SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Gagnon v. Gagnon, 2011 NSSC 486

Date: 20111230
Docket: 1201-064264, SFHD-068425
Registry: Halifax

Between:

Lori-Ann Marlin Gagnon

Applicant/Petitioner

v.

Robert Ronald Gagnon

Respondent

Judge:	The Honourable Justice Beryl MacDonald
Heard:	November 7, 8, 9 and 10, 2011, in Halifax, Nova Scotia
Counsel:	Owen Bland, counsel for the Applicant/Petitioner Kim Johnson, counsel for the Respondent

By the Court:

[1] This is a divorce proceeding. I am satisfied all jurisdictional requirements of the *Divorce Act* have been met and there is no possibility of reconciliation. There has been a permanent breakdown of this marriage. The parties have lived and they continue to live separate and apart from one another for a period in excess of one year from the commencement date of this proceeding. A Divorce Judgment will be issued.

Background/ Credibility

[2] This couple married on December 30, 2000 after a very short relationship resulting in a pregnancy leading to the birth of their first child. The Father has interpreted this event as "entrapment". The Mother has fixated on the Father's relationship with his new partner as a "reason" for his abandonment of the "family" although it is apparent the marital relationship was in trouble long before the new partner was on the scene. While these after the fact interpretations of events are irrelevant to the decision I must make, they do contribute towards an understanding about the driving influences leading to the conflict between this couple, a conflict that must end if they are to achieve what is best for their children who are now 10 and 8 years of age.

[3] The Father and Mother separated on November 13, 2009 after a relationship that lasted one month short of 9 years. The issues upon which I must adjudicate are:

- the custodial arrangement
- the parenting plan
- child support including special expenses
- division of matrimonial property and debt
- spousal support
- retroactive child and spousal support

The testimony, both orally and in affidavits, given by the Father and his witnesses differs materially from that given by the Mother and her witnesses.

[4] When witnesses have a different recollection of events the court must assess the credibility of their statements. I adopt the outline for assessing credibility set out in *Novak Estate, Re*, 2008 NSSC 283, at paragraphs 36 and 37:

> [36] There are many tools for assessing credibility:
>
> a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.

> b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
>
> c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in *Faryna v. Chorny*, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.
>
> d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution *R. v. Mah*, 2002 NSCA 99 at paragraphs 70-75).
>
> e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. *R. v. J.H.* [2005] O.J. No.39 (OCA) at paragraphs 51-56).
>
> [37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.* [1966] 2 S.C.R. 291 at paragraph 93 and *R. v. J.H. supra*).

I may never know the truth about what happened. All I can do is apply the legal principles developed by our courts to assess “credibility”. The action imbedded in this word is a direction to sort out reliable from unreliable information. What information is most persuasive?

[5] In this proceeding the Mother makes serious and potentially damaging allegations against the Father. If proven they will impact the decision I must make. Credibility findings are therefore necessary at the outset.

The allegations are:

- The Father is abusive and disrespectful of her.
- She is the person who made <u>all</u> the decisions involving the children
- The Father does not care about the children’s health, dental requirements, education, or need for counseling. He will willingly place them in dangerous situations. Any suggestion by him to the contrary is just pretense for the purpose of this hearing.

- The Father was never involved with the children's daily lives.

- The Father was and is a regular user and abuser of marijuana and alcohol.

- The Father has physically abused the children and they are afraid of him.

[6] I do not intend to recite in detail the contradictory information provided by each of these parties. I have carefully read the affidavits each has presented and the other documents filed. I have listened to oral testimony. I have decided that the information provided by the Father and his witnesses, is credible. The information provided by the Mother and her witnesses in respect to the serious and damaging allegations she has made is not. My reasons for this finding are:

- The absence of any of these allegations in the affidavit filed and information provided for the interim hearing.

- The request for a parenting plan that, while providing custody to the Mother, contains significant access between the Father and the children.

- The absence of any filed complaint to police forces or to the Minister of Community Services.

- The exaggeration in their statements.

- The inability to remember background for significant events so the event could be understood in light of what happened before and after the event.

- The failure to accept any reasonable explanations for the children's minor injuries.

- The failure to accept any personal responsibility for the children's misbehavior, homework lapses, and the conflict between the parties.

- The unjustified self-aggrandizement of their character and parenting ability.

[7] The Father admits he has not always been as respectful of the Mother as he should have been. He has tried, at least for the last year, to be respectful and his e-mail messages for the most part confirm this. He denies being abusive and he denies that his tone and conversation over the telephone is as has been alleged by the Mother.

[8] The Father is prepared to acknowledge the Mother's involvement in parenting. In his affidavit filed March 17, 2010 the Father states " (the Mother) usually arranged doctor's appointments and I dealt more with the dentist. I am the Francophone parent, so I was more involved with homework, although (the Mother) was as well.

[9] The Father admits he was a casual user of marijuana but after a very serious accident in 2008, he reevaluated his life and resolved to make changes. He has not used marijuana since then.

[10] The Father loves his children and he and his present partner have a nurturing and comfortable relationship with them.

Custodial Arrangement/ Parenting Plan

[11] The Father requests joint custody of the children in a week about shared parenting arrangement. He acknowledges his role in fueling the conflict that has existed but he has been trying diligently to avoid conflict. He wants to engage in the joint decision making process and he is willing to abide by an arrangement that will achieve this result. If the conflict did not exist I would have no hesitation in granting his request.

[12] In reaching a decision about the custodial and parenting arrangements for these children I am directed to make a decision I consider to be in their best interest.

[13] There are no presumptions to apply when determining with whom children should be living under what arrangement. There is no presumption that parents should have joint custody, custody, or shared parenting. There are only various directives. The *Divorce Act* directs that we are to foster maximum contact between the children and each parent. Of course, it also directs that decisions are to be made in the children's best interests. Several cases provide guidance about factors to consider when assessing best interest, *Foley v. Foley* (1993), 124 N.S.R. (2d) 198 (N.S.S.C.); *Abdo v. Abdo* (1993), 126 N.S.R. (2d) 1 (N.S.C.A.); and particularly useful is the comment in *Dixon v. Hinsley* (2001), 22 R.F.L. (5th) 55 (Ont. C.J.):

> 46 "The best interests" of the child is regarded as an all embracing concept. It encompasses the physical, emotional, intellectual and moral well-being of the child. The court must look not only at the child's day to day needs but also to his or her longer term growth and development.

What is in the child's best interests must be examined from the perspective of the child's needs with an examination of the ability and willingness of each parent to meet those needs.

[14] Each parent's plan for the child must be examined, not in respect to what the parent wants or needs, and parents have many wants and needs in relation to their child, but in respect to what the child needs to become an independent, healthy, educated, and socially able human being.

[15] The Mother requests custody of these children. She asserts she is the primary care parent and the conflict between she and the Father prevents consideration of a joint custodial, shared parenting arrangement.

[16] A review of many of the decisions about children's best interests reveals a preference to continue children in the care of the person who is determined to be their "primary care" parent. However, because the primary care parent in a relationship was frequently the female partner, this analysis has come under attack particularly from Fathers. The division of labour within a family often evolves to place the female partner in the role of primary care parent. It is easier to have one person attending to many of the day to day parenting functions, keeping track of schedules, and arranging for time off from work to take children to appointments. These are functions the other parent can learn to preform and often did preform during the marriage when the "primary care" parent was unavailable. In addition a detailed analysis of the "modern" family with two working parents often reveals that neither parent can be classified as the "primary care" parent because both were actively involved although not necessarily equally every day.

[17] Conflict between parents does not necessarily mean they cannot be awarded joint custody and shared parenting. That arrangement may be appropriate if there is sufficient indication of their ability to place the needs of the child before personal needs and to cooperate on issues of vital importance to the child. The role of the court is not to determine which parent is better but to decide which plan for the child's care will best meet the child's developmental, educational, health and social needs. (*Gillis v. Gillis* (1995) Carswell N.S. 517 (N.S.S.C.))

[18] The Mother and her present partner have become so dismissive and disdainful of the Father it is difficult to envision an end to the conflict between them. In previous decisions I have not been prepared to place children in a shared parenting arrangement if there was no indication the parents would likely overcome the conflict that had arisen between them. In this case I am fearful that anything other than a shared parenting arrangement will work against the children's best interest.

[19] While the children have frequently been parented by the Father it would represent a considerable change for them if he became the custodial parent and the children were primarily in his day to day care. In recognition of this he has not asked for this change. In addition, I am convinced that custody to the Mother, with the children primarily in her day to day care, will likely result in the steady alienation of the children from their Father. If the Mother is given custody she will have achieved the control she sought in this proceeding. She will have absolutely no reason to forge a better relationship with the Father for the benefit of the children. This is one of those rare situations when I will use the mechanism of a review order to determine whether the Mother can work co-operatively with the Father in a shared parenting arrangement with a detailed parenting plan that, hopefully, will have considered and provided for as many "potential irritants" as possible. In coming to my decision I have been informed by an article written by Marie L. Gordon Q.C. " The Review Provisions In Custody and Access Orders" Family Law Quarterly, Vol. 27 No. 3. and by the observations of Norris Weisman in an article entitled, *On Access After Parental Separation*, 36 R.F.L. (3d) 35 at pages 56 and 59 where he explains:

> ...the adversarial nature of litigious proceedings can shift the focus of the hearing away from the children and their needs towards an emphasis on the marital sins of the parents; revive and escalate the conflict between the parents; harden their positions; and tempt them to exert pressure upon the child to choose one parent over the other...the litigation itself is often motivated by a need for public vindication, to ward off depression, or salvage shattered self-esteem. These parents enter into litigation to prove that the other spouse has behaved badly or is wrong, and, by contrast, that they themselves are good and right.

Once this litigation has ended the parties, and particularly the Mother, will have an opportunity to put the past behind them and develop a less adversarial relationship for the sake of their children.

[20] The Father has improved, over time, the way he communicates with the Mother. His communication is more respectful and responsive. This is not the case with the Mother. Her e-mail continues to contain unresponsive and insulting content. Her approach towards accommodation is a rigid tit for tat discussion that is frustrating and unnecessarily time consuming. The Mother has failed to accept that the Father wants to parent the children because he enjoys their company, because he has much to offer them as a parent, because he wants to participate in their upbringing and development, because he has the ability and capacity to do so, and because he loves them. She asserts the only reason he is involved is to avoid paying child support. I do not accept her conclusion. If her attitude toward the Father, and her interaction with him does not improve, I will consider placing the children in the primary care of the Father at a future review. This must not be taken by the Father as an excuse for a deterioration in his communication and behaviour. I will be alert to any conflict causation that may be attributed to him.

[21] The children are to be in the joint custody of the Father and the Mother. This means that both parents are to share equal responsibility and authority in making major decisions except for some decisions for which I have decided his or her decision making authority will be final. Decisions about the children's education are to be made by the Father because, as the Francophone parent, his insight into the children's educational need is required and I am not confident the Mother will be as interested in the development of their proficiency in the French language as he will be. Also there has been disagreement about whether a tutor is required. The Mother has engaged a tutor and is seeking proportional sharing of this expense. The Father expects that any additional assistance the children need can be provided by their school and with his assistance. The Mother suggests the Father does not have the capacity to assist the children with their homework. I reject that suggestion entirely.

[22] Final decisions about the children's regular health and dental care shall be in the Mother's authority. She has arranged for most appointments in the past and is to continue to do so keeping the Father informed so he may choose to attend these appointments.

[23] The Mother has not considered the economics of the choice of after school care for the children. Given that the Father will be paying the proportionally greater share of this expense, and given my expectation he will not place the children in an inadequate care situation, he will have final say on the choice of before and after school care.

[24] I am not convinced the children need counseling because of anything their Father has done. They may have needed counseling to help them adjust to the separation, or to cope with the conflict created by their parents. I will not order counseling for the children. I leave it to these parents to seek out that service if the children's behaviours, as confirmed by objective third parties, such as teachers, suggest a need for specific purpose counseling.

[25] These parents do need some form of counseling to improve their communication. I have made provision for this in the parenting plan.

[26] The children's day to day care will be in a shared parenting arrangement under the terms of a detailed parenting plan . That plan is attached as Schedule "A" and is to appear in the order to be prepared by the Father's counsel. I remind counsel that it is counsel's responsibility to provide an order to this court. This remains so (in cases where there can be no legitimate objection to the wording) even if the client refuses to approve the order or "fires" counsel. The duty to prepare an order is owed to the court and other counsel as well as to the client. (*Chrysler Credit Canada Ltd. v. 734925 Ontario Ltd.*, 5 O.R. (3d) 65 affirmed in *Folkes v. Greensleeves Publishing Ltd.*, 159 O.A.C. 99 (Ont. C.A.)).

[27] The parents are to obtain a date on my docket for a return to this court eight months from the date of this decision for a review to determine whether the conflict between the parties has ceased, or at least been substantially reduced, and whether, as a result of that analysis, any change is required to the terms of the order.

Child Support

[28] The Father's total annual income is known for 2010. It was $73,698.00. Because of reductions in the taxable benefits he will receive it is expected his total annual income for 2011 will be $69,288.00. It is unknown what his exact 2012 annual income will be. He may have a further decrease in taxable benefits. For the purpose of child support I accept his annual income for 2011 and his estimated income for 2012 to be $69,288.00. I have been asked to use the previous year to determine income for the child support calculations. This request was made by the Father who has the most to loose if I calculated income in this manner because his 2010 income was definitely higher than his 2011 income. A review of court decisions about the calculation of income provides the following guidance:

- A court should determine a parent's Guideline income for the upcoming 12 months after the decision to pay is to be made.

- A court may assume that a parent will earn the same or a similar amount in a upcoming year as he or she did in the previous year unless there is clear evidence to the contrary.

- A court may extrapolate upcoming yearly income from a payor's year to date income when there is clear evidence that the prior year's income is not an indication of what upcoming income will be.

[29] In this case I know there have been significant changes in income and there may be future changes. I am asked to consider ongoing and retroactive child support. The income figure I use will also impact spousal support. I am not satisfied that using income from a previous year to calculate child support for a current year is appropriate in the midst of such change. I will use the actual annual income for 2010 and extrapolate for 2011 and 2012. I will do the same in respect to the Mother's income. As a result the incomes are as follows:

	2010	2011	2012
Father	$73,698.00	$69,288.00	$69,288.00
Mother	$30,527.00	$31,415.00	$31,415.00

[30] I will first determine the ongoing table guideline child support. Because these children are in a shared parenting arrangement I must consider the provisions of Section 9 of the *Federal Child Support Guidelines* as interpreted by the Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 SCC 63. Under Section 9, there is no presumption in favour of reducing a parent's child support obligation downward from the Guidelines amount. It is possible that, after a careful review of all of the factors in Section 9, a court will come to the conclusion the full table guideline amount is the proper amount of child support.

[31] Section 9(a) requires a court to take the financial situation of both parents into account, but the provision does not include a conclusive formula to determine how the table amounts are to be considered or accounted for. The simple set-off amount is the preferable starting point for the Section 9 analysis, but it must be followed by an examination of the continuing ability of the recipient parent to meet the needs of the child, especially in light of the fact that many costs are fixed. Where both parents are making effective contributions, it may be necessary to verify how each parent's actual contribution compares to the table amount that is provided for each of them. This may assist in deciding whether the adjustments to be made to the set-off amount are based on the actual sharing of child-related expenses. The court retains the discretion to modify the set-off amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as they move from one household to the other.

[32] Neither parent provided me with information about the expected costs associated with caring for the children in his or her household under an alternating week shared parenting arrangement. Each provided a Statement of Expenses but these relate to combined household and personal expenses for the parent and the children. Both parents are living in homes owned by their present partners. Both parents contribute differently to the common living expenses in those households. Neither has a surplus in his and her budget. Deficits are shown that are clearly not sustainable and suggest that the amounts used in the Statements of Expenses must either be wrong or represent, not actual expenses, but proposed expenditures.

[33] The Mother's expense statement has a significant deficit but, because she has declared bankruptcy, she shows no debt payment, not even to the trustee in bankruptcy. It is not possible to have a deficit without disclosing debt instruments used to support debt accumulation. The only conclusion I can reach is that many of the expenditures listed are not accurate or that the Mother's present partner is providing greater financial assistance than may initially be assumed. I was not informed that her partner in fact makes up for the deficit expenditures described in her current Statement of Expenses.

[34] The Father does show a debt payment to the Trustee in Bankruptcy and a monthly credit card payment of $100.00. However, his monthly deficit is $1,256.00, clearly unsustainable if in fact incurred.

[35] The residences provided for the children by each parent are adequate. There are no significant differences between them. The Mother is seeking the full Table Guideline amount. The Father is seeking the set off amount. Although the Father has twice the total annual income of the Mother, she has not convinced me that the set- off amount is inappropriate given the children's needs when living in her household. The Father shall pay the Mother the set -off amount which is $502.00 per month. This payment will commence January 1, 2012. When I calculated this set -off I also considered the new child support table that is to come into effect January 1, 2012.

[36] The Mother is seeking contribution from the Father for child care and Taekwondo expenses. The facility in which the children are enrolled provides child care and Taekwondo training. The Father considers this facility too expensive for what is provided. Because I have given the Father final decision authority in respect to child care the cost may change from the amounts shown in the Mother's Statement of Special and Extraordinary Expenses.

[37] Section 7 of the Child Support Guidelines has wording that must be given meaning by decision makers. Several of those words appear in the opening paragraph; I have underlined them.

> 7 (1) In a chid support order the court may, ...provide for an amount to cover ...the following expenses... taking into account the <u>necessity of the expense in relation to the child's best interests</u> and the <u>reasonableness of the expense in relation to</u>

> the means of the spouses and those of the child and to the family's spending pattern prior to the separation...

Another word requiring interpretation is:

> 7(1)(f) extraordinary expenses for extracurricular activities.

[38] There appears to be little controversy in decisions across Canada that the following are, except in very unusual cases, necessities:

- child care
- medical and dental insurance premiums
- post-secondary education
- physiotherapy, occupational therapy, speech therapy, hearing aids, and glasses

Controversy can develop about the other expenses listed in Section 7. In particular controversy can develop in respect to the "necessity" for a child to be engaged in extracurricular activities. Necessity is to be defined in the "child's best interest". No doubt there may be universal agreement that engaging in extracurricular activities is in a child's best interest. The devil, as they say, is in the details. It may not be in a child's best interest to be engaged in extracurricular activities in situations where the child is living a parent's dream not of the child's own choosing (to be a hockey star, for example). It may be in a child's best interest to spend time with a parent rather than be enrolled in an extracurricular activity. With older children what the family provided for in the past may be an indicator of what is in a child's best interest in the future but for young children there will be no pattern of enrollment in these activities to use as a guide. As is the case with all "best interest" decisions, everything will be determined based upon the information provided about the child, his or her character, interests, strengths, weaknesses, challenges, and previous and present involvement in extracurricular activities; and about the family, how decisions about these activities were made in the past and presently, the support each parent provided and will provide to permit and encourage the child's participation, and whether the activities may impede a child's opportunity to develop a relationship with a parent.

[39] Once an expense is determined to be a "necessity" the next question is whether the cost of the activity is reasonable taking into account the financial means of the parents and the pre-separation spending on these expenses, if any.

[40] The expense of an extracurricular activity, even if necessary and the cost is reasonable, is not shareable unless the expense is "extraordinary". An amendment was made to the Child Support Guidelines to clarify what an "extraordinary" expense may be. First of all Section 7(1.1)(a) indicates an expense is "extraordinary" when it exceeds what the parent, who seeks sharing of the expense, can reasonably pay taking into account that parent's income and the amount of child support he or she will receive. If the parent can't "reasonably pay" the expense, it is extraordinary and the court may order the other parent to contribute. However, if it is determined that a parent can pay the expense claimed it may still be an "extraordinary" expense.

Section 7 (1.1)(b) indicates that an expense a parent can reasonably pay may still be an "extraordinary expense" after consideration of a number of factors. Those are, once again, the relationship of the expense to the requesting parent's income including the amount of child support he or she will receive, the nature and number of the extracurricular activities in which the children participate, the children's special needs or talents, the overall cost of the programs and activities and any other similar factors considered relevant.

[41] Child care is a necessity in this case. The reasonableness of the previous child care expense was contested and I have decided it was not reasonable taking into account the parties' financial means and their pre-separation expenditure on child care. However, child care will be required and the child care provider will be determined by the Father. Once the cost is known it is to be shared in proportion to the parents' incomes. Each is to pay his and her portion directly to the child care provider and obtain a receipt for what has been paid so it may be used to claim a credit on his and her income tax return. If the child care facility will not provide separate receipts the proportion will still be calculable from one receipt. For simplicity I have rounded each parents proportional percentage. These percentages are to be used for all other special expenses I order to be shared and for any expenses the parents' may agree to share in the future. The Father is to pay 69% and the Mother is to pay 31% of those expenses.

[42] Although the Mother initially resisted the children's participation in Taekwondo she has become a supporter of this activity. The children appear to enjoy this training and given all the other upsets in their lives, they should be able to continue to participate in this recreation. For them it is necessary. However, the cost, when separated from the child care aspect, does not appear to exceed either the Father's or the Mother's ability to pay. The children are not enrolled in other activities on a regular basis. This is an expense that these parents should share but I cannot order them to do so because the expense is not extraordinary.

[43] Because of the shared parenting arrangement the Father is paying less than the table amount of the child support guidelines. If the Mother will not contribute to the cost of Taekwondo, he will have to pay the entire cost. Of course the Mother may then pay for another activity for the children at her own cost. Mature parents would recognize what will be beneficial for their children within the confines of their financial means and share the cost of what can then be afforded. These parents are to make joint decisions about the children's recreational activities. Their ability to co-operate in respect to these decisions, and share the expense, will be examined during the review.

[44] If these parents decide the children need counseling, the cost not covered by a medical benefit plan, is to be shared proportionally.

Division of Matrimonial Property

[45] I have very limited information about the value of assets owned by the parties when they separated. I do know the matrimonial home was sold and there was no equity remaining to divide between the parties. The parties argued about that sale and the Father now alleges the Mother

committed waste because the house may have been sold at a time when a higher price may have been offered. There is no information before me from which I can draw the conclusion that, but for the Mother's interference, a higher price would have been obtained.

[46] The Mother admitted she had an R.R.S.P. with a before tax value of approximately $12,000.00. She produced no documentation to substantiate this value. The Father did not ask for documentary confirmation in any court appearances. The Mother cashed out this R.R.S.P. and paid credit card and other debt that was in her name alone. Some of this debt may have been matrimonial but I have insufficient evidence to "prove" that suggestion. I can say that the Father has not shown the Mother to be exorbitant in her lifestyle or expenditures although she does appear to spend much more on food then may be justifiable. Usually debt incurred by spouses during their co-habitation is used to support the family in one way or another. While a couple are living together, and, for example, absent any indication of a gambling addiction (which may be hidden), or proof of trips away without other members of the family for unknown purposes, or purchase of personal use expensive jewelry or clothing, the time and expense of demanding disclosure of credit card purchases with the attendant review of every line item is difficult to justify. It may be more instructive for the parent to look at the combined income remaining after subtracting mandatary deductions and then compare that to the expenses he or she knew had to be paid while they were living together. I expect in most cases little surplus would be revealed but only a deficit.

[47] The Father choose not to seek a division of the Mother's R.R.S.P, nor did he attempt to recreate their debt situation to justify a finding the Mother's debt was not matrimonial. He does want this considered in respect to the Mother's request for division of his R.R.S.P., spousal support and retroactive support. The fact is, to rid themselves of remaining debt following separation, both parents declared bankruptcy.

[48] The Father retains two R.R.S.P.'s. One had a value of $9,800.00 and the other of $3,110.00. Both were valued to February 24, 2010. No documentary confirmation of these values has been provided. I do not know their present values. The Mother did not ask for documentary confirmation in any court appearances. She requests division of the R.R.S.P. valued at $3,110.00. While she has not said so, perhaps she has done so in recognition of her exclusive use of "her" R.R.S.P. Under these circumstances I make no division of R.R.S.P.'s between these parties.

[49] The parties had vehicles prior to their separation but neither has requested equalization of any values attributable to those vehicles. The Father is seeking certain appliances, a washer, dryer, refrigerator, kitchen range, dishwasher and microwave, stored by the Mother for which she has no present use. She did not require use of these appliances, and likely many other furnishings, because she moved into her present partner's already furnished home. At trial the Mother suggested she would give the Father the washer, dryer and microwave. The other items might be "required" as replacements for similar items in her partner's home. Given the history between these parties I am not confident these items are in workable condition. Because she had no use for these items the Mother could have released these to the Father some time ago. She

retained the majority of the household furnishings and while these rarely have significant value, when furnishings and appliances are not required they should be provided to the other party.

[50] The Father placed a value on appliances in his Statement of Property filed March 17, 2010. The Mother placed no value on these items in her Statement of Property filed January 25, 2010. Evidence before me suggests the refrigerator placed in storage is the one he valued at $150.00. He places the following value on the other items:

- Washer and Dryer $500.00
- Dishwasher $300.00
- Ceramic top Stove $700.00
- Microwave $100.00

I have no documentary material to support these values. That is not unusual. These are used appliances but they should, in these circumstances, be given a value. There was no reason to withhold them from the Father. I find the value for the Ceramic top Stove to be somewhat pricey for a used appliance. I have reduced the total value somewhat as a result. The total value I will assign to these items is $1,350.00. Rather than provide those items now, when their condition is unknown, the Mother is to pay the Father for his share in this value - the sum of $675.00.

[51] The only assets of value remaining are the Father's pension and the possibility that he will receive a severance award when he retires from the military. Neither party provided information about the severance award. The Father was not asked any questions during his testimony about the severance award. There was no admission by him that he was entitled to a severance award. The Mother did not request disclosure of the Father's entitlement to a severance award during any court appearance. I have no "evidence" from which to conclude this asset exists. All I have are comments in summation from the Mother's lawyer about division of this asset. I have nothing upon which I can base a conclusion that he has an entitlement or will have an entitlement to a severance award. I cannot take judicial notice of this "fact". Therefore I cannot make an "if and when" order as requested by the Mother. I make no order in respect to a severance award.

[52] Neither party disputes the Father's entitlement to a pension. The Mother does appear to have a pension but whether her entitlement arose prior to the parties separation is unclear. In any event the Father is not seeking any division of her pension. The Father requests division of his pension benefits earned during the marriage. The Mother wants to include the premarital benefits based upon the principles expressed in *Morash v.Morash*, 2004 NSCA 20. There is no dispute that pre marital pension benefits are matrimonial property. The question always is whether there are factors under Section 13 of the *Matrimonial Property Act* , R.S.N.S. 1989, c. 275 to support a finding that an equal division of those benefits "would be unfair or unconscionable".

[53] In *Jenkins v. Jenkins* (1991), 107 N.S.R. (2d) 18 (T.D.), Richard J. reviewed the meaning of unfair or unconscionable as set out in s. 13 of the *Matrimonial Property Act* :

> I propose now to deal with the division of matrimonial assets in accordance with the law as set out in *Donald*, supra, while remaining mindful of the comments of MacDonald, J.A., in *Nolet.* To support a finding that a division is "unfair and unconscionable" it seems that there must be something more than mere inconvenience. The Random House Dictionary defines "unconscionable" variously as "unreasonable", "unscrupulous", "excessive" and "extortionate". These are strong words, and when coupled with the requirement that "strong evidence" must be produced to support an unequal division the burden upon the party requesting an unequal division of matrimonial assets is somewhat onerous.

The subsections of section 13 relevant to this decision are:

> d) the length of time that the spouses have cohabited with each other during their marriage
>
> e) the date and manner of acquisition of the assets

[54] The Father's pension entitlement start date is not entirely clear. A report about the monthly benefits he will receive has been provided. It appears from that report he has 16 years and 315 days of pensionable service. The parties cohabited for almost 9 years. Therefore almost one half of this pension was earned before the parties entered into their relationship.

[55] There appears to be a growing body of decisions suggesting it is generally considered "unfair and unconscionable" to equally divide premarital asset value in a short relationship. Similarly it is generally considered not to be "unfair and unconscionable" to equally divide premarital asset value in a lengthy relationship. The exact reason why this should be so is not often discussed. As a result it is difficult to understand how factors (d) and (e) should be applied in marriages greater than 5 years but less than 20. Within that range considerations that appear to influence the outcome are:

- whether children were born of the relationship;
- the age of the parties at separation;
- whether the owner of the asset that has a premarital value was previously married and shared some portion of that asset with a former spouse;
- whether the spouse seeking an equal division of premarital value has substantial non- matrimonial assets or will retain substantial matrimonial assets;
- whether the spouse seeking an equal division of premarital value was a stay at home spouse who became financially dependent upon the other spouse.

- whether the premarital value of the asset was directly or indirectly maintained or increased by the spouse requesting equal division; for example, the premarital value of a matrimonial home may be enhanced as a result of the labour of a stay at home spouse.

[56] This is not a short marriage, neither is it lengthy. Although there are children born of this relationship, the Mother worked during much of the marriage. She has not become economically dependent upon the Father. She is 37 years of age and has time to accumulate her own pension entitlement. She did not contribute in any way to the acquisition or maintenance of the premarital pension benefits. In these circumstances I consider it "unfair and unconscionable" to equally divide the Father's premarital pension benefits.

Spousal Support

[57] As a result of the interim order granted in this proceeding the Mother has been receiving $125.00 per month spousal support since April 1, 2010. She has requested spousal support in the amount of $350.00 per month for a further 7 years. The Father questions her entitlement to continuing spousal support and denies his ability to pay.

[58] Entitlement to spousal support and the objectives to consider when making an award are governed by Section 15.2 of the *Divorce Act* R.S. , 1985, c.3. Section 15.2(6) creates four statutory support objectives. The Supreme Court of Canada in *Moge v. Moge* [1992] 3 SCR 813. and *Bracklow v. Bracklow* [1999] 1 SCR 420 confirmed that all four objectives are to be considered in every case but no one objective has paramountcy. If any one objective is relevant upon the facts, a spouse is entitled to receive support.

[59] In *Bracklow v. Bracklow, supra,* the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support:

1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.

2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.

3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other.

These rationales take into account both the factors set out in s. 15.2(4) and the objectives set out in Section 15.2(6).

[60] The Supreme Court did recognize that many claims have elements of two or more of the stated rationales. It confirmed that analysis of all of the objectives and factors is required. Pigeonholing was to be avoided.

[61] In this decision I will not comment on the contractual objective because it is not a factor in the case before me.

[62] Examples of circumstances that may lead to a decision that a spouse is entitled to compensatory support are:

a) a spouse's education, career development or earning potential have been impeded as a result of the marriage because, for example:

- a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;
- a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;
- a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons.

b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.

[63] Non-compensatory support incorporates an analysis based upon the concepts of economic dependency, need and ability to pay. If spouses have lived fully integrated lives, so that the marriage creates a pattern of economic dependence, the higher-income spouse is to be considered to have assumed financial responsibility for the lower-income spouse. In such cases a court may award support to reflect the pattern of dependence created by the marriage and to prevent hardship arising from marriage breakdown. L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra*, at p. 390:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin (1991), supra*, and *Linton v. Linton, supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. *As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson,* "*Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)*", supra, at pp. 174-75). (emphasis added)

It is not clear from Justice L'Heureux-Dubé's, decision whether entitlement arising from a "pattern of dependence" is compensatory or non-compensatory. A pattern of dependence may create a compensatory claim because it can justify an entitlement even though a spouse has

sufficient income to cover reasonable expenses and might be considered to be self-supporting. This often is described as the “lifestyle argument” - that the spouse should have a lifestyle upon separation somewhat similar to that enjoyed during marriage.(*Linton v. Linton* 1990 CarswellOnt 316 (Ont. C.A.) A lengthy marriage generally leads to a pooling of resources and an interdependency even when both parties are working. Usually the recipient spouse will never be able to earn sufficient income to independently provide the previous lifestyle. This would form the basis of a compensatory claim but does not necessarily entitle a spouse to lifetime spousal support. The essence of a compensatory claim is that eventually it may be paid out. This leads to a discussion about the quantum and duration of the claim.

[64] Once it is decided a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse including consideration of the division of matrimonial property between the spouses.

[65] There will be cases when the analysis may indicate the only way to adequately address the compensatory or non-compensatory claim is to continue support for significant periods of time possibly during the entire life of the recipient or payor. (*Rondeau v. Kerby*, 2004 CarswellNS 140 (N.S.C.A.) This most often will occur in respect to lengthy marriages where there is significant income disparity.

[66] Generally a non-compensatory claim in a short to mid length marriage is satisfied when a spouse becomes self-supporting and, in such a case, neither the payor spouse’s greater income nor the inability of a recipient spouse to replicate a previous lifestyle, is a factor entitling a spouse to continuing support. When spouses have not had a lengthy relationship and the only effect of the relationship has been that a spouse has enjoyed a better lifestyle than he or she could afford alone, the duration of support will likely be for a period required to ease the recipient spouse’s transition to economic independence. Self-sufficiency, however, is a relative concept. It constitutes something more than an ability to meet basic living expenses. It incorporates an ability to provide a reasonable standard of living from earned and other income exclusive of spousal support.

[67] As I have said previously, this is not a short or lengthy marriage. I have no information about the Mother’s education, skills and training background. I know little about her employment history before she married the Father. Therefore, I do not know what “career” she gave up to marry the Father and move with him to Nova Scotia. There is no indication she was prevented or discouraged from pursuing employment opportunities or developing a career during her marriage. It is clear she did not work for periods of time and remained at home to care for the children. Whenever this occurs there is, in fact, a dislocation from the workplace that will generally result in a decision that a compensatory entitlement to spousal support exists. This is because the spouse who is not working loses certain advantages that are common to most employees, for example, the opportunity to gain experience that may result in better paying employment or payment into the Canada Pension Plan. Rather than force parties to attempt a

calculation of these lost benefits (which would be extremely difficult) these become factors to consider in the compensatory support analysis.

[68] This couple, as is common, did not have enough household income to meet their expenditures. Each blames the other for this unfortunate reality but the information provided during this proceeding suggests each had a measure of fault in adding to family debt. The Mother had to return to the workplace. She returned to work for a period of time after the birth of their first child. Eight months after the birth of their second child she obtained employment and she has been employed ever since. Her present employment appears secure and her income is stable. She had a very limited claim to compensatory support at the time the parties separated. She will receive an equal division of the Father's pension benefits earned during the marriage. She received some spousal support since the Interim Order. At this time I find she has no compensatory claim to spousal support.

[69] The Mother earns substantially less than the Father. Often disparity in income leads to a conclusion a spouse is not self sufficient and has "need" - components of the non-compensatory analysis. Given the length of this marriage, the Mother's work history, present employment and income, I find her to be self sufficient. The Mother has no entitlement to spousal support.

[70] As I explained earlier, the Mother's Statement of Expenses is not an accurate indication of her "need". But even if she does have "need", and I have decided she does not, I believe it is useful to complete an analysis of the Father's ability to pay.

[71] The Spousal Support Guidelines are useful in the search for an answer to the questions about ability to pay. Using the incomes I have chosen, and considering the effect of the child support award, a computer analysis suggests spousal support within a range from $36.00 per month to $596.00 per month for an indefinite duration with a minimum or 4.5 years and a maximum of 12 years from the date of separation. The mid range amount is $321.00 per month. At $36.00 per month the Father will have a net disposable income of $3,579.00 and the Mother's net disposable income will be $3,045.00. At $321.00 per month the Father's net disposable income will be $3,410.00 and the Mother's $3,190.00. However, this analysis does not include the cost of child care or any other Section 7 expenses. Because the Father will be required to pay a larger percentage of these expenses he will have diminished capacity to pay spousal support. The Mother was seeking approximately $8,000.00 per year for child care. If the Father can reduce that to $6,000.00 per year he will pay $345.00 per month as his proportionate share. It is unlikely he will receive any significant deduction from his income tax as a result of paying for child care. The Mother will continue to receive some benefit from that expenditure and she will still receive some child tax benefit. Under these circumstances the Father has no ability to pay.

Retroactive Child Support/ Spousal Support

[72] The majority in *S.(D.B.) v. G.(S.R.)et. al. 2006 Carswell Alta 976 (SCC)* , confirmed that the decision to grant a retroactive award is discretionary. Justice Bastarache, writing for the

majority, described various issues and factors to be considered prior to making a retroactive award. Those are:

1) whether there is or is not an existing court order or agreement
2) status of the child/children
3) delay by the recipient in seeking the award
4) conduct of the payor parent
5) financial circumstances of the child/children
6) hardship imposed by a retroactive award

[73] The Father did provide significant financial support for the Mother and the children after their separation. Their conflict prevented them from making sensible decisions that could have eased their financial chaos. The Mother made decisions about child care without consulting the Father to determine whether the facility chosen was affordable. Beginning April 1, 2010, based upon an income of $69,576.00 the Father began paying table guideline child support of $978.00 per month, child care expense contribution of $307.00 per month and spousal support of $125.00 per month. There is no evidence the children suffered any financial depravation requiring a retroactive award. In addition if the Father is required to pay a retroactive award it will impede his ability to provide child care and pay other expenses relating to his children in this shared parenting arrangement.

[74] I will not recalculate the support already paid nor will I order the Father to pay the mother child support or spousal support for the period from the date of separation until March 30, 2010 .

_____
Beryl MacDonald, J.S.C.

Schedule "A"

Custodial Arrangement/ Decision Making

1) The children are to be in the joint custody of the Father and the Mother meaning, unless stated otherwise, both parents are to share equal responsibility and authority in making decisions which shall be considered to include decisions about significant health, dental and mental health issues; counseling; religious instruction; and enrollment in recreational activities.

2) When a parent has final decision making authority he or she must consult with the other parent before making that decision.

3) With respect to daily decisions, including non-emergency medical care, the parent who has care of the children according to the parenting plan is to be the decision maker with the other parent being advised accordingly.

4) Should the parents be unable to agree about a decision that is to be made jointly, they are first to consider following the recommendations made by professionals (doctors, teachers, counselors etc.), but if no professionals are involved or if there is still disagreement after consulting with professionals they are to engage in mediation before commencing litigation.

5) The Father is to have final decision making authority concerning the children's education and choice of child care facility or program.

6) The Mother is to have final decision making authority concerning the children's regular health care (not including counseling) and dental care.

7) Each parent is entitled to receive copies of all medical, dental, school and other reports related to the children and is entitled to consult with the children's teachers, physicians, dentists, other care givers and third party service providers concerning the children's well being.

8) Each parent is to be listed on all documents pertaining to the children and is entitled to attend any of the children's scheduled appointments (except that attendance at counseling appointments is to be determined by the counselor).

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Parenting Plan

9) The parents are to share parenting of the children.

10) The regular schedule will alternate between the parents from week to week from Friday after school until the following Friday after school.

11) The regular schedule is to commence two weeks after the date of this decision and the exact date is to appear in the Corollary Relief Order. The regular schedule will commence with the children in the care of the Father.

12) For holidays and special occasions the regular schedule is to be suspended. After suspensions, if the resumption of the regular schedule is not mentioned, the regular schedule is to resume and the children are to be in the care of the parent who did not have the children in his or her care immediately before resumption of the regular schedule.

13) For the Victoria Day and Thanksgiving Day holiday long weekends the children will be in the care of the parent who has care of the children according to the regular schedule.

14) For Fridays, including a holiday Friday, when the children are not required to attend school, the parent who was to have the children on Friday after school according to the regular schedule is to have the children in his or her care from Thursday after school.

15) The schedule for Labour Day, Natal Day and Canada Day holiday long weekends are to be the same as for Victoria Day and Thanksgiving Day unless a parent has this time period as part of his or her summer schedule.

16) For the Easter Holiday, the children are to be in the care of the Mother in even years from Thursday after school until the following Tuesday when the children will return to school; in odd years the children are to be in the care of the Father for this same time period.

17) For the Christmas Holiday, the children are to be in the care of the Father in odd years from after school at 6:00 p.m. on the final day of school before the Christmas break until Christmas Day at 2:00 p.m. when they will be in the care of the Mother until their return to school at the end of the break. This shall reverse in even years when the Mother is to have the children in her care from after school at 6:00 p.m. on the final day of school before the Christmas break until Christmas Day at 2:00 p.m. when they will be in the care of the Father until the end of the break.

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18) Each parent is to have the children in his or her care for a consecutive two week period during the children's summer school break. In odd numbered years the Father is to have first choice of that two week period. In even numbered years the Mother is to have first choice of that two week period. The parent with the first choice must notify the other parent of his or her chosen two week period on or before May 31st of each year and the other parent shall notify of his or her two week period on or before June 15st of each year. The parent who is to have the children in his or her care for a two week period is to pick up the children from the other parent's home (if the children according to the regular schedule are in the other parent's home) at 6:00 p.m. the day before the beginning of his or her two week period.

19) For the March School Break, the children are to be in the care of the Father in even numbered years from Friday after school at 6:00 p.m. at the beginning of the break until Saturday at 12:00 p.m . at the end of the break (the Saturday before the Monday when the children must return to school) and they are to be in the care of the Mother, for the same period of time in odd numbered years.

20) The children are to be in the care of the Father on Father's Day and the Mother on Mother's Day from 9:00 a.m. until the following Monday morning when they will return to school.

21) For Halloween the children are to be in the care of the Father in even numbered years, and in the care of the Mother in odd numbered years from after school or, if Halloween is not on a weekday, from 4:30 p.m. on the day of Halloween until the following morning when they will return to school or be placed in the care of the other parent at 9:00 a.m.

22) On their birthday the children are to remain in the care of the parent who has their care according to the regular schedule. The parent who does not have care of the children is to be provided a time when the children will be available to have a telephone conversation with that parent for a period of 10 minutes to wish the birthday child happy birthday and engage in general conversation.

23) The parent who does not have care of the children is entitled to make one telephone call to the children, during the regular schedule, on Tuesday and Thursday evening to say good night and to have a short general conversation. This call is not to be used to question the children about parenting methods or activities of the other parent. The telephone call is to be made at 8:00 p.m. unless the parent has been notified the child will not be available in which case an alternate time is to be provided. The call for both children is not to exceed 10 minutes.

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24) Telephone contact with the children for other than regular scheduled times is to be arranged between the parents as is practical given travel plans, if any, and likely availability of the children. The parent having care of the children is to, at a minimum, ensure the children contact the other parent by telephone once in every 48 hour period and if the parent cannot be reached leave a message that the attempt was made.

25) Changes may be required to this parenting plan because, for example, a parent is unable to care for the children due to illness, work obligations, a child's illness, or because a parent cannot pick up a child from a care giver or parent. In such cases the children are either to remain with or be taken into the care of the other parent. These arrangements may be made as a result of telephone contact but they are to be confirmed eventually by e-mail exchange. The regular schedule is to resume as soon as the unavailable parent becomes available and it is to resume with the children being cared for by that parent.

26) In addition to paragraph 25, the parents may change the parenting plan but to do so they must agree to the changes in writing.

Communication

27) Until the parents are ready to communicate either by way of face to face meetings or in telephone conversations, regular communication is to be by e-mail. The e-mail is to list the topics, and the reply e-mail is to deal with each of those topics in order without adding new topics. The parent having a new topic must send an originating e-mail listing that topic or topics and request a reply.

28) Communications required for emergencies, to speak with a child, to confirm a pick up or drop off and for similar situations that do not require significant back and forth discussions, may be face to face or by way of telephone conversations.

29) The parents, either separately, or if they are advised by a counselor, together, are to engage in a counseling program to improve their communication with each other regarding the parenting of their children. They may do so by attending programs offered by organizations such as Family SOS, (if it provides a program for parents who are separated), or by using a counselor accessed through his or her workplace insurance or employee assistance program.