SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Smith v. Smith, 2011 NSSC 269

Date: 20110623
Docket: 1201-64292
Registry: Halifax

Between:

Adam Richard Smith

Petitioner

v.

Katherine Helen Smith

Respondent

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	June 22, 2011
Oral Decision:	June 23, 2011
Written Decision:	July 28, 2011
Counsel:	Judith A. Schoen on behalf of Adam Smith Katherine Smith on her own behalf

Introduction

[1] In October 2008, Adam and Katherine Smith executed a comprehensive agreement resolving the issues arising from their marriage and separation. It dealt with custody, child and spousal support and property division. Now, Katherine Smith seeks to vary terms of the agreement relating to custody and child support and to vary terms of its property division. Her claims were heard in a divorce and corollary relief proceeding on June 22, 2011.

[2] At the proceeding, I granted the divorce. The following day, I gave an oral decision. When I did so, I told the parties I hoped to provide written reasons. I do so now and, in doing so, I am taking the opportunity to correct the mathematical errors which I noted in giving my oral decision.

History of proceeding

[3] On October 27, 2010 I presided at a date assignment conference in this matter. In the Family Division, a date assignment conference involves setting a date for a hearing, as well as identifying the issues to be litigated, determining whether a settlement conference should be scheduled, addressing outstanding disclosure deficits and setting filing deadlines. At that point there were a number of issues the Smiths intended to litigate:

a. Katherine Smith contested a term of the parties' October 2008 separation agreement dealing with the division of real estate, particularly a vacant lot;

b. Adam Smith sought primary residence of the couple's son, Austin; and

c. as result of Adam Smith's parenting claim, there would need to be a determination of Austin's access and child support.

[4] As happens at conferences, filing deadlines were set. A memorandum outlining the issues and reciting the filing deadlines was sent to parties. The date assignment conference was almost eight months before the trial, so deadlines have been known by the parties for many months.

[5] The date assignment conference memorandum made clear that there are consequences for filing materials late. The consequences were noted to include adjourning hearing dates, striking pleadings, awarding costs and suffering adverse findings. The memorandum noted that leave is required to file materials late and, if leave is not granted, an application can be struck, costs awarded and the material ignored.

Preliminary motions

[6] The deadline for Katherine Smith's disclosure of her affidavit and financial statements was May 25. She is the respondent and her deadline set the stage for Mr. Smith to file a reply affidavit on June 8. Ms. Smith filed some of her materials late: rather than filing her affidavit and financial statements on May 25, she filed them on June 1. Mr. Smith did not object to these materials being admitted into evidence. While they were filed late, Adam Smith and his counsel

had some opportunity to review them and to prepare for the trial. His reply affidavit was due June 8 and each party's brief was due on June 15.

[7] The day before the hearing began Ms. Smith delivered a bundle of documents to Mr. Smith's counsel and to the court. These included current bills for utilities. There were internet records of 2010 and 2011 reservations for the bed and breakfast that Katherine Smith operates with Danny Switzer and lists of purchases made for the makeover studio she operates with Ann Oreske. The internet bills for 2010 would have been available five months ago. Mr. Smith objected to the admission of these documents. Ms. Smith's delivery of these documents on the day before the trial left Mr. Smith and his counsel with no real opportunity to review them and to consider them in their trial preparation. Having waited eight months for his trial date (after waiting two months for a date assignment conference), Mr. Smith did not seek an adjournment. Ms. Smith did not seek an adjournment either.

[8] Almost eight months ago, Ms. Smith was given her filing deadlines. She had ample notice and considerable opportunity to organize her documents for filing. Admitting these documents would prejudice Mr. Smith, who lacked sufficient opportunity to consider these materials before the trial.

[9] I did not grant Ms. Smith leave to file these additional materials late. They were not admitted into evidence.

[10] Mr. Smith requested that I dismiss outright his wife's claims to vary custody, child support and the terms of the agreement. He argued that the affidavits and financial statements of Ms. Smith which were admitted didn't disclose sufficient evidence to support her claims. I dismissed his request that I grant him the relief he sought without hearing evidence. The trial proceeded and I heard from both parties.

[11] As events transpired from October 2010 to the hearing, different matters came to be in issue: Adam Smith no longer sought to change Austin's parenting arrangements; Katherine Smith did still contest the separation agreement as it related to the division of property and she raised a number of issues which were not earlier identified. Ms. Smith wants an order that Austin be allowed to travel with her without requiring Mr. Smith's written consent, she wants to be given certain information with regard to Austin, she wants to modify terms of Austin's time with each parent to accommodate time for Austin with her and the family of her new partner, and she wants a Christmas schedule that will allow Austin to spend time with her annually on Christmas Eve. She seeks to increase child support payments so that Mr. Smith would be assisting in financing an annual trip to Poland for Austin and she seeks an increase in Mr. Smith's weekly child support payments from $30.00 to $50.00. For his part, Mr. Smith wants Austin's Christmas schedule to allow Austin to spend time with him annually each Boxing Day.

[12] In his affidavit, Mr. Smith sought the return of a ring belonging to his grandfather. In her affidavit, Ms. Smith sought the return of china she earned as a reward for her work selling Mary Kay products.

[13] Both parties were aware of a claim to adjust the payment of child maintenance arrears.

[14] The claims I am to address fall into three distinct areas: parenting, child maintenance and property division. In his petition, Mr. Smith sought incorporation of the agreement in its entirety into a Corollary Relief Order and, if this was contested, he claimed costs.

Family history

[15] The Smiths married in August 2001. Their son, Austin, was born on December 30, 2003. They separated in October 2005 and signed a separation agreement on October 7, 2008.

[16] The agreement was drafted by Mr. Smith's lawyer. It was to be a full and final settlement of all the rights arising from their marriage and separation. Ms. Smith signed a certificate indicating that she was informed she should seek independent legal advice and that she chose not to retain, obtain or seek independent legal advice, and confirming that she signed the agreement freely and voluntarily, with a clear understanding of its nature and effect. In paragraph 22 of the agreement, Ms. Smith acknowledged the agreement was "not unconscionable or unduly harsh" and that she signed it "voluntarily, without undue influence or fraud or coercion or misrepresentation". She also indicated she had the opportunity to obtain independent legal advice.

[17] Pursuant to paragraph 22(i) of the agreement, on April 23, 2009 the agreement was registered as an order for child maintenance, spousal maintenance, custody and access under section 52 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160. As a result of this, the provisions of the agreement dealing with these issues became a court order. There is no jurisdiction under the *Maintenance and Custody Act* to register a property division agreement as a court order, so those provisions remain an agreement between the parties.

[18] Since the agreement has been registered as a court order pursuant to section 52 of the *Maintenance and Custody Act*, I will refer to it as an order in the context of maintenance and parenting claims.

Parenting

[19] I will deal with parenting matters first. The parents' order provided that they would have joint and shared custody of Austin, alternating time with him each week, with Austin moving from one parent's home to the other's on Monday.

[20] There are four claims with regard to parenting:

a. Ms. Smith seeks to travel with Austin without being required to obtain Mr. Smith's written permission;

b. Ms. Smith wants certain information about Austin to be provided to her;

c. Ms. Smith wants Austin's week with one parent to be interrupted so Austin may spend time with the parent and family with whom he is not having access; and

d. both parents want to determine Austin's Christmas schedule.

[21] Most of these claims involve varying the current parenting order: determining the Christmas schedule does not involve varying the current parenting order because the current order doesn't provide a Christmas schedule.

Approach to varying parenting orders

[22] I will explain how I must deal with requests to vary a parenting order before dealing with these claims.

[23] I'm governed by *Gordon v. Goertz*, 1996 CanLII 191 (S.C.C.) in making a decision to vary parenting arrangements contained in an order. At paragraph 10 of the majority reasons, then-Justice McLachlin instructs me that before I can consider the merits of a variation application, I must be satisfied there has been a material change in Austin's circumstances that has occurred since the last custody order was made.

[24] At paragraph 13, Justice McLachlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are:

a. there must be a change in the condition, means, needs or circumstances of the child or the ability of the parents to meet the needs of the child;

b. the change must materially affect the child; and

c. the change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.

[25] The notion of a material change is important for two reasons. While parties who agree can change the terms of an order whenever they want, I can only change the terms of an order where there is a material change, as described by Justice McLachlin. So, when a parent wants a judge to change an order, the first thing the parent must do is prove there has been a change in the condition, means, needs or circumstances of the child or the ability of the parents to meet the child's needs. Also, the parent must show that the change materially affects the child and that the change was either not foreseen or could not have been reasonably contemplated when the order sought to be varied was made. This first step tells me "why" the order should be changed: it should be changed because what was best for the child has changed and the order is no longer in the child's best interests.

[26] The second reason material change is important is because all decisions about parenting are determined on the basis of the child's best interests. Once I know that the order doesn't

reflect the child's best interests, section 17(5) of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, instructs me that in making the variation order, I shall consider only the best interests of the child as determined by reference to that change. In other words, this second step tells me "how" the order should be changed.

[27] Before I can consider the changes that Katherine Smith wants, I must be satisfied that there has been a material change that has occurred since the date of the most recent order.

[28] I'll deal with each aspect of the parenting application in turn.

Travel permission

[29] The first claim relates to travel. Ms. Smith seeks to travel with Austin without being required to obtain Mr. Smith's written permission. Paragraph 5(d) of the order provides that:

> Two trips outside the Country per year will be permitted to each parent within [*sic*] a minimum of 60 days written notice provided to the other parent. Within 30 days of their departure, the parent travelling with the child shall provide an itinerary of the scheduled trip to the other party. Consent of both parents will be required if the trip is longer than 14 days or if school will be missed.

[30] Ms. Smith detailed difficulties she had in obtaining Mr. Smith's consent for Austin's travel to England and Poland during the summer of 2009 after the agreement was registered as a court order. At the time, Ms. Smith applied to this court to compel Mr. Smith's consent to Austin's travel. Mr. Smith's evidence was that his actions were consistent with the requirements of the order as it related to the provision of notice and an itinerary and Ms. Smith's actions were not. His evidence was not contradicted.

[31] When faced with the court application, Mr. Smith capitulated and her application was resolved by agreement and Austin was allowed to travel.

[32] Adam Smith's adherence to the terms of the order is not a material change which warrants changing the terms of the order.

[33] Katherine Smith was concerned that Mr. Smith might fail to provide written consent even if she fulfilled the order's requirements. To allay Ms. Smith's concerns that Mr. Smith might not honour the agreement, I am willing to require that paragraph 5(d) of the order be amended by adding a provision stating "Consent shall not be withheld where these conditions are met" which means a parent cannot withhold consent where the travelling parent has met the order's requirements.

[34] In her submissions, Ms. Smith suggested that the notice and information requirements are too onerous if she wants to travel with Austin to the United States for a weekend visit. Her comment is valid in the context of travel on this continent. If either parent wants to travel with Austin within North America for a period of less than four days, she or he shall give the other

parent seven days' written notice and provide an itinerary five days before the trip. Where a parent wants to travel outside North America for any period of time or within North America for a period of more than four days, the terms of the order as written shall continue in force. Here, too, consent shall not be withheld where these notice requirements are met. For further clarity, four days means that the date of departure and the date of return shall be within four days of each other – for example, if Austin leaves on Tuesday, he must return on Friday.

Provision of information

[35] Paragraph 7(b) of the order gives each parent the right to make inquiries and to be given information about Austin's health, education, child care and general well-being. All authorities, child-care providers, health professionals and others were thereby authorized to disclose requested information to both parents.

[36] Ms. Smith complains that she doesn't know who Mr. Smith uses as Austin's babysitter and she says she wants this sort of information. There is no material change shown that suggests there's any reason for either parent to have this sort of information as it relates to day-to-day parenting in the other's household.

[37] However, in the interest of engaging both parents in Austin's care, I order that each parent provide the other with certain information. Within thirty days of the Corollary Relief Order, each parent shall provide the other with the name, address and telephone number of Austin's doctor, dentist, school, school principal, regular babysitters (day and evening babysitters), daycare, Excel program staff, counsellors and any individuals who are involved in any extra-curricular activities in which Austin participates. I expect that initially, the parents will exchange lists that contain information the other already knows. When this information changes, the parent responsible for the change must provide notice of the change to the other, including the name, address and telephone number within ten days of the change being made.

[38] The parents are not required to notify each other every time they call a babysitter who has not been previously identified. This is a joint and shared custody relationship premised on the confidence that each is a capable parent and neither needs to be micromanaged by the other.

[39] I recommend that Mr. Smith's counsel prepare a discrete order that addresses the provision of information from third parties to the parents so the third parties who are asked about Austin do not see the terms of the entire Corollary Relief Order.

Extended family access

[40] Paragraph 5(e) of the order provides that Austin sees his paternal grandmother every week, regardless of whether Austin is spending that week with his mother or his father. The order also says that Austin sees his extended maternal family only during weeks he is spending with his mother. Katherine Smith's parents and sister live in Ontario so there is a very limited personal contact between them and Austin.

[41] When the parties reached their initial agreement in the fall of 2008 and when it was registered as a court order in April 2009, Ms. Smith's family was living in Ontario and she was living in Nova Scotia. Throughout this period she was involved in a relationship with Danny Switzer. This relationship continues. Mr. Smith's family is in Nova Scotia, as it always has been. Despite Ms. Smith's relationship with Mr. Switzer, there was no agreement there would be any special time for Austin and Mr. Switzer or Mr. Switzer's family.

[42] Both parties gave evidence that Austin doesn't see his paternal grandmother for one day every week, despite the order providing this would happen. Mr. Smith told me that Austin had a close relationship with his grandmother and this relationship was why special provision was made for weekly contact between the two. That relationship does not appear to have continued: the dedicated access between the two has not been occurring.

[43] Ms. Smith seeks the opportunity to break up Austin's week with each parent, by allowing the other parent or other parent's family access with Austin. Subject to any agreement the parents make on their own, I order that each parent or its family shall have the opportunity to have time with Austin during the week that Austin is at the other family's home. There should be no distinction between the families, if Austin can have dedicated access with his father's extended family, he can have dedicated access with his mother's extended family. If this access takes place from Monday to Friday, it shall be between two and four hours long. If this access takes place on Saturday or Sunday, it shall be no longer than six hours.

Christmas

[44] Paragraph 5(h) of the order addresses the division of Austin's time at Christmas in 2008 and 2009. It makes no provision for access at Christmas after 2009. This is not a variation application because the order doesn't address Christmas access on an ongoing basis.

[45] Mr. Smith wants to have access with Austin every Boxing Day afternoon, so that Austin can attend a large family gathering his mother hosts. Ms. Smith agrees with this.

[46] Ms. Smith wants to have access with Austin every Christmas Eve, so that Austin can experience a traditional Polish Christmas. Ms. Smith says that while the family was together (the separation occurred when Austin was less than two years old), they celebrated a Polish Christmas. She says she's celebrated a Polish Christmas with Austin since separation when Austin is with her. This involves a family meal with particular foods, a ritual bread-breaking among those present and gift-giving. All of these activities occur on December 24. Ms. Smith says that Austin is too young to attend midnight mass though eventually, he will attend mass and this would be part of their Christmas celebration.

[47] Mr. Smith wants Austin to alternate Christmas Eve between his parents. He says there are no particular events or family traditions that occur at this time. Mr. Smith says that Christmas Eve is an exciting time of anticipating Christmas and he wants to share that experience with Austin in alternate years.

[48] This isn't a variation application, so I don't need to find there's a material change before I determine the schedule for Austin's Christmas. Austin has two distinct family traditions: his mother's tradition of a Polish Christmas Eve and his father's tradition of a family gathering on Boxing Day. There is no reason why one should be preferred and annually recognized while the other should not. In fact, to recognize and enhance Austin's Polish heritage, his traditional Polish Christmas should be encouraged.

[49] I order that every year, Austin will be with his mother from nine a.m. on December 23 until 7:30 a.m. on December 25. If Austin is awake prior to 7:30 a.m., Ms. Smith shall take him to his father's home. In any event, Austin shall be at his father's no later than 7:30 a.m. on December 25 and Austin will be with his father from that time until 9 a.m. on December 27. Otherwise, Austin's time shall be allocated in accordance with the alternating week schedule provided by the order. Austin's Christmas will annually involve participating in the traditions of both of his parents.

Child support

[50] Ms. Smith seeks to vary two aspects of the child support order:

a. she wants Mr. Smith's weekly payment of $30.00 to be increased to $50.00; and

b. she wants Mr. Smith to contribute to the cost of Austin travelling to Poland once each year so Austin will be exposed to his Polish heritage.

[51] Mr. Smith wants me to address how he should repay arrears of child support.

Approach to child support variation applications

[52] Before I may vary a child support order, I must be satisfied that there has been a change in circumstances as provided for in the applicable *Guidelines* that has occurred since the last order was made. This requirement is found in section 17(4) of the *Divorce Act*. If I find a change has occurred, I am to determine the new amount of child support. According to section 17(6.1) of the *Divorce Act*, when making a variation order in respect of a child support order, I am to do so in accordance with the applicable *Guidelines*.

Current child support

[53] Mr. Smith's weekly payment is provided for in paragraph 11(d) of the order which states that "[t]he Father shall pay to the Mother $30.00 per week for the extracurricular activities and attractions for Austin. This is intended to cover such expenses as skiing passes, skating, swimming or dance lessons, Sportsplex membership, entrance fees to museums and other travelling expenses."

[54] This payment is pursuant to neither section 3 nor section 7 of the *Federal Child Support Guidelines*, SOR/97-175. Austin is in a shared parenting arrangement so his support is governed

by section 9 of the *Guidelines*. The payment of child support dictated by section 3 of the *Guidelines* is the focus of section 9(a). Special or extraordinary expenses are considered in the context of section 9(c): at paragraph 71 of his reasons in *Contino v. Leonelli-Contino*, 2005 SCC 63, Justice Bastarache wrote, "Moreover, given the broad discretion of the court conferred by s. 9(c), a claim by a parent for special or extraordinary expenses falling within s. 7 of the *Guidelines* can be examined directly in s. 9 with consideration of all the other factors. Section 9(c) is conspicuously broader than s. 7 [citations omitted]."

[55] Returning to section 17(4) of the *Divorce Act*, before I may vary child support I must be satisfied that there has been a change in circumstances as provided for in the applicable *Guidelines* that has occurred since the last order was made. The circumstances provided for in the applicable *Guidelines* are: the payor's province of residence, the number of children supported, the income of either parent and the provisions of section 9 of the *Guidelines*, since this is a shared parenting situation.

[56] As with every claim she has made, Ms. Smith bears the burden of proving this claim on a balance of probabilities.

[57] Clearly, the province of residence hasn't changed nor has there been a change to the number of children being supported.

[58] Mr. Smith's income has changed since the last child support order was made. In 2009 when the order was issued, his income was $27,979.00. His 2010 tax return shows annual income of $51,693.00. There's been an increase of $23,714.00 in Adam Smith's annual income since the order was made.

[59] Because there has been a change in Mr. Smith's income, it isn't necessary that there be any change in Ms. Smith's income. However her income is relevant to determining what child support payment should be made pursuant to section 9 of the *Guidelines*.

[60] Determining Katherine Smith's income is a difficult task. Since 2004, she has not filed a personal income tax return. Her Statement of Income indicates her monthly income is a mere $100.00. This is supported by no documentation. Because she doesn't file tax returns, she doesn't receive Canada Child Tax Benefit payments or HST credit benefits. Ms. Smith works with Mr. Switzer in operating a bed and breakfast and with Ann Okwese in operating a makeover studio. Financial statements were not provided for either business.

[61] Ms. Smith says that she supports herself and Austin through creative financing: when she receives income from one source to pay an expense, she will use the income for some other purpose and delay paying the expense. She says she shops at discount stores, buys second hand clothing and she has been able to afford vacations by not staying in hotels. Ms. Smith, Mr. Switzer and Austin live in the home occupied by the bed and breakfast. As well, Ms. Smith has used dividend income to finance her needs and Austin's. Though she hasn't filed tax returns, she has received the income information slips and she provided these.

[62] Mr. Smith has not suggested that I should impute income to Ms. Smith. Section 19(1) of the *Guidelines* allows me to impute income as I consider appropriate. The *Guidelines* provide a non-exhaustive list of circumstances where it may be appropriate to impute income. These circumstances include under-employment, tax-exemption and income diversion, for example. Of particular import in this case is section 19(1)(e).

[63] Section 19(1)(e) of the *Guidelines* refers to imputing income where a spouse's property is not reasonably utilized to generate income. When the Smiths divided their property, Ms. Smith retained the property at 27 Hastings Drive in Dartmouth. At that time, the property was said to have a value of $150,000.00. It was encumbered by a mortgage and credit line in a total amount of $85,438.00. Ms. Smith says she "sold" this property to Mr. Switzer last year. When asked how much she received on this sale, she said that she had an agreement with Mr. Switzer that he would bequeath this property to Austin in his will. Mr. Switzer has re-mortgaged the property and used the proceeds to purchase another property.

[64] Katherine Smith's makeover studio operates at 27 Hastings Drive and it pays rent of $700.00 each month to Mr. Switzer. Mr. Switzer's sister is also a tenant in this property and she pays monthly rent of $750.00. Mr. Switzer is making efforts to finding other tenants for the building. These tenants would pay weekly rent of $150.00 or monthly rent of $500.00. It appears there is room for more than one additional tenant.

[65] Pursuant to section 19(1)(e) I impute annual income of $23,400.00 to Katherine Smith. This amount is comprised of the rents paid by Ms. Smith and Sarah Switzer and the rent that would be paid from renting just one of the available rooms.

[66] I do find there has been a change in the circumstances as provided for in the applicable *Guidelines* that has occurred since the making of the last child support order. The change is the increase in Mr. Smith's income. Since I do not have income information for Ms. Smith for 2009, I cannot conclude that her income has changed. Finding a change has occurred, I am to determine the new amount of child support. According to section 17(6.1) of the *Divorce Act*, when making a variation order in respect of a child support order, I am to do so in accordance with the applicable *Guidelines*. For this family, section 9 is the applicable section of the *Guidelines* because Austin is in a shared parenting situation.

[67] The first step in determining child support for Austin is calculating the set off amount pursuant to section 9(a) of the *Guidelines*. Based on an annual imputed income of $23,400.00, Ms. Smith would pay child support of $198.00 each month to Mr. Smith. I note that I have corrected this figure from the amount incorrectly stated in my oral decision. At his current income of $51,700.00, Mr. Smith would pay monthly child support of $450.00. The offset amount of child support between the parents is $252.00 per month.

[68] I have no evidence of any increased costs of the shared custody arrangement which I am directed to consider by section 9(b) of the *Guidelines*.

[69] At paragraph 68 of Justice Bastarache's decision in *Contino v. Leonelli-Contino*, 2005 SCC 63 he tells me that section 9(c) vests me with "a broad discretion for conducting an analysis of the resources and needs of both the parents" and the child and reminds me to be especially concerned with the child's standard of living in each household and each parent's ability to manage the costs of maintaining the appropriate standard of living.

[70] At this step I am to recognize that a shared parenting arrangement may not result in any saving. Justice Bastarache, at paragraph 54 of *Contino v. Leonelli-Contino*, 2005 SCC 63, says it's possible to presume, in the absence of evidence to the contrary, that a parent's fixed costs are unchanged and variable costs are reduced only modestly.

[71] I am mindful of Justice Bastarache's comment at paragraph 51 of his reasons in *Conino v. Leonelli-Contino*, 2005 SCC 63: "one of the overall objectives of the *Guidelines* is, to the extent possible, to avoid great disparities between households." While this comment was made in his remarks about section 9(a) of the *Guidelines*, it was in the context of explaining why I retain discretion to modify the set-off amount if, considering the parents' financial realities, the set-off would "lead to a significant variation in the standard of living experienced by the children as they move from one household to the other".

[72] Adam Smith's Statement of Expenses shows monthly expenses of $200.00 for extracurricular activities, $100.00 for gifts and $200.00 for holidays and entertainment. Austin is frequently able to travel to New Brunswick with his father to visit Mr. Smith's new partner and her child who live there.

[73] Katherine Smith provided no Statement of Expenses. In her testimony she explained that she lives by juggling the receipt of income against the payment of expenses. It's in the context of section 9(c) that I consider both Ms. Smith's request for an increased contribution by Mr. Smith and a contribution to the cost of travel to Poland. I don't distinguish between these requests: both are encompassed by the regulation.

[74] Pursuant to paragraph 11(d) of the order, Mr. Smith paid child maintenance of $30.00 each week "to cover such expenses as skiing passes, skating, swimming or dance lessons, Sportsplex membership, entrance fees to museums and other travelling expenses."

[75] I have evidence that Austin's travel to Poland would cost $1,000.00 per visit and Katherine Smith asks that Adam Smith equally share the cost of one visit to Poland each year.

[76] Considering the set off amount calculated pursuant to section 9(a) of the *Federal Child Support Guidelines*, the absence of any identified additional costs arising from the shared custody arrangement and the financial circumstances in each household, I order Mr. Smith to pay child support of $300.00 each month. This amount exceeds the set off amount by approximately $50.00 each month. This additional amount will assist in lessening the disparities between the parents' households and ensuring that Austin's standard of living in each home is roughly equivalent. Mr. Smith's monthly payments shall begin on July 1 and support shall be paid in full at first of each month.

Arrears of child support

[77] Mr. Smith asks that I order he pay his arrears of child support into Austin's R.E.S.P. I decline to do so.

[78] The Supreme Court of Canada's decisions in *Richardson*, 1987 CanLII 58 (S.C.C.) and *Willick*, 1994 CanLII 28 (S.C.C.), articulate four core principles relating to child support:

a. child support is the right of the child;

b. the right to support survives the breakdown of the relationship between a child's parents;

c. as much as possible, child support should provide the child with the same standard of living the child enjoyed when the parents were together; and

d. the specific amount of child support owed will vary based upon the income of the payor parent.

[79] According to Justice Barstarache at paragraph 38 of *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 these core principles "animate" child support. Child support is intended to finance a child's present needs. Mr. Smith has failed to meet his obligation to finance Austin's present needs by failing to make his child support payments when they are due. He cannot now satisfy his obligation by further delaying the benefit of these payments to Austin until Austin is ready to pursue post-secondary education. Austin is not yet eight years old. Mr. Smith shall fully repay the arrears, by payment to Ms. Smith of the entire sum determined by the Maintenance Enforcement Program on or before December 31, 2011.

[80] Both parents have agreed that they intend to continue to contribute to Austin's R.E.S.P. This is outside the ambit of a child support order. Registered Education Savings Plans are not section 7 expenses, nor are they part of the table amount of child support. Here, where the parties are willing to consent to the inclusion of a provision for this contribution in a Corollary Relief Order, it will be included.

Varying the property division

The history of the agreement

[81] The Smiths began to discuss separating in the summer of 2005 and they separated in October 2005. There were difficulties between them sufficient to involve the R.C.M.P. in 2007 and 2008 and, where the R.C.M.P. are involved, child welfare authorities follow. Prior to the agreement's execution, Ms. Smith had last seen Austin on July 23 when there was an altercation between the parents that involved the R.C.M.P. In his affidavit, Adam Smith said that "Children's Services in Windsor were involved and it was strongly recommended to me that a

written Agreement or Court Order was required in order to provide some sort of consistency for Austin." I suggest that a written agreement would also reduce the potential for conflict between the parents and its negative impact on Austin. In his cross examination, Mr. Smith explained that an employee of Children's Services told him there was to be "no back and forth until a signed agreement was in place".

[82] Ms. Smith wanted to take Austin to Ontario in August 2008. Mr. Smith insisted that she could only take Austin if there was a written agreement between them relating to parenting. He was able to have an agreement prepared, but Ms. Smith did not sign it. She went to Ontario alone and was gone for ten days in mid-August. Approximately one month after returning from Ontario, on September 19, 2008, Ms. Smith filed an application in this court. She sought sole custody and primary residence of Austin, completion of an access assessment of Mr. Smith before Austin could have any face-to-face access with him, direction that Austin would attend a school in her neighbourhood and a mobility restriction so that neither parent could remove Austin from the Halifax Regional Municipality. In her supporting affidavit, Ms. Smith said she felt access with Austin was being used as a tool to get her to sign an agreement.

[83] Ms. Smith says that she was continuing to discuss matters with Mr. Smith until she started her application and she delayed starting the application because of their ongoing discussions. As well, she was speaking with Austin every few days. Mr. Smith says that he and Ms. Smith "exchanged many emails negotiating the terms of the agreement."

[84] On October 7, 2008 the parties signed the comprehensive agreement. Mr. Smith says he made concessions in negotiating so that an agreement could be reached. His concessions, he said, included treating what he felt was a business asset (the vacant land) as a matrimonial asset.

[85] Ms. Smith's *Maintenance and Custody Act* application was scheduled to be heard on October 14, 2008. As noted, one week before her court date, she signed the agreement.

[86] It was within Katherine Smith's grasp to wait one week and to have a judge resolve the parenting dispute. Ms. Smith decided to sign the agreement. I do not accept that Children's Services required there to be a property division agreement between the parties for Austin to have access to his mother. I accept that it was advisable for the parties to have an agreement dealing with parenting, which might avoid the parents' conflict and police involvement.

Section 29 of the *Matrimonial Property Act*

[87] Ms. Smith's application to vary a portion of the agreement is governed by section 29 of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 which provides that on the application by a party to a separation agreement, where I'm satisfied that any term of the agreement is unconscionable, unduly harsh on one party or fraudulent, I may make an order which varies the agreement as I see fit. Before I can vary the agreement I must be satisfied that the agreement or some term of it is unconscionable, unduly harsh or fraudulent.

[88] I refer to the parties' agreement as an agreement quite specifically in this context. The *Maintenance and Custody Act* cannot permit its registration as an order, so it remains an agreement.

The property division

[89] The agreement is specific about values of the real estate. It describes property that is matrimonial and subject to division in paragraph 13. According to that paragraph, the matrimonial home has "divisible equity" of $101,480.00. This amount is calculated considering the value of the property, the amount of its encumbrances and deducting the further amount of $8,000.00 which I assume to be an allocation for the notional costs of disposition. No other explanation is offered for the deduction. It is appropriate to consider the notional costs of disposition and this has been recognized by decisions such as Justice Goodfellow's in *Clancey*, 1990 CanLII 2602 (NS SC).

[90] In 2003, Adam and Katherine Smith purchased a home at 27 Hastings Drive in Dartmouth. In the agreement, this property is said to have divisible equity of $64,562.00: an actual cash value of $150,000.00 with an outstanding mortgage and credit line of $85,438.00. Notional disposition costs were not deducted when determining this property's divisible equity. Considering notional disposition costs (five percent real estate commission, $1,000.00 for legal fees, which would include the cost of migrating title, and HST of fifteen percent on each of these amounts), the Hastings Drive property had a value of $54,787.00.

[91] In her submissions, Ms. Smith said $150,000.00 was more than this property was worth. She also argued that this property was a business asset, so it shouldn't have been included in the property division. I have no evidence of any other value for the property and Ms. Smith adduced no evidence to prove the property wasn't a matrimonial asset. According to section 4(1) of the *Matrimonial Property Act*, all assets are matrimonial unless they are proven to fall within one of the excepted categories. The burden is on Ms. Smith to prove this property was excepted. She did not discharge this burden: she offered no evidence on this issue.

[92] Ms. Smith also raises concerns about thirty-two acres of land which were owned solely in Mr. Smith's name. This land was purchased in the summer of 2003. It cost $115,000.00 and its purchase was financed by a credit line debt of $180,000.00 borrowed by Mr. Smith's father, Richard Smith. The agreement stated no value for the vacant land. Its value was to be determined by sale.

[93] The parties' agreement provided that if this land sold prior to October 7, 2009 for a price greater than the sum of $180,000.00 and amounts paid by Adam Smith, the sale proceeds in excess of the sum of $180,000.00 and the amounts Adam Smith paid would be divided equally between the parties and Richard Smith.

[94] The property did not sell and there's been no division of its value. The agreement was explicit: if the property did not sell within twelve months of the agreement's execution, "then

[Ms. Smith] waives absolutely any entitlement to the property and it shall remain [Mr. Smith's] sole property."

[95] Real property was not the only property divided by the agreement. The agreement also divided motor vehicles, furnishings and household effects, Registered Retirement Savings Plans, stocks and bank accounts. It clearly stated that Ms. Smith had no claim to Mr. Smith's businesses: Stix Market and Cash4Less.

[96] In addition to the property at 27 Hastings Drive, Ms. Smith received additional funds which were largely funded by debt: she kept the $15,812.50 which she took from Mr. Smith's credit card, she was given $1,000.00 from another business operated by Mr. Smith and she took $920.00 from a bank account. Mr. Smith paid her an additional $4,726.50.

[97] I have no information about the vehicles that either party owned and retained at the time of separation. Ms. Smith provided a list showing the division of household contents. Mr. Smith claims she "cleaned out" the couple's home. She does not suggest that she received less than an equal share of furnishings and contents.

[98] Mr. Smith's Statement of Property shows he currently has RRSP contributions of $1,641.27. According to Mr. Smith's tax returns, he has liquidated RRSP contributions of $3,756.00 since the agreement was executed and made a $700.00 contribution in that period. I conclude his RRSP holdings were approximately $4,700.00 when the agreement was reached. Ms. Smith's Property Statement shows she retains an RRSP containing $10,633.96 at the time of the hearing.

[99] Mr. Smith has shares with a current value of approximately $240.00. While she's filed no tax returns, Ms. Smith did provide income information slips which indicate that in the time since the agreement was signed, she has received dividend income from shares she owned in a company which previously employed her. She hasn't disclosed the value of those shares on her Statement of Property.

Analysis

[100] Pursuant to section 29 of the *Matrimonial Property Act* before I may vary an agreement I must be satisfied that the agreement or some term or it is unconscionable, unduly harsh or fraudulent. I will not consider whether this agreement is fraudulent: Ms. Smith does not suggest it is.

[101] In *Zimmer*, (1989), 90 N.S.R. (2d) 243 (T.D.) at page 250, Justice Davison said that "Obviously an agreement which could only be characterized as unbalanced or unfair should not be set aside as being unduly harsh. **I would suggest the agreement should be found severely unjust as to show on its face a disregard for the rights of one party**. [emphasis added]"

[102] The general scheme of the *Matrimonial Property Act* is one where all assets are considered matrimonial, unless proven to fall within one of explicitly excepted categories.

Assets are to be divided equally under the *Act*, unless – having regard to thirteen specifically enumerated circumstances – an equal division of matrimonial assets would be unfair or unconscionable.

[103] My review of the agreement's terms indicates that most assets have been divided equally. This is demonstrated in the table below. In calculating the value of RRSP contributions, I've totalled the amounts held by each party and the amount liquidated by Mr. Smith. I've discounted this figure by one-third to recognize the unavoidable tax liability of realizing the asset's value.

Property	**Value**	**Ms. Smith**
Matrimonial home	101,480.00	
27 Hastings Drive	54,787.00	54,787.00
R.R.S.P.	10,222.64	7,089.30
Payment to Ms. Smith		22,459.00
Total value	166,489.64	84,335.30
Percentage	100%	50.6%

[104] Because the division of these assets is equal, Ms. Smith focuses on the thirty-two acres of vacant land. In effect, the agreement gave her no share of its value. Of course, there is the question of the land's value, but first there is the question of whether the land is a matrimonial asset.

[105] Mr. Smith suggests the land is a business asset, which should be excluded from a division under section 4(1)(e) of the *Matrimonial Property Act*.

[106] A business asset is defined by section 2(a) of the *Act* as "real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose". The vacant land was purchased by Richard Smith so that his son and daughter could operate a flea market on it. Title was registered in the name of Adam Smith. The flea market has never been developed. It has never operated in any sense and, while it would be operated to produce income or profit, it certainly has never done so. In these circumstances, I find the land is not a business asset.

[107] The land was purchased in June 2003 and its cost was entirely financed by Richard Smith, Mr. Smith's father, who borrowed $180,000.00 from a credit line. To the date the agreement was signed, all payments on the credit line were made by Richard Smith.

[108] Adam Smith's Statement of Property shows the land was worth $230,000.00 in July 2010. According to that Statement of Property, the land was mortgaged to Richard Smith and the mortgage was for $315,000.00. I was not given details of this debt, so I don't know whether

it's truly a mortgage or whether it remains a credit line but is now secured against the land. The land was purchased in 2003 for $115,000.00. The amount of the debt relating to the property eight years later is $200,000.00 more than its original purchase price – and $85,000.00 more than Mr. Smith says the property is worth.

[109] I determine the land has a value of $315,000.00: a value equal to the amount of the associated debt.

[110] In *Simmons* 2001 NSSC 46117, Justice Campbell directs that assets should be valued at the date of their division. Here the assets were divided in October 2008 when the parties signed their agreement.

[111] Assuming the growth in value occurred evenly over time, the increase from $115,000.00 to $315,000.00 is an increase of $200,000.00 over eight years or an increase in value of $2,083.00 each month. On this basis, from June 2003 to October 2008 (a period of sixty-four months), the property's value would have increased by $133,312.00. Adding this to the property's original value of $115,000.00 means the land had a gross value of $248,312.00 in October 2008.

[112] According to the agreement, the debt relating to the land was still $180,000.00. Considering the notional disposition costs for real estate commission, legal fees and HST, the property's value is further reduced by $19,262.50. Once the debt and disposition costs of $199,262.50 are considered, the vacant lot had a net value of $115,737.50.

[113] If Ms. Smith was entitled to an equal share of this value, her entitlement was to $57,868.75.

[114] Mr. Smith says no matrimonial money was invested in the vacant land. The initial purchase price was funded by Richard Smith's credit line and the payments on the credit line were fully financed by Richard Smith at least until the agreement was signed if not longer. There was a plan that Adam Smith and his sister would operate a business on the land and this is the reason why Richard Smith was willing to invest in the land. Mr. Smith gave evidence that Katherine Smith did not participate at all in any aspect of the business. He says that he and his father attended different meetings, such as meetings with lawyers, but that Ms. Smith attended none.

[115] Ms. Smith's evidence was that both she and her husband purchased the land. This is clearly not so, it was purchased with money borrowed by Richard Smith. She says that she and her husband talked about operating a flea market and they both came up with the name. She doesn't identify any steps or contribution which she made beyond those. She didn't know that Mr. Smith was operating a management company under the business name that had been selected.

[116] All costs associated with the vacant land were paid by Richard Smith. Any increase in the value of the property came about by virtue of market forces: there were no steps taken or

work done to increase the value of the property. Ownership of this asset is due entirely to Richard Smith. It appears that only after the agreement was signed did Adam Smith actually begin to make any payments toward the cost of purchasing the land.

[117] Ms. Smith claims she negotiated from a position of duress. She says she needed to conclude the agreement so she could see Austin. Child protection workers told Mr. Smith that access should occur in the context of a formal agreement, but this didn't require the spouses to resolve any issue other than parenting. I appreciate Mr. Smith wanted a comprehensive agreement and would have directed negotiations toward that end.

[118] Ms. Smith did not press her concern about access to Austin. She says that prior to signing the agreement she last saw him on July 23. In mid-August, when she had not seen him for two and one-half weeks, she visited family in Ontario for approximately one and one-half weeks. After she returned to Nova Scotia, it was a further month before she approached the court to secure access to Austin. In her affidavit, Ms. Smith offered her opinion that Mr. Smith was attempting to use access to negotiate the deal he wanted.

[119] Ms. Smith was alive to the possibility that she would be asked to compromise on one or some issues to secure access. On September 19, she started a court application to address the issue of access. Involving the court was a step which limited or deprived Mr. Smith of the ability to use access to Austin to pressure Katherine Smith. Ms. Smith's application was scheduled to be heard on October 14. She signed the agreement on October 7. It was within Ms. Smith's grasp to wait one week to have the court resolve the issue of her contact with Austin.

[120] Our Court of Appeal has repeatedly expressed the view that there must be compelling reasons before the court should interfere with a separation agreement: *Cox* (1982), 52 N.S.R. (2d) 298 (A.D.) and *Mooy*, 1993 CanLII 3174 (NS C.A.). This philosophy is echoed in the requirement that an agreement or the term of it must be unconscionable or unduly harsh in order to be set aside. An agreement that is merely unbalanced or unfair is not unduly harsh or unconscionable, according to Justice Davison in *Zimmer*, (1989), 90 N.S.R. (2d) 243 (T.D.) at 250.

[121] This is not a case like *Rick v. Brandsema*, 2009 SCC 10: Ms. Smith was not mentally fragile and Mr. Smith's disclosure was not incomplete and defective.

[122] As I have calculated, other than the vacant land, the value of the Smiths' property has been equally divided. Considering the value of all the assets, Ms. Smith received thirty percent of the value of the couple's assets. The question I must answer is whether it was unduly harsh or unconscionable that Ms. Smith did not receive any share of the vacant acreage's value.

[123] Section 13 of the *Matrimonial Property Act* allows that matrimonial assets can be divided unequally where it's unfair or unconscionable to divide them equally having regard to certain enumerated factors.

[124] The factors that would appropriately justify an unequal division of matrimonial assets between the Smiths are found in section 13(d) and (e). Section 13(d) refers to the length of time the spouses cohabited with each other during that marriage. This section does not entitle those with long marriages to an unequal division of assets: *Roberts v. Shotton* (1997), 156 N.S.R. (2d) 47 (C.A.) involved a short marriage. Ms. Shotton left her home and employment in Halifax to follow her husband to Rome. At trial, the marriage was described as "traditional": Ms. Shotten stayed at home while her husband was the breadwinner. The trial judge found it would be unfair or unconscionable to divide matrimonial assets equally and awarded Ms. Shotton a one-third share of the matrimonial assets, and a payment of $2,000.00 to compensate her for her contribution to her husband's business assets.

[125] Writing for the Court of Appeal, Justice Bateman agreed with the comment of Justice Davison in *Zimmer* (1989), 90 N.S.R. (2d) 243 (S.C.) at page 253, "The legislature did not intend for the *Matrimonial Property Act* to be used as a vehicle for one party to profit by entering into a short marital relationship and departing with a profit by reason of the contribution made to the marriage by his or her spouse". Ultimately, the Court of Appeal awarded Ms. Shotton an amount equal to less than five percent of the total value of the assets. Here, the Smiths' marriage was longer, but the vacant acreage was acquired, maintained and its value improved without any financial contribution or effort by the Smiths. The entire reason the asset exists is because of Richard Smith's desire to see his son and daughter established in a business.

[126] Section 13(e) refers to "the date and manner of acquisition of the assets". Here, the vacant land was acquired two years into the marriage and two years prior to the couple's separation. The property's value was divided three years after the couple separated. The greatest increase in the property's value occurred after the couple separated. Throughout the period prior to the property's division, the cost of acquiring it was paid by Richard Smith. I am told that Richard Smith was investing in a business for his son and daughter and that he was opposed to paying Ms. Smith anything for the property.

[127] The division of property was unequal, but it was both fair and conscionable and, accordingly, the agreement (and particularly paragraph 13iii) is not unconscionable or unduly harsh on Ms. Smith I dismiss Ms. Smith's application to vary the agreement as it relates to the division of property.

Miscellaneous

[128] With both parties' consent, I order that if Ms. Smith finds the ring belonging to Mr. Smith's grandfather, she shall return it immediately and Mr. Smith shall immediately return to Ms. Smith her Mary Kay china.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia