SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Lubin v. Lubin, 2012 NSSC 31

Date: 20120119
Docket: 1201-064422, SFHD-069303
Registry: Halifax

Between:

Sonia Rene Lubin

Applicant/Petitioner

v.

Samile Junior Lubin

Respondent

Judge:	The Honourable Justice Beryl MacDonald
Heard:	September 15 and 16, 2011, in Halifax, Nova Scotia
Counsel:	Angela Walker, counsel for the Applicant/Petitioner Owen Bland, counsel for the Respondent

By the Court:

[1] This is a divorce proceeding in which the parties have been unable to agree upon:

- the custodial and parenting arrangements for their 14 year old son
- child support
- division of matrimonial property and debt

The parties separated on July 24, 2009. They had been together for 13 ½ years.

[2] I am satisfied all jurisdictional requirements of the *Divorce Act* have been met and there is no possibility of reconciliation. I am further satisfied 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.

[3] The Father is seeking primary care. He alleges the Mother:

- works all the time and leaves their son alone,
- is unable to assist their son with his homework and in any event does not care about his education,
- is disinterested in their son's extracurricular activities and fails to take him to his practices and games.

[4] The Mother wants to continue the shared parenting, week about, arrangement the parties initiated when the Mother vacated the matrimonial home.

[5] The testimony, both orally and in affidavits, given by the Father differs materially from the testimony given by the Mother. When parents have different recollections 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*).

[6] 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?

[7] I do not intend to recite in detail all of 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 the information provided by the Mother is credible and when it differs from the information given by the Father, I have accepted the Mother’s version of events.

[8] The Father blames their son’s recent poor grades in math on the Mother’s inability to assist him with his math homework. In speaking about the Mother he uses dismissive language. He considers her ill educated and he has an inflated opinion about his own abilities and intelligence. He testified that one of the reasons why he should be the primary care parent is to ensure his son will receive the benefit of his tutoring assistance.

However, later in his testimony he informed the court that his son was in his care about 70 percent of the time because the Mother worked so much. Nevertheless he placed all of the responsibility for their son's deteriorating math results on the Mother. The Father complained that their son often slept in and missed the bus to his school. The evidence is this rarely happened. On one occasion when the Mother admitted their son did miss his bus he called his Father who told him to call his Mother at work even though the Father, who was not working, could have driven his son to school. The Mother left her work, went to her home , and drove their son to school. Certainly in doing this the Father was punishing the Mother for her perceived failures. He was not considering his son's best interest.

[9] The parties came to the conclusion their relationship was at an end in July 2009. Neither left the family home. The Father continued to expect his meals to be served and he came and went from the home as he pleased. He had injured his back at work, was on disability and was therefore not working. On November 12, 2009 the Father left the home and flew to Montreal to live with his mother. In his affidavit he explains he did so because the Mother "would come home from work at 11:30 pm and move furniture around in the room above my bedroom and wake me up so I could not sleep properly". In his oral testimony he mentioned the Mother assaulting him. I do not believe he left the home because of any action of the Mother. The Mother suggests an episode of domestic violence occurred between them prior to his leaving but in her affidavit and the supporting document from her physician the date used is November 2010. The Mother moved out of the matrimonial home in March 2010 so this cannot refer to the events of November 2009. Nevertheless, I am satisfied the Father intimidated the Mother and there was police involvement on at least one occasion that did lead to his vacating the home whether that was in November 2009 or in February 2010.

[10] The Father remained in Montreal from November 12, 2009 until January 2010. Although he was in Montreal he complains because their son was alone in his mother's home on Christmas Day, 2009. The Mother was required to work from am until 7pm. The Father did not provide a return ticket, for a trip by air, for his son to join him in Montreal. I accept the Mother's information that the Father, while in Montreal, told her to purchase a one way ticket for their son to join him. He would not tell the Mother what his intentions were and she feared their son would not return to Nova Scotia so he remained in Nova Scotia. The Father remained in Montreal.

[11] When the Father returned in January he continued to spend significant time in the matrimonial home although he had obtained a residence elsewhere. In February 2010 his present partner moved into that residence. He considered his continuing presence in the family home necessary to ensure their son was not alone when the Mother was working. I do not accept his presence was necessary. He had no difficulty leaving his son alone

while the Mother worked when he chose to reside in Montreal from November until January.

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

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

[13] What is in the child's best interests must be examined from the perspective of the child's need with an examination of the ability and willingness of each parent to meet those needs. Each parent's plan for the child must be examined, 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.

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

[15] Concern about conflict may also give way to other concerns such as power imbalance between parents, the potential for one parent to alienate a child from the other parent, the opportunity for increased earning potential if parenting is shared and the needs of the child when each parent can balance the other's shortcomings. (*Baker-Warren v Denault*, 2009 NSSC 59; *MacDonald v MacDonald*, 2011 NSSC 317)

> Section 16 (10) of the *Divorce Act* requires a child to 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.

[16] In *Young v. Young*, [1993] 4 S.C.R. 3, Justice Mc Lachlin when reviewing this section stated:

> [18] This is significant. It stands as the only specific factor which Parliament has seen fit to single out as being something which the judge must consider. By mentioning this factor, Parliament has expressed its opinion that contact with each parent is valuable, and that the judge should ensure that this contact is maximized. The modifying phrase "as is consistent with the best interests of the child" means that the goal of maximum contact of each parent with the child is not absolute. To the extent that contact conflicts with the best interests of the child, it may be restricted, but only to that extent.

[17] After the Father left the matrimonial home the parties did institute a form of shared parenting for their son. The Father often made unilateral changes to previously agreed upon arrangements but these did not alter the usual routine of shared parenting. Ordinarily I would determine whether sole or joint custody was appropriate before I decided upon the residential parenting plan. In this case my findings relate to both issues and to avoid repetition I have not separated my discussion of these issues. In addition these parents have agreed they should have joint custody. I would refuse their request if I believed joint custody was not in their son's best interest. Each of these parents have perspectives that will be important to parenting decisions that must be made from time to time. They have recognized joint custody does require joint decision making and they have agreed to some solutions to break an impasse. These will be reflected in the parenting plan.

[18] Both of these parents can perform the necessary parenting tasks. The Father is in the Navy and often was at sea. I do not accept that he dealt with school and other issues by e-mail and telephone while he was aboard ship. The Mother was responsible and I am satisfied that, until recently, she was the person making dental and doctor appointments, dealing with school issues, and attending to the daily care tasks.

[19] The Mother's residence is approximately a 15 minute drive from her son's school. The Father has a somewhat longer drive to the school but this also is within a reasonable driving distance. From the Mother's residence to the Father's residence is approximately a 30 minute drive.

[20] Neither parent mentioned any particular neighbourhood friends close to their son. The Mother's relatives do not live in Nova Scotia. I have not been informed of any relatives of the Father's living in Nova Scotia other than his mother.

[21] The Mother is extremely hardworking. She has worked during most of the marriage. Presently she is employed as a personal care assistant in a full time position with the Capital Health Authority. She also works in a similar capacity on a casual basis with Shannex on days when she does not have her son in her care. After she left the matrimonial home, in order to provide for herself and her son, she accepted additional casual employment with a third employer. The Father is not working because he is recovering from an injury. He will need to return to employment eventually. As a result he may not be as available in the future to provide care for and transport his son to and from recreational events as he suggests he will be.

[22] There was no report from an assessor about how the parties' son viewed his situation. I did not want to adjourn to have this report prepared because of the delay. On the consent of the parties I spoke with their son. Neither the parties nor their lawyers were present. I did record our discussions and I informed the parties of my impressions after that interview. Their son was brought to the court by his Mother but I am satisfied this did not influence his discussions with me. He is a mature, reflective, intelligent 14 year old. We talked about each of his homes, his likes and dislikes. I did not ask him directly about preferences but I concluded from our conversation he was comfortable in each home and he was content to continue the present arrangement which he described as one week with his Mom and one week with his Dad. He did acknowledge that sometimes the arrangement didn't always work out that way. He recognized he was caught in the middle on some occasions.

[23] In my conversation with the parties' son it became obvious he does not like carrying messages back and forth between his parents. The evidence before me confirmed the Father did not share information with the Mother and this is why their son has occasionally not attended a practice, or event, and it explains why she was not informed about his recent report card. The Father expects their son to tell his Mother what she needs to know. Their son does not always know what information his Father expects him to give to his Mother. To place this burden upon him is an inappropriate devolution of parental responsibility.

[24] Since his injury the Father has been attending parent teacher meetings and he has arranged their son's recreational activities. The Mother has not objected to this and recognized the Father may be better able to assist their son by taking on these tasks. However, she expected to be informed by the Father about any concerns expressed by educators. She expected to be consulted about recreational activities to determine whether her work schedule could accommodate transportation to those activities. The Father's answer is that the Mother should gather this information herself. Because she did not do

so he suggests I should draw the conclusion she doesn't "care" about their son's best interest. I do not draw that conclusion.

[25] The Father has a partner and his mother also lives with him. The Mother lives alone. Their son has told me he enjoys his time alone in his Mother's home. There are rules in place when he is in her home by himself. He has to check in with her regularly by calling her at work and he is not to have anyone in the house with him. He is not afraid to be alone and I am satisfied he is quite capable of looking after himself on the occasions when he must do so. This is particularly true in the mornings when his Mother must begin her work schedule at 7 am. She wakes him up so he can ready himself for school. He takes the bus to school. He gets up early but he usually goes to bed early as a result. Until recently he did well at school. He is starting to find math difficult but his Father's help is useful. However, after listening to the Father explain how he "helps" his son I am concerned he is in fact doing the work rather than explaining "how" it is to be completed.

[26] My discussions with this adolescent suggested he confides in his Mother and she also described this as an important element of their relationship.

[27] The Father does not talk respectfully about the Mother. He has a very high opinion of himself and I accept that he can be overwhelming and manipulative. While I do not believe the Father could alienate this child from his mother, their relationship is solid, I do believe he may make decisions serving his interests rather than those of his son. To avoid this, and because neither has asked for sole custody, I have agreed that these parents should have joint custody. The details about this arrangement are included in the parenting plan attached as Schedule "A" to this decision. Because I am concerned about any further conflict between these parents I have added provisions I considered necessary to ensure they are clear about their responsibilities.

[28] These parents are to continue to share parenting of their son for the same reasons I consider it appropriate that he continue to be in their joint custody. However, I am concerned that the Mother's week about parenting plan may leave him alone in the evenings and overnight even though the Mother suggests she will change shifts with a co-worker to avoid this. There is a plan that will make shift changes unnecessary.

[29] The Mother's schedule with the Capital District Health Authority is as follows:

	Mon	Tue	Wed	Thurs	Fri	Sat	Sun
Week 1	3-11 pm	3-11 pm	3-11 pm	Off	Off	Off	Off

Week 2	am - 3 pm	am - 3 pm	am - 3 pm	am - 3 pm	am - 3 pm	Off	Off
Week 3	am -7 pm	am -7 pm	am - 3 pm	3-11 pm	Off	am - 3 pm	3-11 pm

I have placed this schedule in the month of January and the first part week of February 2012 to determine how this child might receive the benefit of both homes within the confines of the Mother's schedule. (attached as Schedule "B") The most appropriate week day parenting time for the Mother would be when she is working the am - 3pm shift. Although the son will be required to raise early in the morning, I do not consider this to be against his best interest. Learning to become independent of a parent's prompting is important. Taking responsibility for oneself is important. This adolescent is reported by both of his parents to be polite, well mannered, and generally obedient. He is capable of caring for himself for a few hours before he takes the bus to school. The schedule, as I have plotted it, provides the Mother with weekend time every second weekend. She will still have weekends when her son is not in her care to work for her second employer so she may maintain financial security. In the parenting plan I have described this shared parenting arrangement. I recognize this plan will require the Mother to make arrangements for her son's care in the summer when she is working. This is common to all working parents. The Father may have returned to work by this time. This adolescent should not spend significant time alone in either household. There are activity programs in which he can be enrolled during the summer and he may enjoy these. Also the regular schedule will be suspended when either parent has summer vacation parenting time with their son.

Child Support

[30] The Mother's total annual income for 2010 was $55,546.00. At the time she was working for three employers. Extrapolating from her 2011 pay stubs from two employers it appears her total annual income will be at least $50,000.00. The Father suggests it will be as much as $66,650.00. His calculation includes more income from her second employer than I am prepared to credit.

[31] Because of the parenting schedule I have ordered, the Mother likely will have less time to work for her second employer in 2012 and as a result I have determined her 2012 total annual income will be $46,000.00.

[32] The Father's total annual income for 2010 was $64,158.00. In 2011, from his pay stubs and from the calculations on his Statement of Income filed September 9, 2011, it

appears his total annual income will be $64,374.00. It is expected his 2012 total annual income will be the same as it was in 2011.

[33] The parties agreed the child support amount provided by the set off was appropriate. The Mother wants child support to commence from the date she left the matrimonial home and was, as a result, required to set up a second household to accommodate a shared parenting arrangement. The Father believes that because she did not contribute to paying the mortgage after this date he should be relieved from paying child support. These are separate issues and I cannot relieve the Father from an obligation to pay child support because of a debt claim against the Mother. Based on the parents total annual incomes for 2012, and using the new table guideline amounts to be paid by each , the resulting set off amount is $157.00. On the 1st day of every month beginning January 1, 2012 the Father shall pay child support to the Mother in the amount of $157.00. Payments are to be made through the Maintenance Enforcement Program.

[34] The parties separated in March, 2010. The Mother filed her Petition for Divorce on March 16, 2010. It was served on the Father on May 12, 2010; however, I am satisfied the Mother had requested child support shortly after she moved from the matrimonial home. The Mother's request for child support from March 2010 is a request for retroactive child support. I have considered the factors discussed in *DBS v. SRG, LJW v. TAR, Henry v. Henry, Hiemstra v. Hiemstra,* 2006 SCC 37. There was no delay in seeking this award. There was blameworthy conduct, the Father refused to pay anything. The child will benefit from this award and the Father has the ability to pay. Based upon the parties incomes, using the set off approach to child support, the Father owes the Mother a total of $675.00 for the nine months from April until December 31st 2010. For the period from January until December 31, 2011, he owes $1,500.00.

Division of Property and Debt

Division of Debt

[35] I will begin with the debt division because it does impact what assets remain, either notionally or actually to be divided between the parties. The party asserting that a debt is a matrimonial debt, the payment of which is to be shared equally, must satisfy the court, on a balance of probabilities, that the debt was reasonably incurred for the benefit of the family unit, during the marriage, for household and personal family expenditures, and, if incurred after separation, that it was necessary for basic living expenses or to preserve matrimonial assets." (*Grant v. Grant*, 2001 NSSF 13)

Honda CRV

[36] While the Mother was living in the matrimonial home, the Father, without notice to her, stopped paying the account for their cable, phone and internet. He suggests this was her fault because she did not take over paying these bills. I am satisfied he did nothing to engage the Mother in a discussion about how they should separate their assets and debts. I do not believe him when he says she refused to pay any of the debts they owed. He acted unilaterally. This also applies to his sale of the vehicle she drove, the Honda CRV . He removed it from the parking lot at her residence without notice to her. He suggests the vehicle was to be repossessed and as a result he received nothing from its sale. He provided no documents to support this claim other than an alleged loan document signed, not by him, but by his brother in Montreal. According to that document a debt of $8,500.00 is owed to Le Centre D"Auto Renfred in Montreal. It does not state the purpose for the loan. The Honda CRV is taken as security. The interest rate is 80% per year. This is a criminal rate of interest pursuant to section 347 (1) of the *Criminal Code* of Canada. The Father says he did not know this. The "loan" is dated December 12, 2007. The Mother's information, confirmed by the Father in his oral testimony, is that she had an accident with this vehicle in November 2007. The bumper was damaged. The Father did the repair work himself. In his affidavit the Father states:

> 160 We could not get a loan on the CRV to purchase parts, so in early 2008 I had my brother sign for a loan in Montreal, get the needed parts and have the broken Honda CRV fixed.

If there was a loan of money to the Father, this document does not constitute an enforceable loan against him nor does it constitute valid security against the vehicle. The Father attempted to remedy this situation by obtaining a document dated December 12, 2009, after the parties separated, signed by a Director of Le Centre D"Auto Renfred indicating the vehicle was now owned by his company because of the debt owed by the Father. This document was signed by the Father. This document does not elevate the first document into a legally enforceable loan against the vehicle. I will not recognize this as a matrimonial debt nor will I accept that the vehicle was "repossessed" although it may no longer be in the Father's possession.

BMW Loan

[37] In January 2009 the Father purchased a used BMW for $21,491.00. He financed this purchase from money loaned by Scotia Bank. The only document provided about this loan is one that suggests there was a previous borrowing by these parties and this additional amount was added. Both parties are debtors on the instrument provided. The Father could not explain why the original debt was incurred. The Mother wants the remainder of the original debt ($2,583.00) subtracted from the loan amount owing to the

date of separation. She asserts the father did not prove the previous amount borrowed was a matrimonial debt. In submissions the Father's counsel stated " My notes show that (the Father) explained this on cross-examination. This loan itself was new as of the purchase date of the BMW, but into this loan was rolled an amount owing from (the Father's) previous vehicle, a Nissan X-Terra, plus administration fees, in addition to the cost of the BMW itself." In fact, upon review of the cross-examination, after the Father was shown the opening balance he was asked whether he had an explanation for the difference between the opening balance and the amount of the loan he requested. His reply was "I don't". However, the Mother did testify the family did have debt and keeping all of the bills paid was a struggle. In addition she is a joint debtor on the instrument. I accept this in its entirety as a matrimonial debt. The amount owing on this debt on July 23, 2009 was $21,997.59. I accept this is the amount owing at the separation date.

Mother's Master Card

[38] The Mother had a Master Card that was used:

> 24 ...to purchase gifts and general items for the home. The charges incurred during the year prior to the separation were mostly with JC Penny. I purchased clothing and items for myself and (their son) and also used it for cash advances to buy items for the household. (Mother's affidavit filed August 18)

The Mother also provided details of the charges to this account for 12 months prior to the separation. I accept her evidence. The credit card debt owing at separation is matrimonial. The amount owing was $319.00.

Mother's Student Loan

[39] In 2001 the Mother, with the consent of the Father, enrolled in a two year program in sewing and fashion design. The amount owing at separation was $4,271.67. A student loan debt can be considered to be a matrimonial debt if it was incurred during the marriage and the income was used for the benefit of the family. (*Schaller v. Schaller*, [1993] 120 N.S.R. (2d) 82 (NSCA) In *Schaller* the income earned during the marriage as a result of the diploma was also used for the benefit of the family. In this case the student loan was incurred during the marriage and was used to benefit the family. It paid for the parties joint living expenses. Although the Mother was two courses short of a diploma she did receive a Certificate confirming her successful completion of 1465 hours of study in the program. She worked in the fashion industry for two years after completing this program. The income she earned was used to support the family. The student loan debt is matrimonial.

Father's TD Bank Account

[40] Both parties agree that the Father's TD Bank Account overdraft is a matrimonial debt. The amount owing is $2,913.00.

Father's Scotia Bank Visa

[41] At the separation date the Father owed $9,811.75 on his Scotia Bank Visa account. Five thousand dollars of this amount was for cash advances. The Father first suggested these were to pay family debt and to pay for other family expenditures. However, he could not specifically identify what debts were paid and he did admit that a $1,000.00 cash withdrawal in April 2009 was to pay a personal, not a matrimonial, debt. He suggested other cash withdrawals were put into the TD joint account to pay family bills but he did not provide documentary evidence of these cash advances flowing into that account. The Father has not satisfied me on a balance of probabilities that these cash advances were used to benefit the family. Once they are deducted the remaining acknowledged matrimonial debt is $4,811.75.

Father's MBNA Credit Card

[42] At separation the Father owed $5,521.72 on his MBNA credit card. The Mother knew nothing about this debt. She was not a joint creditor and she had no access to this card. No details about the purchases made by using this card were provided by the Father. He testified the purchases were for the household. I will not accept his statement without more because of my previous credibility findings. He has not satisfied me on a balance of probabilities that this is a matrimonial debt.

Loan on Mother's Life Insurance Policy

[43] During their relationship both parties took out loans on their life insurance policies. Although the Mother initially denied she arranged for a loan on her policy which resulted in a balance owing at separation of $3,036.77, I am satisfied it is her signature on the application. In submissions the Mother acknowledged the debt as a matrimonial debt because she was able to trace the cheque received into the Joint TD bank account from which family purchases were made. This is a matrimonial debt.

Mother's Sears Debt

[44] Both parties agree the debt owed by the Mother to Sears Canada in the amount of $229.00 is to be paid by the Father although it was incurred after separation.

Nova Scotia Power Bill

[45] At a settlement conference held July 18, 2011 the parties agreed to share a Nova Scotia Power Bill in the amount of $899.77.

RRSP Debt

[46] Both parties agree the debt owing in respect to the Mother's RRSP ($6,299.56) is to be deducted from the after-tax value of that investment. They agree the after-tax value is $8,688.00.

Post separation Mortgage Repayment

[47] The Father requests reimbursement from the Mother for one half the mortgage payments he made from the date of separation until the sale of the property or in the alternative for the six months this property remained vacant.

[48] There are few reported cases dealing with the question about when it may be appropriate to require a non- occupying spouse to contribute equally to payment of the mortgage on the matrimonial home prior to the sale of the home. Those that have been reported often invoke a discussion about occupation rent. While no specific pleading for occupation rent has been made by the Mother, I have accepted her submissions that I consider the potential for this claim in my decision to provide for the "...orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship". (preamble to the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275)

[49] In *Maston v. Cotton* (1925), 58 O.L.R. 251 (Ont. C.A.) it was held that the occupying spouse could only ask her husband for contribution toward payments made on mortgage interest, taxes and repairs if she submitted to being charged for use and occupation. This finding, that occupation rent is to be awarded only by way of counterclaim against claims for contribution to expenses, has been followed in Ontario in subsequent cases. The wife however, was entitled to contribution from the husband for payments she made on the principal money secured by the mortgage.

[50] In *Kazmierczak v. Kazmierczak* , 2001 ABQB 361 aff'd 2003 ABCA 227, the court summarized the factors to be considered when determining whether occupation rent should be awarded:

> 95 .....
>
> (a) The spouse who is not in possession generally should not be entitled to occupation rent if the other spouse is occupying the premises with the children of the marriage, and is not making a claim for support or contribution toward the expenses of the house.
>
> (b) Where the spouse in possession does make a claim for contribution towards the expenses of the house, that claim, the cross-claim for occupation rent, and any claim for spousal or child support should be considered together. The occupation rent would be a potential expense item in one party's budget, and a revenue item in the other party's budget.
> .....
>
> (d) The spouse in occupation will generally not be entitled in the matrimonial property proceedings for any credit for the mortgage payments and taxes paid by hm or her. The only possible exception is with respect to the portion of the mortgage payment that actually goes to reduce principal, as notionally one-half of that payment is made on behalf of the non-occupying spouse. See *Balzar v. Balzar* (1990) 67 Man. R. (2d) 196 (Man. Q. B.). However, if the party in occupation has not adequately maintained the property, and has essentially eroded its capital value, a set-off for the excessive wear and tear might be called for.

[51] In *Balzar*, supra, the court said:

> 21 The law appears to be well-settled that an occupying party will be entitled to reimbursement for one-half of the principal reduction of the mortgage, but will only be entitled to claim current expenses, such as mortgage interest, taxes, insurance and repairs, if that person submits to a claim for occupation rent. (*Mastron v. Cotton*, (1995), 58 O.L.R. 251 (Ont. C.A.); *Osachuk v. Osachuk*, [1971] 2 W.W.R. 481 (Man.C.A.)

These decisions have been made in jurisdictions that have different legislation governing the division of matrimonial property and so they are merely informative.

[52] In *Andrist v. Andrist*, 2011 NSSC 58, Justice Coughlan was faced with an argument that Sharon Andrist should receive some credit for maintaining the mortgage on the home post-separation. In this case, Ms. Andrist was paying the mortgage at an accelerated rate and provided documentation showing the difference between the required

rate of repayment and the accelerated rate she was maintaining. Justice Coughlan concluded she should receive credit for the accelerated payments but not for the regular payments.

[53] Justice Campbell touched on this subject in *Simmons v. Simmons*, (2001) 196 N.S.R. (2d) 140 (NSSC) :

> 49 I would add however that the use of division date value for the mortgage is not restricted to those parties who pay the mortgage equally. While the argument that the payor should profit from the pay down is attractive, this assumes that the fact of separation necessarily involves a separation of estates which entitles each of the parties to the consequences of their own financial transactions thereafter. However, until such time as the final division of all assets is implemented, there continues to be an overlap between their respective estates. Sometimes the mortgage instalment is paid by the spouse in possession and it is often the case that such spouse is also in receipt of support payments the amount of which is affected by the existence of the mortgage instalment. That the occupier would pay the mortgage instalment should not necessarily entitle that spouse to the benefit of the pay down since it may have been funded in part by the support payment. In some cases, responsibility for mortgage instalments is taken on in exchange for the other spouse paying various other debts. Furthermore, while the occupier spouse pays the mortgage the other spouse usually pays rent. It occurs to me that until the entire asset and support issues are resolved, the somewhat separate finances of the divorcing couples continues to be sufficiently intermingled so as to require the conclusion that typically the division date is the appropriate valuation date for the mortgage so that both spouses have a share in the pay down.

[54] In Nova Scotia it appears there may be a recognition that a non- occupying spouse may have a claim for occupation rent to set off against any request for contribution towards the regular monthly mortgage payment, or an accounting for these payments when the property is sold. Usually the non-occupying spouse had his or her own shelter cost as a result of his or her inability to share the right of possession that comes with joint ownership. Rather than engaging in the expense of determining the appropriate amount to attribute as an occupation cost, and calculating the amount of principle paid with each mortgage payment, these claims are considered as an equal set off and they are not pursued. This is not to say contribution will never be awarded. There may be circumstances that justify such an award and the award may include payments of both principle and interest.

[55] In this case both parties resided in the matrimonial home from their separation until November 12, 2009 when the Father travelled to Montréal to live with his mother until his return to Nova Scotia on January 6, 2010. Upon his return the Father moved into a property owned by a friend in Lakeside and shortly thereafter his present partner joined him. At some point his mother also came to live with him. There was no lease between the Father and his friend in respect to this residence and he could have moved out at any time. Although he had his own residence the Father frequently was physically present in the matrimonial home and he suggested he did so to help his son with homework and to care for him while the Mother was working. The mother found this intimidating. Although the evidence about an altercation between the parties is unclear, the frequency with which the Father felt entitled to enter the matrimonial home and the obvious fact that it might eventually need to be sold made the mother's decision to find her own accommodation a reasonable one.

[56] The Mother left the matrimonial home and found her own accommodation in early March 2010. The Father suggests there was an agreement with the Mother that she would pay one half the mortgage payments after their separation. I accept the Mother's testimony that there was no such agreement between them. The Father had always made the mortgage payments as well as payments for cable, internet and telephone. While he was in Montréal he did not pay for those utilities and they were cut off. The Mother has not requested retroactive or prospective spousal support from the Father. She found a third job to provide sufficient money to establish her own residence and provide for herself and her son. She continues to work for two employers. The Father admitted he could have moved into the matrimonial home any time after the Mother vacated that home. He did not do so until September 2010. The Father has produced no calculations about the principal reduction on the mortgage for the periods when he seeks equal contribution from the Mother. Under these circumstances I have decided the division date is the appropriate valuation date for the mortgage. The Father's claim is denied.

House and Mortgage Insurance Reimbursement

[57] The Father in his submissions includes as a matrimonial debt the house and mortgage insurance he paid since separation. There is no reference to this debt in his affidavit. He offered no oral testimony about his debt. It was not referenced in his Statement of Property. I have no evidence to support the existence of this debt. In addition the sharing of this sum is subject to the same considerations I addressed in respect to whether a non-occupying spouse will be required to contribute toward the mortgage payments. This "debt" will not be included as a matrimonial debt.

Assets Subject to Division

[58] The Father intends to remain in the matrimonial home. The parties have valued the matrimonial home and have agreed the net equity is $45,132.00. They have agreed the Father's 2009 CRA refund in the amount of $1,007 is a matrimonial asset subject to division as is the Mother's RRSP. The after tax value of that RRSP is $8,688.00. The parties workplace pensions are to be divided at source according to applicable legislation for the period of their marriage. Finally the parties have agreed if the Father receives a severance payment from his present employer, the Department of National Defence, 50% of the sum earned during the parties marriage, less tax, is to be paid to the Mother.

[59] The parties do not agree about the value of the Honda CRV and the BMW. I am satisfied, following the analysis described in *Simmons*, supra, that the proper date of valuation for these vehicles is the date of separation. Only the Mother provided information about these values. She provided "Black Book" values as of July 2009 for each of these vehicles. The retail price for the BMW is $19,700.00; the retail price for the Honda CRV is $10,800.00. These values presume the vehicles are in reasonable condition given their age. The Father alleges the sunroof on the BMW was damaged prior to the parties separation. The Mother denies there was any damage. I accept the mother's evidence. The BMW had been purchased only 6 months before the parties separation for $21,491.00. The Black Book value is accepted.

[60] The Father suggested no value for the Honda CRV because he said it was repossessed due to the debt owing against it. He assigns no value to this item. I rejected his submissions about that alleged debt. The Black Book value is accepted.

[61] The Father's submissions contain a balance sheet for division of assets and debt. On it as an asset of the Mother appears an entry under Bank Account $14.13. This is not disclosed on her Statement of Property filed as Exhibit 8 in this proceeding. Nothing was said during the hearing about this Bank Account. I will not include it in the asset division.

[62] Attached as Schedule "C" to this decision is my calculation of the asset and debt division. The Father must pay the Mother $25,777.50.

Neither party has addressed the issue of costs. If costs are requested, and cannot be resolved between the parties, written submissions are to be provided to this court by the Father, with a copy to the Mother no later than February 7, 2012. The Mother's submissions are to be filed with this court and copied to the Father no later than February 21, 2012. If the Mother has raised an issue in her submissions not considered in the Father's submissions he may file and copy to the Mother a further submission addressing those issues no later than February 28, 2012.

_____

Beryl MacDonald, J.S.C.

Schedule “A”

Custodial Arrangement/ Decision Making

1) The parties son is to be in the joint custody of the Father and the Mother meaning, unless stated otherwise, that both parents are to consult with one another and share equal responsibility and authority in making decisions of importance to their son which shall include decisions about enrollment in recreational and extracurricular activities, the school their son is to attend, any additional educational programs in which he is to be enrolled, including tutoring, and treatment for significant dental, physical and mental health issues.

2) With respect to emergency decisions, the parent who has care of their son according to the parenting plan is to be the decision maker with the other parent being advised as soon as possible about the emergency and the decision made.

3) The Mother shall make all appointments for the son’s regular dental and health care and she shall take him to those appointments unless the Father has agreed to do so at her request. The parent who takes their son to the appointment shall inform the other parent of the results.

4) Both parents are to obtain from their son’s school, copies of his progress reports and a schedule of all parent teacher meetings, school concerts and other events in which their son will be involved. Both may attend parent teacher meetings but if only one parent does so he or she must inform the other parent of the results of that meeting.

5) The parents will consider their son’s expressed choices about participation in extracurricular and recreational activities. He is not to be enrolled in an activity that will require transportation by a parent and will interfere with a parent’s parenting time unless that parent consents after having been provided with scheduling and other necessary information including cost. Each parent is free to enroll their son in one activity per year, at his or her own expense, that does not require the other parent to provide transportation and will not interfere with that parent’s parenting time.

6) Should the parents be unable to agree about a decision that is to be made jointly, they are to accept and implement the recommendations made by professionals (doctors, teachers, counsellors etc.), but if no professionals are involved they are to engage in mediation before commencing litigation.

.../1

Residential Parenting Plan

7) The parents are to share parenting of the child.

8) The regular schedule will alternate between the parents but will be suspended for a holiday or vacation schedule. After suspension the regular schedule will resume.

Regular Schedule

9) During the school year the parties son is to be in the daily care of the Mother for 8 consecutive days from after school on each Thursday that follows her four consecutive day 3-11pm work schedule until the following Friday after school when he is to be in the daily care of the Father.

10) During the summer school break the parties son is to be in the daily care of the Mother for 8 consecutive days from 10am each Thursday that follows her four consecutive day 3-11pm work schedule until the following Friday at 6pm when he is to be in the care of the Father.

Holiday/Vacation Schedule

11) During statutory holidays, other than Christmas Day, Boxing Day and New Year's Day, the regular schedule is to apply.

12) In odd numbered years the Mother will have their son in her care from after school on the last day of school beginning the Christmas school break until December 25th at noon when he will then be in the Father's care for the remainder of the school break.

13) In even numbered the Father will have their son in his care from after school on the last day of school beginning the Christmas school break until December 25th at noon when he will then be in the Mother's care for the remainder of the school break.

14) In each year each parent may have their son in his or her care as vacation time for a period not to exceed three consecutive weeks. During this time either parent my travel with the child to places within Canada and the United States. In odd years the Mother will have first choice to include the March school break as one of those

.../2

weeks; in even years the Father will have first choice to include this break. If neither parent has requested to include the March school break as one of his or her three weeks vacation time, the regular schedule shall apply.

15) On or before May 31 of each year, each party is to inform the other about vacation time with their son each requests during the summer school break. If both parents request the same time, the Mother's request shall prevail in odd years and the Father's in even years.

16) At any time their son is to be taken outside the Province of Nova Scotia, the travelling parent shall give the other parent a travel itinerary and a telephone number or other contact information at which the travelling parent and their son may be reached.

17) Both parents shall sign all documentation necessary, including passport applications, to permit travel to occur.

18) Changes may be made to this parenting plan upon agreement between the parents in writing and an exchange of e-mail confirming clear acceptance of the proposed change is an "agreement in writing" for this purpose.

Schedule “B”

JANUARY

Sun	Mon	Tue	Wed	Thurs	Fri	Sat
1 3-11 pm	2 3-11 pm	3 3-11 pm	4 3-11 pm	5 off **Mom**	6 off **Mom**	7 off **Mom**
8 off **Mom**	9 7-3 pm **Mom**	10 7-3 pm **Mom**	11 7-3 pm **Mom**	12 7-3 pm **Mom**	13 7-3 pm **Mom**	14 off
15 off	16 7-7 pm	17 7-7 pm	18 7-3 pm	19 3-11 pm	20 off	21 7-3 pm
22 3-11 pm	23 3-11 pm	24 3-11 pm	25 3-11 pm	26 off **Mom**	27 off **Mom**	28 off **Mom**

29 off **Mom**	30 7-3 pm **Mom**	31 7-3 pm **Mom**	**FEB** 1 7-3 pm **Mom**	2 7-3 pm **Mom**	3 7-3 pm **Mom**	4 off

Schedule “C”

ASSET & DEBT DIVISION

DESCRIPTION	VALUE	OWNERSHIP	
ASSETS		HUSBAND	WIFE
Matrimonial Home	$45,132.00	$45,132.00	
Honda CRV	$10,800.00	$10,800.00	
BMW	$19,700.00	$19,700.00	
Refund Income Tax 2009	$ 1,007.00	$ 1,007.00	
RRSP	$ 8,688.00		$ 8,688.00
TOTAL ASSETS	$85,327.00	$76,639.00	$ 8,688.00
DEBTS			
BMW	$21,998.00	$21,998.00	
Master card	$ 319.00		$ 319.00
Student Loan	$ 4,272.00		$ 4,272.00
TD Bank account overdraft	$ 2,913.00	$ 2,913.00	
Scotia Bank Visa	$ 4,812.00	$ 4,812.00	
Life Insurance Loan	$ 3,037.00		$ 3,037.00
NS Power bill	$ 900.00	$ 900.00	
RRSP debt	$ 6,300.00		$ 6,300.00
TOTAL DEBTS	$44,551.00	$30,623.00	$13,928.00
EQUITY/Balance	$40,776.00	$46,016.00	$(5,240.00)
each entitled to ½ Equity $20,388.00			
EQUALIZATION PAYMENT		($25,628.00)	$25,628.00
		$20,330.00	$20,330.00
Reimbursement for Sears Debt Total owed by the Husband to the Wife		$ 229.00 $ 25,857.00	