.J. No. 10, Cromwell, J. on behalf of the Court, in companion cases concerning unjust enrichment and retroactivity of spousal support awards, considered the matter of ordering support for a period before the date of the order:

> 212. . . . Consideration of the circumstances of the spouse seeking support, by analogy to the D.B.S. analysis, will relate to the needs of the spouse both at the time the support should have been paid and at present. The comments of Bastarache J. at para. 113 of D.B.S. may be easily adapted to the situation of the spouse seeking support: "A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". As for hardship, there is the risk that a retroactive award will not be fashioned having regard to what the payor can currently afford and may disrupt the payor's ability to manage his or her finances. However, it is also critical to note that this Court in D.B.S. emphasized the need for flexibility and a holistic view of each matter on its own merits; the same flexibility is appropriate when dealing with "retroactive" spousal support.

[70] Given that the Respondent and the Petitioner enjoyed essentially the same earning capacity in 2010, after separating in November 2009, and in considering as well that the Petitioner bore the burden of servicing the joint matrimonial debt during that period, I am satisfied there was ultimately no financial hardship suffered by the Respondent during that period which could support the necessity for a retroactive award.

Costs

[71] While claimed in the Petition, neither party addressed the Court on the issue of costs. The results of trial are mixed for both parties, and therefore I am of the view they should each bear their own costs.

[72] I ask that counsel for the Petitioner prepare the Corollary Relief Judgment giving effect to this decision, consented to as to form by counsel for the Respondent.

J.