

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Domoslai v. MacNeil, 2013 NSSC 88

**Date:** 20130308

**Docket:** 1206-005614

**Registry:** Sydney

**Between:**

Roderick Joseph Domoslai

Petitioner

v.

Dawn Kathryn-Ann MacNeil

Respondent

**Judge:** The Honourable Justice Darryl W. Wilson

**Heard:** June 11 - 15, 2012; June 25 - 27, 2012; September 4 - 5, 2012; and September 14, 2012, in Sydney, Nova Scotia

**Written Submissions:** Received on behalf of the Applicant on October 9, 2012  
Received on behalf of the Respondent on September 27, 2012

**Counsel:** Lloyd Berliner, for the Petitioner  
Cassandra Armsworthy, Article Clerk, for the Petitioner  
Ralph Ripley, for the Respondent

**By the Court:**

[1] The Petitioner father and the Respondent mother met and began a relationship while residing in Alberta. They lived together for a year prior to their marriage on August 21, 2002. They moved to Cape Breton in September, 2003. They separated on October 18, 2006, after a physical altercation in which the father was charged and subsequently convicted of assaulting the mother. The parties did not resume cohabitation after October 16, 2006.

[2] A Divorce Judgment shall issue. All the procedural and jurisdictional requirements for divorce have been met. The grounds have been established. There is no possibility for reconciliation.

[3] The parties are the parents of Tessa, age 9, and Liam, age 8. The children spend an equal amount of time with each parent in a shared parenting arrangement. They attend Coxheath Elementary School, which is located two lots away from the mother's residence. The father's residence is located within a five minute motor vehicle drive from the school and the mother's residence. Both parties own their own home.

[4] The mother, age 39, is employed as an Engineer with the Sydney Tar Ponds Agency, earning approximately \$96,000.00 per year. She has a partner, who is employed as a member of the Cape Breton Regional Police Service.

[5] The father, age 50, is not employed. At the time of separation he had been employed in land development and new home construction. In the past he owned two corporations, Rivercity Investments Incorporated and Atlantic Projects Incorporated. Atlantic Projects ceased to do business in November, 2007, and Rivercity Investments ceased to do business in November, 2009. Since 2009 the father has not had any personal income. He has been supporting himself from proceeds from the sale of his home and a personal construction mortgage. He is upgrading his education to gain meaningful employment in the property inspection and appraisal industry. He is working to obtain his Canadian / US National Accreditation in this field and expects to take a few more years to complete this process.

[6] The father has had two girlfriends that have met and spent time with the children, including his current girlfriend.

[7] A Separation Agreement which purported to deal with all matters relating to the care and custody of the children, support, and division of property and debt was executed in March, 2007, while the father was awaiting trial for assaulting the mother.

[8] **ISSUES:**

1. Parenting -
  - (a) what parenting schedule is in the children's best interest?
  - (b) which parent should have final decision making authority when they disagree on a parenting matter?
2. Child support -
  - (a) what is each parent's income for purposes of fixing child support in a shared parenting arrangement?
  - (b) should income be imputed to either parent?
  - (c) what section 7 expenses are appropriate and how are they to be shared?
  - (d) should retroactive child support be ordered?
3. Interpretation and enforcement of the Separation Agreement regarding division of assets and debts -
  - (a) equalization payment
  - (b) matrimonial home contents
  - (c) damages to the matrimonial home
  - (d) debts
  - (e) pontoon boat
  - (f) tractor and loader
  - (g) education trust fund

**PARENTING:**

[9] Initially after separation access by the father to the children was limited due to an undertaking restricting contact with the mother. A family friend and his wife agreed to facilitate access exchanges. This arrangement broke down due to the stress caused by continuing conflict between the parties.

[10] Criminal court proceedings were prevalent for two to three years after separation. The father was convicted of assault on July 18, 2007 and sentenced on October 24, 2007, to a conditional discharge and probation for one year. The conditional discharge was made absolute on October 27, 2008. There were additional Informations with charges including assaults and breach of orders filed which did not result in any convictions.

[11] There were ex parte applications to this court relating to the return of children and applications seeking consents to travel as well as signing of passport documents.

[12] Three Orders were issued by the court involving the care and custody of the children. In October, 2006, proceedings were initiated pursuant to the ***Maintenance and Custody Act, R.S.N.S. 1989, c. 160.*** by the mother seeking interim custody of the children with supervised access to the father. This application was discontinued on November 2, 2006. Court proceedings were initiated again by the mother in March, 2007, seeking interim custody of the children. This resulted in the registration of the Separation Agreement dated April 25, 2007, as an Order of the Court pursuant to the *Maintenance and Custody Act* (supra).

[13] Section 3 of the Separation Agreement outlined general terms with respect to the care and custody of the children. The parties agreed to shared custody with equal residency time. Birthdays and holidays were to be shared with a schedule to be agreed upon in advance. Each parent was designated the alternate caregiver if the custodial parent required a caregiver, permitted to remove the children on extended holiday trips outside the Province of Nova Scotia for two weeks with thirty days notice to the other parent, entitled to call the children while in the care of the other parent and responsible for the health, education and recreational concerns and activities of the children. The parents were to consult with each other and act cooperatively on parenting issues. In the event of a disagreement they were to obtain the services of a family counsellor or mediator to resolve the disagreement.

[14] The agreement as it related to custody was short lived. On June 18, 2007, the mother filed a variation application seeking specified access to the father who

replied with a variation application for joint custody of the children with him being the primary care giver. The applications were heard before Justice MacAdam who issued an Order dated October 29, 2007, which was rescinded and replaced by an Order dated December 31, 2007. Justice MacAdam's Order provided for joint custody with shared care, specified weekly parenting time including telephone time, Christmas, Easter, birthdays, Mother's and Father's Day access, as well as summer and winter vacation. There were other provisions dealing with major decisions, third party facilitators, and communication. The Order required the parties to use the facilitated access and exchange program offered through the YMCA with the cost to be born by the father.

[15] The provision dealing with major decisions provided that the parties have "meaningful discussions pertaining to any matters that may effect the welfare, education and health of the children. In the event after meaningful discussions the parties cannot come to an agreement regarding the particular decision, the applicant, Dawn MacNeil shall have final decision making ability." This was a change from the Separation Agreement. Mr. Domsolai was responsible for guiding the children with respect to their religious upbringing and faith. These provisions also included a direction that neither party was to register the children in activities without the consent of the other party if the effect of that registration would interfere with their parenting time as set forth in the Order.

[16] The father filed a Petition for Divorce on April 22, 2008, seeking to incorporate the Separation Agreement into the Corollary Relief Judgement. The mother filed an Answer on June 2, 2008, seeking to set aside the division of property terms of the Separation Agreement. The mother abandoned her request to set aside the division of property terms of the Separation Agreement prior to trial.

[17] The father initiated a variation application in August, 2008 which resulted in a court appearance in November, 2009. The court provided directions. An Order was not taken out.

[18] Both parties filed applications in 2010 - the mother in April and the father in June which were heard in October. The court issued an Order in December, 2010 which was the Order in place at the time of trial.

[19] With respect to parenting time, the Order provided for equal time based on a two week cycle with the father having the children from Saturday at 5:00 p.m. to Tuesday at 5:00 p.m. in week one and from Saturday at 5:00 p.m. to Wednesday at 5:00 p.m. in week two. It also provided for -

- summer vacation which was split into four blocks of two weeks;
- winter vacation - two weeks;
- mother's and father's day;
- telephone access;
- Christmas, Easter, and birthdays - as per Justice MacAdam's Order;

[20] With respect to major decisions, the mother retained final decision making authority.

[21] Counsel for the father submits the following parenting schedule with him having final decision making authority as being in the children's best interests:

- week on week off, rather than split weeks;
- changing the summer vacation to eight blocks of one week rather than four blocks of two;
- eliminating the winter vacations but splitting or alternating March Break;
- alternating Christmas Eve, Christmas Day;
- eliminating the need for a third party facilitator; and
- no fixed telephone times

[22] The father submits a week about schedule is in the children's best interest because:

- the parties live in close proximity to one another, ensuring little disruption in the children's lives when moving between homes and also ensuring they stay connected with friends and family;
- the need for multiple exchanges through the week would be reduced;
- exchanges can be facilitated through phone contact;
- the mother has failed to include the father in relevant health, education and recreational decision making and activities despite his wish to be involved. Week about access would ensure that both parents would equally share the responsibilities associated with the activities and provide consistency for the children with respect to scheduling and attendance

[23] Counsel for the mother submits the following parenting schedule with her having final decision making authority as being in the children's best interests:

- continuing the existing split weekly schedule and summer schedules;
- eliminating the winter vacation time and splitting or alternating March Break;
- providing for parenting time for each parent on each child's birthday;
- continuing the remaining provisions of the existing Interim Order

[24] The mother is opposed to week about access because the parties have a history of poor communication and there would be little contact during the week between the children and the mother since the father has demonstrated an unwillingness to facilitate contact in the past.

[25] According to the mother, the father is quick to lose patience. He subjects her to verbal barrages in e-mails (ex 27, pg 20) even when she has provided him with information such as the children's dental work. This behaviour stifles positive communication. He involved the police in Christmas access, 2012, despite prior discussions wherein she pointed out the provision in the court Order which entitled her to Christmas access.

[26] The father's actions have resulted in Tessa not being available to the mother on Tessa's birthday for several years. In March, 2012, he returned from a two week winter vacation to the Dominican Republic shortly before Tessa's birthday. There was no communication with the mother while out of the country and on their return to Canada the father did not ensure that Tessa spoke with her mother on Tessa's birthday. According to the mother, the father has communicated concerns about Tessa taking bubble baths to the mother but at the same time has dyed her hair and pierced her ears without communication knowing that the mother would be upset since Tessa has a skin sensitivity. The father dismisses Tessa's behavioural problems even though school authorities have indicated a concern. He cancelled an appointment in 2012 with a Psychologist because he was not consulted.

[27] The father refuses to allow any more than six hours of access on Mother's Day. The children are with the father on Sundays and so Father's Day access is not an issue. The mother attempted to eliminate the exchanges required at five

p.m. on Saturday and twelve noon and six p.m. on Sundays during the Mother's Day weekend. The father had acquiesced to this change once. The mother attempted to make this change permanent. The father would not agree.

[28] According to the mother, week about access would interfere with the children's activities. The mother has registered the children in activities that do not interfere with the father's parenting time. The father has not registered the children in any activities. When the father did attend a soccer game he spent the time harassing her rather than watching the children play soccer.

[29] The mother said there are no problems with access exchanges at the present time since her mother facilitates the exchanges. According to the mother, it is necessary to stipulate a time for telephone access since the father has a cell phone and not a land phone. The mother's practice is not to answer her phone when the call display indicates "name or number unknown". The mother will answer the phone at the scheduled time perceiving the call is from the father.

[30] The trial took eleven days to complete. There were thirteen witnesses, eight called by the Petitioner, including the Petitioner, and five called by the Respondent, including the Respondent. Much of the trial was spent examining the interactions between the parties during the past six years. Each party challenged the credibility of the other parent's evidence and asked the court to accept their evidence when it conflicted with the evidence of the other parent.

[31] Documents filed as part of the forty-five exhibits tendered during the hearing included observation notes on one hundred and twelve supervised access exchanges through the YMCA in 2008, a collection of emails too many to count, Informations and Undertakings related to criminal court proceedings, assessment requests for the children, school records, photos, a puffer and a video. There were numerous financial records relating to support, property and debt issues as well as personal and corporate financial statements and income tax returns.

[32] The children were three and two years old at the time of separation. They are now nine and eight. There have been behavioural concerns with Tessa and medical issues with Liam, which have prompted further conflict and which have the potential to negatively impact the children's health and development.



[33] The essential issue in this dispute is the parents' inability to consult and communicate with one another in a positive way when dealing with parenting issues. Neither parent believes that co-parenting is appropriate without a provision that provides for final decision making authority. Each parent submits the children's best interests would be served if they had final decision making authority.

[34] It is necessary to put in context the parties' relationship and their responses when confronted with behaviours and actions of the other parent affecting them and their relationship with the children.

[35] The father's position is that the mother's animosity towards him clouds her ability to act in the children's best interests. He argues that as long as the mother has final decision making authority, she will try to exclude him from their lives. The father submits the mother takes unilateral action, refuses to engage in consultation for the benefit of the children, and refuses to share information with him about them. He referred the Court to actions and behaviours of the mother which, in his opinion, failed to comply with Court orders, created stress for the children and conflict with him, thereby putting the children's health and development at risk. While the father acknowledges his behaviour has not assisted with cooperative parenting at times, he submits the Court should understand his behaviour is caused by frustration with the mother's refusal to parent cooperatively.

[36] Examples cited by the father of the mother's efforts to exclude him from the children's lives include:

- (i) Registering Tessa in school without consulting the father and not naming him as a parent on the registration form.
- (ii) Not informing the father that Tessa was to be taken to daycare after school on a day when he was to pick her up.
- (iii) Not informing the father of Liam's need for a puffer or discussing Liam's health issues, which resulted in hospitalization for an asthma attack while Liam was in the father's care.
- (iv) Lack of consulting the father on dental appointments and treatments.
- (v) Referring Tessa to counselling with a psychologist without informing the father until after the fact.

- (vi) Leaving it to school authorities to inform the father of a recommendation and referral for a psychological education assessment for Tessa.

[37] The father alleges that the above noted incidents are examples of the mother's failure to comply with the Court order requirement to have meaningful discussions on parenting issues.

[38] The father further alleges the mother does not respond to his emails. There were minor issues such as two school bags for Tessa when she started school and more serious matters such as coordinating medical care when the children have colds or other illnesses.

[39] The father also alleges the mother's decisions are made in her best interest, and not in the best interests of the children. He refers to times where the mother does not inform the father of the children's extra curricular activities because she does not want him to be there, thus excluding him from this important aspect of their lives. She creates rules unilaterally which cause stress for the children, such as a rule that they could not take toys from the father's home to her home. She involves the children in their conflict by videotaping an access exchange, which showed Tessa in great distress and taking pictures of the children to present as Court exhibits.

[40] Counsel for the father submits the mother is not prepared to follow court orders and parent cooperatively. Therefore it would be in the children's best interests if he has final decision making authority since he is prepared to consult and cooperate with the mother on issues affecting the children.

[41] From the mother's perspective, her relationship with the father is influenced by concerns that he will harm her and/or he will remove the children permanently from her care. These concerns are based on displays of anger during the relationship, physical assaults and threats. Their relationship ended when he physically assaulted her while the children were in the home. He was convicted of this assault after trial in July 2007.

[42] Soon after the assault, he attempted to minimize his behaviour by having a new car delivered to her with a note saying, "Enjoy". He also sent a letter of

apology. Both of these incidents were reported to the police and he was charged with breaching a condition of his undertaking not to have contact with her. In early 2007, she was contacted by a friend of the father's, Tim Dallyn, about reconciling with the father and allowing him to see the children. She informed Mr. Dallyn of the no contact provision in the father's Criminal Court undertaking.

[43] The mother initiated court proceedings in March 2007, seeking custody of the children. The father came to her home while she was in the shower and entered the bathroom. He was on an undertaking not to have contact with her or be near the residence. They argued - he got mad at her - she told him to get out. He said he was working on an agreement that she had to sign, or she would not see the children. She was afraid he would hurt her. Shortly thereafter, she got a copy of the proposed agreement. There were some discussions and amendments with respect to the agreement. The father's lawyer drafted the final agreement which she executed.

[44] The father denies the incident in the home. On a prior court appearance, the mother filed an affidavit which indicated the father had a knife and threatened her with the knife. She made no mention of this knife in her direct testimony. When questioned by counsel for the father about this inconsistency, she became visibly upset and stated she was trying to put the whole incident out of her mind. She did not report the incident to the police.

[45] The mother has registered the children in a school that was two doors from her residence and in the same neighbourhood as the children's pre-school friends. They attended this pre-school for several years. The father lived not far from the school and her home. The father believes the mother should have had meaningful discussions with him before registering them in this school and should have included him as a contact person.

[46] The mother believed the father was aware that Liam had been given a puffer for breathing problems when they lived together. The family doctor had prescribed a puffer for Liam when he was young. The father denies knowing that Liam was prescribed with a puffer until informed by staff at the YMCA. The mother had taken Liam to hospital with breathing problems shortly before an asthma attack while in the father's care. She did not inform the father.

[47] The YMCA program was utilized until 2010 to facilitate access exchanges. While it was helpful in facilitating access, there were many times each parent complained of the other parent's early or late arrival. The mother attempted to cancel the program because the father missed three exchanges without fully exploring the reasons for the missed exchanges. Both parties involved the staff of the program when they felt the other was not complying with court orders. Both parties took unilateral actions to make up for lost time because of late exchanges.

[48] Both parties have filed complaints against others. The mother against court staff, lawyers and the court and the father against the mother's partner, who is a member of the Regional Police Service.

[49] Section 16 of the *Divorce Act, R.S.C. 1985, c. 3 as amended* provides the court with the jurisdiction to make an order restricting the custody of or access to any or all children of the marriage. Section 16 (8) states that:

“In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.”

And further, para 16(10) provides that:

“In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.”

[50] MacIntyre, J. in *King v. Low (1985)*, 44 R.F.L. (2d) 113 (S.C.C., McIntyre, J.) P. 126 stated:

“I would therefore hold that in the case at bar the dominant consideration to which all other considerations must remain subordinate must be the welfare of the child. This is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be

determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he will be equipped to face the problems of life as a mature adult.”

[51] Time has not eased the animosity, conflict, fear and lack of trust which has pervaded the parties relationship since their separation in October, 2006.

[52] I have reviewed in detail the various orders because , in my opinion, these orders have allowed each parent equal time with their children and the opportunity to play a significant role in their lives. They agreed to continue with equal parenting time in the future. While they may disagree on some aspects of the parenting schedule, the current parenting schedule with minor adjustments can easily accommodate the children’s development needs and the *Divorce Act* principal that a child should have as much contact with each spouse as is consistent with the best interest of the child.

[53] A co-parenting plan as set out in the existing interim orders is not working because neither parent has a high regard for the other as a parent. The disagreements between them have escalated to a power struggle in which both parents want final decision making ability. This power struggle has impacted the children and have included disputes over the father not allowing Tessa to have contact with her mother on Tessa’s birthday, disagreements on whether Tessa should attend for counselling, conflict over Liam’s asthma and breathing problems. Both parents have initiated court applications for non compliance with existing orders. They have not been able to negotiate in advance trade offs for family vacations and events. Neither parent can be present during important medical events and make decisions as equals without conflict.

[54] Both parents have at times made parenting decisions without meaningful discussions. The highly conflicted nature of their relationship makes cooperative

shared parenting impossible going forward. Cooperative shared parenting requires a great degree of communication and cooperation in order for the relationship to work in the children's best interest.

[55] Despite the father's protestations, I am not able to conclude the mother is unreasonably restricting the father's involvement in the children's lives. The father is responsible for creating an environment of fear and mistrust in his relationship with the mother. The mother has a reasonable basis for her fears. The father has been convicted of assaulting the mother while the children were in the home. There continues to be a high degree of conflict in the parties relationship six years after this incident.

[56] The father seems to be more concerned about the mother not consulting him before enrolling the children in activities than whether the children actually enjoy the activities. The existing order allows each party to enroll the children in activities that does not disrupt the other parent's parenting time. The father has chosen not to enroll the children in organized activities. However, he was free to do so including activities initiated by the mother if he believed they were beneficial to the children.

[57] I am satisfied that the decisions of the mother with respect to the children's education and health and their social well being were in the children's best interests and based on child focussed factors even if meaningful discussions did not occur in all instances. I am not convinced that the father would make decisions involving the education, health care, and social welfare of the children giving priority to their needs. In my opinion, these decisions would more likely be influenced by his personal conflict with the mother. His decisions not to allow Tessa to be seen by a Psychologist and to restrict contact between Tessa and her mother on her birthday are examples of decisions that are not child focussed but conflict driven. Therefore, granting him final decision making authority in all matters involving the children would not be in their best interests. The current arrangement is not working in the children's best interest.

[58] However, both parent's have been active participants in the children's lives and both parents are willing to continue with shared physical custody of the children. The court finds that it is in the children's best interest to order a parallel parenting scheme as being in the children's best interest.

[59] A shared parallel parenting plan would allow both parents to participate in their children's lives in a way that is in the children's best interests. It is important for the children's welfare to remove the parental conflict by minimizing the need to consult. The parents seem to agree on general parenting issues such as discipline. They can maintain separate household regimes. The mother can enroll the children in an activities without obligating the father to take them or pay fees. However, the father can participate on his time if the children are enjoying the activities. Special events and holidays can be alternated on an annual basis. All scheduled weekday and weekend times will be exactly as scheduled unless one requests a change and the other agrees. Parents can communicating by way of emails and will not be required to consult with each other about routine parenting decisions. The court can assign each parent responsibilities to make decisions with respect to a particular aspect of the child's life.

[60] In my opinion, it would be in the children's best interests to continue the existing parenting schedule of split weeks rather than week about access. The children are use to this routine and there does not appear to be any problems with access exchanges at this time. It is important for each parent to engage the children in activities they enjoy on a regular basis without interruption if the other parent is not agreeable to the activity.

[61] The existing parenting schedule will continue with the following changes and additions:

- MARCH BREAK - defined as the period from 9:00 a.m. on Friday of the last day of school until 5:00 p.m. on Sunday, the day before school resumes. The mother will have the children in her care in the odd numbered years and the father will have the children in his care in the even numbered years, unless the parties agree otherwise in writing. The winter vacation schedules in the current order are rescinded.
- CHILDREN'S BIRTHDAYS - if one parent is not scheduled to have the children in their care for their birthday, that parent will have the children from 6:00 p.m. to 9:00 p.m. on their birthday.
- MOTHER'S DAY / FATHER'S DAY - the current arrangement allows for the father to have the children on Father's Day. The mother will have the children in her care on Mother's Day by extending her parenting time from

- 5:00 p.m. on Saturday to 5:00 p.m. on Sunday during the Mother's Day weekend.
- **CHRISTMAS EVE / DAY** - Christmas time is defined as 5:00 p.m. on December 24<sup>th</sup> until 5:00 p.m. on December 26<sup>th</sup>. The father will have the children in his care in the odd number years from December 24<sup>th</sup> at 5:00 p.m. until December 25<sup>th</sup> at 5:00 p.m. and the mother will have the children in her care from December 25<sup>th</sup> at 5:00 p.m. until December 26<sup>th</sup> at 5:00 p.m. The parties will alternate these times with the mother having the children in the even numbered years from 5:00 p.m. on December 24<sup>th</sup> until 5:00 p.m. on December 25<sup>th</sup> and the father having the children from 5:00 p.m. on December 25<sup>th</sup> to 5:00 p.m. on December 26<sup>th</sup>. The parties will resume their regular schedule after the Christmas period as defined ends.
  - **TRAVEL** - Should either parent wish to travel with the children off of Cape Breton Island, they are to notify the other parent of the dates of travel, location, addresses and telephone numbers where the children can be reached. Neither party may remove the children outside of Canada without the prior written consent of the other party or by an Order of a court of competent jurisdiction.
  - **PASSPORTS** - The mother shall hold the passports and make them available to the father for necessary travel outside of the country.
  - **TELEPHONE CONTACT** - the existing telephone arrangements will continue
  - **ACCESS EXCHANGE** - the existing access exchange provisions will continue
  - **DECISION MAKING AUTHORITY** - both parties will be responsible for routine day to day decision making authority when the children are in their physical care. Each party is to provide the other with information on routine decisions made with respect to any health, educational, or social welfare matter made while the children are in their care.
  - Each parent is able to make emergency medical decisions for children in their care to relieve the emergency. That parent is to notify the other parent as soon as possible as to the nature of the emergency and any treatment taken.
  - **MAJOR DECISIONS / RELIGION** - the father will continue to be responsible for making decisions with respect to the children's religious instruction.



- EDUCATION - The mother will decide major educational decisions on behalf of the children including the choice of school and education program. Each parent is entitled to attend school meetings, concerts, and programs. The parent with the care of the child will be the contact person that the school is to contact in case of illness
- MEDICAL CARE - the mother will provide the father access to any medical/dental plan that the mother has in place for the children so that the father may access the plan for the benefit of the children while in his care. The mother will select the family doctors and dentists and be responsible for scheduling all medical and dental appointments including mental health, psychological or behavioural issues. The father will be responsible for taking the children for emergency medical care or dental care during the time the children are in his care. The mother will be responsible for significant health and dental care decisions.
- EXTRA CURRICULAR ACTIVITIES - each party are free to enroll the children in activities which occur during their residential time and will be solely responsible for any costs associated with those activities
- Each party has the right to communicate with all professionals involved in the children's lives, including the right to obtain information and documentation respecting the children from all medical professionals, educators, and social welfare professionals without the prior consent of the other party.
- The parties shall communicate on all matters relating to the children's health, education, religion and general welfare through email communication.
- The parties will cooperate and participate in therapeutic interventions deemed appropriate by professionals.

### **CHILD SUPPORT:**

[62] Section 4 of the Separation Agreement dated April 25, 2007, contains the following provisions with respect to child support:

- 4.0 It is agreed that the Husband and the Wife will equally share in the care and upbringing of the children and as a result there shall be no formal "child support order" put in place.

- 4.1 The parents shall cooperate and agree as to the apportionment between them for daycare and activity expenses for the children on a month to month basis.
- 4.2 The “Husband”, Roderick Joseph Domoslai, shall establish and maintain an educational trust fund for the children of the marriage in the amount of One Hundred Thousand Dollars (\$100,000.00). Funds from this account shall be disbursed for the benefit of the children by the mutual consent of the parents.
- 4.3 The “Husband”, Roderick Joseph Domoslai, shall obtain and provide a Family Health plan for the “Wife”, Dawn Kathryn Ann MacNeil, and the children, while the children remain children of the marriage within the meaning of the Divorce Act and the “Wife” is eligible for such coverage.

[63] At the time of the parties separation the mother was employed by Fire Protection Engineering Inc. a company owned by the parties which provided septic system and sprinkler system designs. The mother’s income from this business in 2006 was \$31,717.00. The father was employed by Atlantic Projects, a division of Fire Protection Engineering Inc., which was involved in the property development business. He was also in the process of selling his interest in Rivercity Incorporated, an Alberta company which owned real estate.

[64] Atlantic Projects was subsequently incorporated as a separate entity. Pursuant to the Separation Agreement, the mother became the sole owner of Fire Protection Engineering Inc. and the father became the sole owner of Atlantic Projects Inc.

[65] Subsequent to the execution of the Separation Agreement, the mother obtained employment as an Engineer with the Sydney Tar Ponds Agency. Her current income is approximately \$96,000.00 per year. Since the Separation Agreement was executed, the father’s companies, Atlantic Projects Inc. and Rivercity Inc. ceased doing business. He reported income of \$155,213.00 in 2006; \$40,625.00 in 2007; and \$50,000.00 in 2008. He did not file personal income tax returns for 2009, 2010 and 2011 until January, 2012. He reported no income for each of those years.

[66] According to the father he supports himself from the proceeds of the sale of the matrimonial home and a construction mortgage. He is retraining to gain employment in the property inspection and appraisal industry. He is working on his Canada/US accreditation which he expects will take several more years to complete.

[67] The father registered a consulting business , RJD Consulting, in 2010 with himself as a partner. He subsequently executed contracts totalling approximately \$170,000.00 with two businesses. He did not voluntarily disclose these contracts until questioned by counsel for the mother. He stated he did not earn any money from the contracts and is currently being sued with respect to one of them.

[68] The mother's position with respect to child support is that neither party should pay a table amount to the other. She requests that the court impute an income to the father since he has an income earning capacity equal to if not greater than herself. She requests that future activity expenses for the children be shared on an equal basis, the costs of a medical plan she incurred for the children be reimbursed and that the Education Trust be established and funded by the father. Initially the mother requested the father share section 7 activity expenses on a retroactive basis but did not pursue this request at trial.

[69] The father's position is that the mother should pay him child support of \$1,300.00 per month which is the full set off amount applicable to a shared care arrangement when one parent earns \$96,000.00 and the other parent has no income.

[70] The father agrees to the establishment of an Educational Trust for the children but requires time in order to set up the fund. He has not established the fund to-date because the agreement did not fix a date for its creation and the mother has made it financially difficult for him to fund the trust. He incurred significant costs in relation to criminal defence litigation for groundless allegations, family proceedings for matters such as consent to travel and passports, extended use of YMCA services, repairs to the home and recovering assets in the possession of the mother, income tax liabilities from the sale of Rivercity Inc. to pay for the mother's property settlement, and significant debt obligations.

**EDUCATION TRUST FUND:**

[71] The father shall establish and fund an education trust for the benefit of the children as agreed in the Separation Agreement. He confirmed his commitment to the establishment of this fund in his testimony. Six years have elapsed since the agreement was executed. Although no date was specified for the establishment of the fund, I find the parties intended that it be established and funded in a reasonable period of time. Costly litigation cannot be attributed solely to the behaviour of only one party and is not a reason for delaying the establishment of the fund. The agreement provides that the fund should be established and maintained. If the children are to benefit from the education trust which, in my opinion, is what the parties intended, it should be established and funded by now. To suggest the parties intended the date for the establishment of the fund to be open ended is not reasonable since this could result in the fund not being established until the children go to university or later.

[72] Therefore the Educational Trust Fund provision in the Separation Agreement shall be included as part of the child support provisions of the Corollary Relief Judgement with the proviso that it be established within the next six months.

[73] The father agrees to share activity expenses for the children if both parents agree on the activity. If there is no agreement, each party shall be responsible for the cost of activities of the children while in their care.

[74] The father requests access to the mother's medical plan for the children and to be added to the mother's health care plan if allowable. The mother shall provide the father with access to her medical plan for the children. The mother is not required to add the father to her medical plan. He agreed to provide her with a health care plan as part of the Separation Agreement which was not done. He is also capable of working and paying for his own health care.

[75] The father agreed to obtain and provide a family health plan for the mother and the children. He has not done so. As a result, the mother purchased a group health insurance plan for herself and the children through her employment. This has cost her \$3,325.58 for the children and \$5,542.63 for herself and the children as of May, 2012. The father shall reimburse the mother for these expenditures.

The father will pay the mother 50% of the future monthly premiums of her health care plan related to the children. The parties will share equally any health care costs over and above the amount payable by the medical plan. The mother shall notify the father and provide him with proof of health care plan premiums by January 1<sup>st</sup> of each year. The father shall reimburse the mother his 50% share of the costs of these premiums on June 30<sup>th</sup> and December 31<sup>st</sup> of each year.

### **IMPUTATION OF INCOME:**

[76] Section 19(1)(a) of the *Federal Child Support Guidelines* provides:

19.(1) **Imputing Income** - The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[77] Forgeron J. in *MacDonald v. Pink* 2011 NSSC 421 at paragraphs 24 and 25 succinctly summarized the law in relation to the imputation of income for child support payments:

24 Section 19 of the Guidelines provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:

- a. The discretionary authority found in sec. 19 must be exercised judicially, and in accordance with rules of reasons and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: *Coadic v. Coadic* 2005 NSSC 291.

- b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: *Staples v. Callender*, 2010 NSCA 49.
- c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: *MacDonald v. MacDonald*, 2010 NSCA 34; *MacGillivray v. Ross*, 2008 NSSC 339.
- d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: *Smith v. Helppi* 2011 NSCA 65; *Van Gool v. Van Gool*, (1998), 113 B.C.A.C. 200; *Hanson v. Hanson*, [1999] B.C.J. No. 2532 (S.C.); *Saunders-Roberts v. Roberts*, 2002 NWTSC 11; and *Duffy v. Duffy*, 2009 NLCA 48.
- e. A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-induced reduction in income: *Duffy v. Duffy*, supra; and *Marshall v. Marshall*, 2008 NSSC 11.

25 In *Smith v. Helppi* 2011 NSCA 65, Oland J.A. confirmed the factors to be balanced when assessing income earning capacity at para. 16, wherein she quotes from the decision of Wilson J. in *Gould v. Julian* 2010 NSSC 123. Oland J.A. states as follows:

16 Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so

was summarized in *Gould v. Julian*, 2010 NSSC 123 (N.S.S.C.), where Justice Darryl W. Wilson stated:

Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in *Hanson v. Hanson*, [1999] B.C.J. No. 2532, as follows:

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor". ...
2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
4. Persistence in unremunerative employment may entitle the court to impute income.

5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

...

[33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

[78] The mother has proven on a balance of probabilities that the father is intentionally unemployed. The father at age 50 has been a successful businessman. He has significant entrepreneurial skills and experience which provide him with the capacity to earn an income. He has shown initiative in establishing companies including a property development business and consulting business in Cape Breton. Aside from attempting to earn an income through his consulting business, RJD Consultants, which he did not disclose to the mother, there is no indication that he has attempted to find other employment.

[79] There are no health issues which prevent the father from working. If the father's educational pursuits prevent him from seeking employment, they are at this stage of his life not reasonable given the young age of his children and their need for financial support. In other words, his pursuit of an accreditation in the property inspection and appraisal industry does not relieve him of his obligation to seek employment in order to meet his child support obligation.

[80] I, therefore, accept the submission of counsel for the mother that it is reasonable to impute an income to the father for the purpose of determining child support. I also agree with counsel's submission that considering the lack of adequate disclosure of financial information, the lifestyle enjoyed by the father since separation, and his business acumen, it is reasonable to assume he has an income earning capacity equal to the mother. I, therefore, impute the father's income for purposes of fixing child support to be equal to that of the mother.



[81] In determining the amount of child support in a shared custody arrangement the court must take into account the amounts set out in the applicable table for each of the spouses, the increased costs of shared custody arrangements and the conditions, means, needs and other same circumstances of each spouse and of any child for whom support is sought. The court does not have sufficient detail of each parent's expenditures to deviate from the set off amounts.

[82] The children have a comparable lifestyle in the home of the father and the mother without either paying child support. The father has been able to take the children on numerous trips from 2009 onward including vacations to Disneyland in 2011 and the Dominican Republic in 2012 as well as trips to New Brunswick, Prince Edward Island and Alberta. He has been able to arrange financing for the purchase of two homes in the Sydney area. He agreed to share equally in the cost of caring for the children without a contribution from the mother. He has been not been forthright in disclosing his employment efforts. Since both parents have been deemed to have comparable incomes, neither parent will be required to pay child support to the other except for the requirement that the father pay 50% of the health care premiums and fund the Education Trust.

#### **INTERPRETATION OF SEPARATION AGREEMENT:**

[83] Under the terms of the Separation Agreement, the father was to pay the mother an equalization payment of \$125,000.00. The mother needed additional funds for the closing on the purchase of her new home and the father paid \$128,126.88 on the understanding that the excess of \$3,126.88 would be repaid. The mother acknowledges this debt which is owed to the father

#### **MATRIMONIAL HOME CONTENTS:**

[84] Paragraph 6.4 of the Separation Agreement provided that furniture and household contents located in the matrimonial residence were to be divided by consent of the parties. The father states that the mother removed a significant amount of furniture and contents from the matrimonial home which he valued at approximately \$65,000.00 without his consent. These items included appliances, furniture, office and electrical equipment, ride on lawn mower, generator, tools, pellet stove, built in vacuum system, and star choice satellite system.

[85] The father is seeking a contribution of \$32,500.00 from the mother as his share of the value of the household contents. He was not able to provide reliable evidence with respect to the value of all the household contents at separation but did provide invoices showing replacement cost for some items he purchased to replace items taken by the mother.

[86] According to the mother some of the items claimed by the father for division as household contents were owned by Fire Protection Engineering Inc. which was transferred to her as part of the property settlement and should not be considered household contents. The mother further states that the father told her during a conversation in April, 2007, to take what she wanted from the home.

[87] The father had just purchased a new home which he had furnished. The mother was about to purchase a home which needed to be furnished. The father increased the agreed upon equalization payment by an additional \$3,000.00 to assist the mother with the purchase of her new home. The father did not attend the former matrimonial home until October, 2007, to check on the contents of the home. It is impossible at this time to come up with a reasonable value for the household contents at the time of separation.

[88] I agree with the submissions of counsel for the mother that some of the items claimed by the father were not household items but were owned by Fire Protection Inc. which was transferred to the mother as part of the property settlement. I also accept the submissions of counsel for the mother that a conversation occurred between the parties in which the father consented to the removal by the mother of those items she wanted from the home. Therefore, the household contents have been already divided by the consent of the parties.

### **DAMAGES TO THE MATRIMONIAL HOME:**

[89] The father claims that the mother caused extensive physical damage to the matrimonial home including water damage and mould. She did this by removing built in fixtures including an under the counter dishwasher, central vacuum system, a power generator, and a pellet stove. She also removed boxes of hardwood flooring which had been purchased prior to separation. The father

estimates that it cost him in excess of \$50,000.00 to replace the flooring and repair the damages prior to selling the home.

[90] The mother moved out of the matrimonial home in June, 2007, to reside at her parent's residence. She and family members returned in mid July to remove various household items. The home was not damaged, as claimed by the father, when she vacated the home. The mother transferred her interest in the matrimonial home to the father in mid July, 2007. The father did not return to the home until October, 2007. He was subject to a condition in his Provincial Court Undertaking not to go near the home. He did not take reasonable steps to change this condition which would have allowed access to the home and either the prevention or mitigation of damages he claims are the responsibility of the mother.

[91] The mother stated that their water filtration system had a drip problem which existed prior to the parties separation. The parties placed a bucket underneath the filtration system to catch the drip. The filters were replaced regularly. According to the mother it is possible that the bucket overflowed causing the carpet to become wet and mouldy.

[92] Part of the father's claim for damages included costs for cutting grass as well as invoices from Walter MacLeod who was employed in the father's business on a contract basis at a rate of \$3,000.00 per month. Mr. MacLeod's evidence does not support a claim of \$3,000.00 per month for repairing damages as submitted by the father. The father's damage claim also included damage to the roof of the home which had nothing to do with the occupation of the mother.

[93] The father has not established on the balance of probabilities that the damages to the matrimonial home occurred while in the mother's exclusive possession. The court denies his claim for damages.

### **PONTOON BOAT:**

[94] The father purchased a pontoon boat while the parties were living together. It was financed with a loan from Laurentian Bank. While the parties were living together, the loan payments were made on the account of Fire Protection Engineering Inc. After separation the mother became the sole owner of Fire

Protection Engineering Inc. In June, 2007, after the Separation Agreement was signed, the father signed a Bill of Sale transferring ownership of the Pontoon Boat to the mother. The mother stated that she was to pay for the boat which was hers to use. She made payments approximating \$9,000.00 on the boat loan until early 2009. At that time Canada Revenue Agency froze the bank account of Fire Protection Engineering Inc. She personally could not transfer or dispose of the boat since it was not in her name. She had no ability to do anything about the loan since it was not in her name. She allowed the loan to fall into arrears without notifying the father or contacting the bank. She kept possession of the boat.

[95] Eventually, Laurentian Bank attempted to recover possession of the boat through its agent, Scotia Recovery. The mother was confronted about her possession of the boat and its location. Initially she informed Scotia Recovery she did not have the boat but later admitted to having it in her possession.

[96] The father paid the costs incurred by Scotia Recovery and brought the arrears up to date. He currently has possession of the boat and is making the monthly payments on the loan. He requests the mother reimburse him \$15,000.00 which he paid to recover the boat as well as \$24,000.00 for the remaining loan payments.

[97] I agree with the submission of counsel for the father that the mother is responsible to reimburse the father for recovery costs paid by him to obtain possession of the pontoon boat and the unpaid arrears on the loan during the time of the mother's possession. She was aware the loan was in arrears and it would impact the father's credit. He acted reasonably in paying the recovery costs in light of his ongoing debt obligation to the loan company. He now has possession of the boat which he is able to either dispose of or use. The court denies his claim for payment of the outstanding loan balance. He can dispose of the boat and apply the proceeds of the sale to the loan balance. There is no evidence to indicate the value of the remaining debts exceeds the value of the boat.

#### **TRACTOR AND LOADER:**

[98] Pursuant to s. 7(3) of the Separation Agreement, the parties agreed that a tractor and dresser loader be transferred from Fire Protection Engineering Inc. to Atlantic Properties Inc. for \$25,000.00 as well as the assumption of \$15,000.00 in

debt. The father claims the mother did not provide snow chains and service manuals for the vehicles which he valued at \$1,500.00. Neither counsel made submissions on this point in their post trial submissions. The father did not provide documents to support his claim and it is therefore denied.

**MATRIMONIAL DEBTS:**

[99] Section 10 of the Separation Agreement contains the following provisions with respect to matrimonial debt:

- 10.1 The parties shall each assume and pay in full any debts in their names, otherwise than as specified herein.
- 10.2 The "Husband" shall indemnify and save harmless the "Wife" with respect to the payment of the debt obligations specified herein, in the event the "Wife" is called upon to make any payments for the debts specified herein as debts of the "Husband".
- 10.3 The "Wife" shall indemnify and save harmless the "Husband" with respect to the payment of the debt obligations specified herein, in the event the "Husband" is called upon to make any payments for the debts specified herein as debts of the "Wife".
- 10.4 The parties hereto shall at all times hereinafter indemnify the other, his or her heirs, executors, administrators and assigns, from all debts and liabilities which the party has agreed to pay hereunder or which is hereinafter contracted or incurred by that party, and from all other actions, proceedings, claims, demands, costs, damages and expenses whatsoever in respect of such debts and liabilities.

[100] The agreement did not specify or list any debts.

[101] The list of debts paid by the father after separation included the following:

<b>CREDITOR</b>	<b>AMOUNT PAID</b>
Murray Gouthro Wall	\$ 2,289.08
Murray Gouthro Wall	1,854.54

ScotiaBank Line of Credit	24,500.00
RBC Consolidation Loan	17,488.36
RBC Visa	11,887.88
Capital One	6,000.00
Home Depot	3,940.64
Tim & Joe-anne Mikula	12,000.00
Kelly Fitzgerald (labor)	1,500.00
Grant Thornton CCA	2,508.00
Grant Thornton CCA	1,026.00
CRA	5,862.00
RRM Farmer	250.00
Grant Thornton CCA (Fire Protection)	8,295.00
Pat Murray	5,876.13
<b>Total</b>	<b>\$105,277.63</b>

[102] According to the father, these debts were paid by him after separation for services received during the marriage of which the mother received benefit.

[103] The mother's list of matrimonial debts are found in her pre-trial brief. They include, among others, mortgage payments for the matrimonial home while she was in exclusive possession, loan payments on the pontoon boat while in her possession, accounting bills and Revenue Canada assessments for Atlantic Projects and Fire Protection Inc. Also included were several debts for payments made before separation on accounts that were related to property retained by the father pursuant to the Separation Agreement.

[104] Some of the debts claimed by the father included legal bills tendered in November, 2010. The mother did not have the opportunity to have any input with respect to whether these invoices or the amount of the invoices were reasonable or should be payable. Some of the invoices related to work done after the parties separation in relation to property retained by the father in the Separation Agreement. The parties had agreed, pursuant to the Separation Agreement, to be responsible for debts in their name. More than 70% of the value of the debts claimed by the father including the line of credit, consolidated loan, visa, capital one, and home depot accounts were solely in the father's name. The debt

identified as owing to Tim and Jo-anne Mikula was a personal debt of the father's. The debts submitted by Grant Thornton were business debts.

[105] The parties have agreed to abide by the Separation Agreement as it relates to the division of property and debts. To re-open the issue of debts would involve a reexamination of the property division including the division of corporate assets. Each party shall be responsible for the debts paid by them since the date of separation without contribution by the other party.

### **CONCLUSION:**

[106] Parenting - a parallel parenting arrangement with the mother responsible for major decisions involving the children's education, health and general welfare and the father responsible for their religious instruction. There will be a continuation of the existing weekly schedule. Other provisions are included in the body of the decision.

[107] Child Support - the father's income is imputed to be equal to the mother's income for the purposes of determining child support. The father is to reimburse the mother for the cost of premiums for the health care plan for the children and the mother to the date of trial. The parties are to share equally in the future cost of the premiums for the health care plan bought by the mother for the children only and the cost of major health care expenditures not covered by the plan.

[108] Educational Trust - the father is to establish and fund an educational trust for the children within six months.

[109] The mother is to reimburse the father the equalization overpayment.

[110] The mother is to reimburse the father for the cost of recovery of the pontoon boat as well as arrears in loan payments while the boat was in her possession.

[111] The various amounts owing are to be offset with a balance owing by the mother to the father. This amount is to be paid into the education trust fund. The

father's obligation to fund the trust shall be reduced by the amount of this payment.

[112] If the parties cannot agree on costs, I will receive submissions within the next 45 days.

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J.