SUPREME COURT OF NOVA SCOTIA
Citation: Cunningham v. Cunningham, 2012 NSSC 91

Date: (20120302)
Docket: 1202-001904(073766)
Registry: Amherst

Between:

Michael Anthony Cunningham

Petitioner

v.

Nancy Kathleen Cunningham

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Heard: December 20 and 21, 2011 in Amherst, Nova Scotia

Written Decision: March 2, 2012

Counsel: Peggy Power, for the Petitioner
Lloyd Berliner, for the Respondent

By the Court:

FAMILY BACKGROUND:

[1] The parties to this proceeding have an interesting family background. Although they married in August of 2000, were blessed with a son Andrew John ("AJ") on January 2, 2003, and separated on July 3, 2009, there is, "more to the story".

[2] Over a decade prior to their marriage, the parties, while in their early twenties were involved in a relationship which resulted in the birth of their daughter Kristi in December of 1987. Mr. Cunningham, shortly thereafter left the Pugwash area where the parties both resided, to work in western Canada. Ms. Cunningham eventually married and subsequently divorced. That marriage was blessed with two children, Bobby Weeks, born in June 1990, and Adam Weeks, born in June 1992.

[3] In 1997 Mr. Cunningham returned to Pugwash and re-initiated his relationship with Ms. Cunningham and their 10 year old daughter. The couple began cohabiting in 1999, with Ms. Cunningham and the three children moving

into a home owned by Mr. Cunningham. Mr. Cunningham was, and remains, self-employed as a general contractor, operating as a sole proprietorship. Ms. Cunningham was also employed outside of the home for much of the marriage, including in management positions and operating her own business at one point. Ms. Cunningham also juggled meal preparation, running the household, and attending to the children's various needs. To a great extent, Mr. Cunningham relied upon his spouse to undertake the "hands on" management of the family, given his long work hours. He did, however, involve himself in the children's activities, most notably Bobby Lynn's participation in hockey, which required a great deal of commitment in terms of both time and travel.

[4] Following the parties' separation in July 2009, all three older children remained with Mr. Cunningham in the matrimonial home for varying periods of time. At that time Kristi and Bobby Lynn were preparing to embark upon post-secondary education, and Adam was still in high school, in grade 11. It would appear that all 4 children, including those who are now adults themselves, still enjoy a positive and supportive relationship with both parties.

[5] Immediately following the separation, Ms. Cunningham vacated the matrimonial home, and resided temporarily in the parties' travel trailer, parked at a

local beach. Although AJ would go with his mother during the day, he would return to the matrimonial home in the evening to stay overnight with his father. When his mother was working, he would be in his father's care, with his grandparents, or with a sitter.

[6] When the school year approached, Ms. Cunningham resided briefly in an apartment owned by her sister. This resulted in AJ leaving Pugwash Elementary School, where he had previously attended since commencing primary, and attending school in Wallace. Ms. Cunningham subsequently moved to the home of her father in Pugwash Junction, which resulted in AJ returning to Pugwash Elementary School. Throughout this process, AJ remains a very good student. His parents are clearly proud of him, and love him dearly.

[7] During the summer of 2010, the parties agreed to equally share parenting time with AJ, on an alternating week basis. In October 2010, the parties, both represented by legal counsel, entered into an Interim Consent order before the Family Court. That Order, issued October 27, 2010, contained the following terms:

> 1. The Applicant, Michael Cunningham, and the Respondent, Nancy Cunningham, shall have interim joint custody of the child of the marriage, namely Andrew John Cunningham, (AJ), born January 2, 2003.

2. For the interim, the child Andrew John Cunningham shall reside primarily with the Respondent, Nancy Cunningham.

3. The Applicant, Michael Cunningham, shall have the child Andrew John Cunningham in his care every second week from 6:00 p.m. on Friday until the following Wednesday around suppertime at times agreed between the parties. Michael Cunningham shall return the child to his mother's home.

4. The Applicant, Michael Cunningham, shall also continue to enjoy the child Andrew John Cunningham's company in the mornings prior to school, as well as any other time the Respondent, Nancy Cunningham, shall seek assistance with child care.

5. Interim child support shall be paid by the Applicant, Michael Cunningham, to the Respondent, Nancy Cunningham, in the amount of $383 per month based upon an income of $44,000. Support payments shall commence on September 1, 2010, and shall be payable on the first day of each month thereafter.

6. Child support payments shall be made directly to Nancy Cunningham.

7. This Order is without prejudice with respect to the amount of child support payable and with respect to any claims by the Respondent, Nancy Cunningham, for retroactive child support.

[8] The Order further provided that the parties would implement certain communication strategies as recommended by Family Court assessor, Ms. Prager, who had previously conducted a custody assessment. In addition to the communication strategies, Ms. Prager had recommended a shared custody arrangement.

[9] Divorce proceedings were subsequently commenced, thus bringing the parties before this Court. Since the issuance of the above Order, AJ has continued

to be in his father's care 5 days out of every 14. At some point, the additional morning access time as ordered in paragraph 4 above was discontinued. During the summer of 2011, the 5 day rotation continued, despite Mr. Cunningham seeking a return to the week-on/week-off pattern utilized during the previous summer.

[10] In terms of finances and employment, Mr. Cunningham at the time of trial, continues to operate his construction business. At present, Ms. Cunningham is nearing completion of a 2 year Business Administration program with the Nova Scotia Community College, through the Amherst campus. This program involves a work placement which will take place in the spring of 2012. Ms. Cunningham has secured a work placement at the Cumberland Regional Health Care Center in Amherst. There is, however, no guarantee that Ms. Cunningham will be "kept on" as a permanent employee at the end of the 6 week placement. Ms. Cunningham has been travelling from Pugwash Junction to the Amherst campus to attend this course. Following her graduation in June 2012, Ms. Cunningham indicates she will be seeking employment in the Amherst or Truro areas. She has no job offers or firm moving plans at this time. In terms of income, while attending this program, Ms. Cunningham has received funding from the Nova Scotia Department

of Labour and Advanced Education, which includes payment of her tuition and books, plus $350.00 each week for living expenses.

***Position of the Parties*:**

[11] The parties both agree that reconciliation is not possible, and that a divorce is appropriate.

[12] The parties have reached agreement on the valuation of various assets, as well as marital debts. Ms. Cunningham seeks an equal division of marital assets and debts. Mr. Cunningham asserts that the Court should consider an unequal division of marital assets in his favour, and further, should exclude certain assets entirely, as they are not matrimonial in nature.

[13] In terms of custody arrangements regarding AJ, the parties agree to maintain the pre-existing joint custodial designation. Presently, by virtue of the Interim Consent order issued by the Family Court on October 27, 2010, AJ is in the care of his father 5 days out of every 14, running from alternating Fridays through Wednesday. Mr. Cunningham is seeking to have this expanded to 7 days, thus creating an equal shared parenting arrangement. Ms. Cunningham however, is

seeking to decrease the time AJ spends in his father's care to every second weekend, plus some additional evening time during the school week.

[14] Both parties acknowledge that the **Federal Child Support Guidelines**, SOR/97-175 ("the Guidelines") will apply with respect to determining an appropriate amount of child support. Each party asserts that the amount should reflect their proposed custodial arrangement. Further, Ms. Cunningham asserts that this Court should impute income to Mr. Cunningham asserting that his available income for the purpose of paying support for AJ's benefit is significantly higher than shown on his income tax returns. Ms. Cunningham is also seeking a retroactive award of child support. Both of these arguments are strongly opposed by Mr. Cunningham.

[15] Ms. Cunningham is also seeking an award of spousal support, which is also opposed.

ISSUES:

[16] The issues to be determined by this Court are as follows:

a) Divorce

b) Custody - What living arrangement is in the best interest of AJ?

c) Division of marital assets and debts – What assets are to be considered matrimonial, and should assets be divided unequally as requested by Mr. Cunningham?

d) Child support - Based on the Court's determination regarding the custody arrangement, what amount of child support is payable in relation to AJ's care? In making this determination, should the Court impute income to Mr. Cunningham, and should a retroactive award be considered?

e) Spousal support - Is Ms. Cunningham entitled to spousal support, and if so, in what amount and duration?

CREDIBILITY:

[17] Prior to embarking upon a consideration of the above issues, I pause to make a preliminary observation. In assessing the evidence before the Court, there are a number of aspects which differ as between the parties. They have differing views on events, and have explained their concerns with respect to the positions taken by the opposing party. An assessment of credibility will be required. As such, I find helpful the comments 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 statement, 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 behaviour.

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*).

DIVORCE:

[18] The Court is satisfied, upon hearing the evidence of both parties, that there is no possibility of reconciliation. The jurisdictional requirements for the divorce have been met.

CUSTODY:

Position of the Parties:

[19] Mr. Cunningham is seeking a shared parenting arrangement with AJ being in the care of each parent on a week on – week off basis. He feels such an

arrangement would provide maximum contact between AJ and both of his parents, as well as family members, most notably his paternal grandparents. Mr. Cunningham asserts that his work hours are flexible, and he is willing and able to accommodate AJ's needs. He asserts he was able to effectively do so when AJ was with him on an equal basis during the summer of 2010, and also when he was, pursuant to paragraph 4 of the Interim Order, having AJ with him before school on weekdays. Mr. Cunningham acknowledges that there have been some communication difficulties with Ms. Cunningham, however, he feels that they can be rectified and he suggests e-mail as an effective means of the parties communicating regarding AJ. He thinks much of the confusion surrounding AJ would be lessened if a "week on – week off" arrangement was in place. He is prepared and willing to co-operatively parent with Ms. Cunningham.

[20] Ms. Cunningham is seeking a change of the current parenting arrangement. She asserts that the current situation is, due to a lack of communication between herself and AJ's father, not working. She feels an alternating weekend scenario would be in AJ's best interests, as such would provide more stability for AJ. Ms. Cunningham points to some hygiene concerns when AJ is in his father's care, but acknowledges that Mr. Cunningham is a good father. Ms. Cunningham also testified that at the end of the school year, she will be seeking employment outside

of Pugwash, which will likely require a move to Amherst, Truro, or somewhere in between. Although she asserts her employment aspirations are not the motivation behind seeking a change to weekend access for Mr. Cunningham, she did indicate she felt the current arrangement or a shared custody designation would impede her employment opportunities.

***The Law*:**

[21] Custody decisions in a divorce context are governed pursuant to section 16 of the **Divorce Act**, R.S.C., 1985, c. 2 (2nd Supp.). Sections 16(8) and (10) are particularly relevant. They read:

> 16(8) 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.
>
> (10) 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.

[22] In **Gagnon v. Gagnon**, 2011 NSSC 486, Justice MacDonald explains the role of the court in custody determinations as follows:

> [13] There are no presumptions to apply when determining with whom children should be living under what arrangement. There is no presumption that parents should have joint custody, custody, or shared parenting. There are only various directives. The *Divorce Act* directs that we are to foster maximum contact between the children and each parent. Of course, it also directs that decisions are to be made in the children's best interest. Several cases provide guidance about factors to consider when assessing best interest, *Foley v. Foley* (1993), 124 N.S.R.

> (2d) 198 (N.S.S.C.); *Abdo v. Abdo* (1993), 126 N.S.R. (2d) 1 (N.S.C.A.); and particularly useful is the comment in *Dixon v. Hinsley* (2001), 22 R.F.L. (5th) 55 (Ont. C.J.):
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> > 46 "The best interests" of the child is regarded as an all-embracing concept. It encompasses the physical, emotional, intellectual and moral well-being of the child. The court must look not only at the child's day to day needs but also to his or her longer term growth and development.
> >
> > What is in the child's best interests must be examined from the perspective of the child's needs with an examination of the ability and willingness of each parent to meet those needs.

[23] Ms. Cunningham, arguing against a shared custody arrangement relies upon **Bryden v. Bryden** 2005 NSSC 9, where Justice Coady writes:

> 15 If I were to accept Mr. Bryden's proposal, it would be effectively shared parenting regardless of the use of the words "joint custody". I am of the opinion that it is the rare case, the rare parents and the rare children who can make week-on, week-off work in a way that is in the children's best interests.

[24] There are several recent decisions which I have considered which address the appropriateness of shared parenting arrangements, and in particular the factors a court should consider when such an arrangement is being sought. See **Murphy v. Hancock** 2011 NSSC 197; **Gibney v. Conohan** 2011 NSSC 268 and **Hammond v. Nelson** 2012 NSSC 27.

[25] As noted by ACJ O'Neil in **Gibney v. Conohan, supra**, every case must be determined, not on precedent, but rather on the unique family circumstances of the parties before the Court. He writes:

> [91] Jurisprudence on the issue of whether shared parenting should be ordered is very fact specific. I agree with the comments of Justice Wright in *Hackett v. Hackett* [2009] N.S.J. 178, at paragraph 13:
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> > 13. It is all well and good to look at other cases to see how these principles have been applied, but the outcome in other cases is really of little guidance. Every case must be decided on a fact specific basis and nowhere is this to be more emphasized than in custody/access/parenting plan cases. To state the obvious, no two family situations are ever the same.

[26] I adopt the reasoning of ACJ O'Neil, and in particular the factors outlined in **Gibney, supra**. Justice Dellapinna has also helpfully outlined various factors for the court to consider in weighing a request for shared parenting in the recent decision of **Hammond v. Nelson, supra**. I particularly find helpful his observations regarding parental communication in paragraph 68:

> [27] The communication level between the parents and their ability to co-operate with each other and make decisions together. It is easy to say that parents should put aside their differences and do what is necessary to serve the best interests of their children but the Court must recognize human nature for what it is. Many couples are able to set aside their personal differences for the sake of their children and frequently are able to agree upon a shared parenting arrangement that works for them and their children. The Court sees it in agreements that accompany consent orders. However, frequently parents whose relationships have broken down are unable to achieve the necessary degree of cooperation in spite of their best efforts. A shared custody arrangement requires an unusual level of cooperation between the parents on a day in and day out basis. As Justice Coady said in *Bryden (supra*), it is "the rare case, the rare parents and the rare children" who can make shared parenting work.
>
> [28] It is essential that the parties communicate with each other, keep each other informed of matters relating to their child and make decisions together. If the court is not satisfied that they can, then imposing a shared custody arrangement over the objections of one of them may lead to a deterioration of an otherwise good relationship and subject the child to conflict and instability. **At the same time however, the Court must not give a license to litigants to be disagreeable simply to defeat a joint or shared custody determination** (see *Farnell v. Farnell*, 2002 NSSC 246; 209 N.S.R. (2d) 361 (NSSC). (Emphasis added)

[29] ACJ O'Neil has also commented upon the disharmony and conflict that often arises upon the separation of parents. Some disharmony is not fatal to a shared parenting arrangement. In **Murphy v. Hancock, supra**, his Lordship writes:

> 60. The parties do communicate at an acceptable level to parent effectively. They have demonstrated that they can do so. They may not enjoy communicating with each other but that is different than being unable to meet their responsibility to do so. Furthermore, the absence of shared parenting will not eliminate the need for the parties to communicate . . .

And further at paragraph 68, ACJ O'Neil notes:

> 68. Significant conflict arises between parents when a parenting arrangement establishes a status quo that one parent interprets as a power position, confirming superior authority on that parent. In such circumstances, the other parent often interprets the parenting arrangement as victimizing. To the extent that a parenting arrangement can be concluded, and result in a lessening of this dynamic, it must be considered. Of course, the result must be one that is in a child's best interest. I am satisfied that a shared parenting arrangement will result in less conflict for these parents.

***Determination*:**

[30] The Court has no hesitation in concluding that for both parties, the custody determination in relation to AJ is the most significant determination to be made. AJ is a well-loved little boy.

[31] I also have no hesitation in finding that both parties are capable of parenting AJ and providing him with appropriate care and nurturing. Either of these parties

could, effectively, parent AJ on a full-time basis. They do, like many parents, have different parenting styles. I do not view them however, as being incompatible, or preclude either parent from having extensive parenting time with AJ.

[32] Although Ms. Cunningham raised some hygiene concerns relating to AJ's time with his father, I do not view these as being serious. Mr. Cunningham testified that he was unaware of any concerns being held in this regard. I find that Mr. Cunningham, now that he is aware of the specifics, will be mindful to ensure AJ is properly drying himself following showers.

[33] Both of these parents are, overall, mature and reasonable individuals. There is no evidence before this Court that suggests that there is aggression or threats of violence underlying their communications, nor, is there any indication that there is any serious or lasting impediment to them communicating effectively regarding AJ and his needs. Ms. Cunningham asserts that a lack of communication between the parties is the primary impediment to a shared custody arrangement.

[34] In her evidence, Ms. Cunningham points to several incidents as indicative of the lack of communication, and she asserts, an inability to co-parent with Mr. Cunningham on an equal basis. She described a series of communication "issues"

including an incident where she was unaware of a hockey banquet; an occasion when skates were forgotten when AJ went from one home to another; the fact AJ had seen his father on a Sunday morning with an older sibling and she found out "after the fact", not before the visit; and the difficulties surrounding arranging Halloween and Christmas parenting times. She further suggests that Mr. Cunningham does not use the journal carried by AJ from home to home as suggested by Ms. Prager, and she is critical of his suggestion that the parties communicate by email.

[35] With respect, I cannot agree that Ms. Cunningham's assessment of the ability of these parents to communicate is accurate. In my view, Ms. Cunningham is unfairly critical of Mr. Cunningham's communication attempts and unrealistic in terms of her expectations. In fact, after having heard the evidence of both parties, I find that it is Ms. Cunningham who is unreasonably creating barriers to effectively communicating regarding AJ. She is unreasonably attempting to control the time AJ spends with his father, most times based on her own needs, not the child's best interest.

[36] In reaching the above conclusion, I noted in particular, that the parties have been able to effectively make arrangements relating to AJ, when it suits Ms.

Cunningham. When she was working during the summer of 2010, AJ was in the shared care of his father. Conversely, the following summer, when Ms. Cunningham was unable to find employment, Ms. Cunningham insisted upon the 5 day/9 day cycle as outlined in the Interim Order remaining in place, despite Mr. Cunningham seeking additional time with AJ. Similarly, when Ms. Cunningham was required to leave Pugwash early in the morning during the 2010 school year, Mr. Cunningham had the opportunity to care for AJ prior to school, in addition to his own "5 days". Notwithstanding that this extra time was specified in the Interim Order, Ms. Cunningham stopped this practice when her schedule no longer required an early morning departure. Last March break, the parties were able to agree to AJ spending time with his mother, as their respective school breaks coincided, notwithstanding that this fell within part of Mr. Cunningham's parenting time.

[37] Mr. Cunningham has, overall, demonstrated a willingness to be flexible and open minded with respect to parenting time with AJ. As noted above, he agreed to Ms. Cunningham having AJ during March break, notwithstanding they fell on "his days". Similarly, Ms. Cunningham was critical in her evidence regarding Mr. Cunningham's approach to arranging Halloween and Christmas parenting time. In both instances, the days in question fell within Mr. Cunningham's 5 day period.

He was open to sharing time on Halloween with Ms. Cunningham, yet she is critical of the limited amount of time Mr. Cunningham was prepared to agree to AJ having with her. Given AJ's age and other circumstances, Mr. Cunningham's suggestion as to how the evening was to be divided, was extremely reasonable. Ms. Cunningham's position was not.

[38] As for arranging Christmas parenting time, Ms. Cunningham's criticism of Mr. Cunningham was completely unwarranted. As noted above, December 24 and 25 fell within Mr. Cunningham's 5 day period. He does however, hold the belief that it is appropriate for AJ to spend overnight on Christmas Eve and Christmas morning with his mother and older siblings. He wanted time on Christmas Eve to take AJ to a Church service, afterwards, returning him to his mother. The parties could not agree and this Court made a determination as to how AJ's time would be spent over the Christmas holiday at the conclusion of the hearing. What is more important for the purpose of this decision is the attempts the parties made to communicate regarding Christmas plans, in advance of the court hearing.

[39] The evidence disclosed that in early December, Mr. Cunningham contacted Ms. Cunningham via telephone to discuss how time at Christmas was going to be divided. On one occasion, Ms. Cunningham was studying and asked Mr.

Cunningham to call her back. On another occasion when he telephoned, Ms. Cunningham was eating and advised it was not a good time to speak to him. Ms. Cunningham suggested Mr. Cunningham "put it in writing". After being put off twice, Mr. Cunningham made no further attempts to discuss with Ms. Cunningham Christmas parenting time. Although Ms. Cunningham may have been busy, clearly Mr. Cunningham attempted, well in advance, to discuss this issue. His attempts, in my view, were unreasonably deflected by Ms. Cunningham. If there are problems with communication between these parents, the majority of the causation rests, in my view, with Ms. Cunningham's current mindset as to what is appropriate, and her overly rigid view of how parenting arrangements should be made.

[40] I find that the level of communication between these parents is not an impediment to a shared parenting arrangement. In fact, should Ms. Cunningham's proposed parenting arrangement be put in place, effectively giving her even more control over AJ's living circumstances, it would more probably than not, result in increased conflict between these parents. Ms. Cunningham has demonstrated on more than one occasion that giving her control over scheduling AJ's parenting time will result in Mr. Cunningham having his time with AJ unreasonably decreased.

[41] It is my determination that Ms. Cunningham in seeking a change to the parenting arrangement is more motivated by her future career aspirations than by any other factor. In her submissions, it was suggested that to maintain the status quo or to increase Mr. Cunningham's parenting time would sentence her to remaining underemployed in the Pugwash area. She clearly wants to move to explore employment elsewhere, and she wants to be able to take AJ with her. In effect, Ms. Cunningham is seeking this Court to pre-approve a move, without the necessity of a proper mobility application and assessment.

[42] This Court was presented with little concrete evidence as to Ms. Cunningham's actual future plans, other than her desire to find a job in Amherst or Truro. She has no job offers, and is uncertain where she would propose moving. In a mobility application, the Court is asked to determine whether a move with a parent is in a child's best interests. In order to make that determination, typically evidence is presented which permits a comparison of the status quo, to the proposed new living arrangement.

[43] In the present instance, there is nothing to compare. Ms. Cunningham does not have a job as of yet, and it is not even entirely clear that a new job would even require a move from the Pugwash area. It is noted that while living in Pugwash,

she has travelled to other communities for work (Oxford) and school (Springhill / Amherst). There is no indication where she would live, what school AJ would attend, what child care would be required, or how that would impact on his extra-curricular activities. I am not prepared to alter the present arrangement to an every second weekend schedule on the basis of Ms. Cunningham's future career goals. The Court will make a custody determination based on the present, or reasonably foreseeable future.

[44] At present, Ms. Cunningham resides in Pugwash Junction, sufficiently close to Mr. Cunningham's home that the school district is the same, and AJ is able to take the same bus to school. Although Ms. Cunningham is presently residing in her father's home, there is no convincing evidence that she will be unable to find suitable housing in the Pugwash area to permit AJ to spend considerable time with each parent.

[45] AJ does well in his present school and enjoys extra-curricular activities, notably hockey. He also spends significant time with his paternal grandparents who live nearby and who provided assistance in caring for AJ both before and after the separation. They have been important figures in his life.

[46] I find that AJ has been successfully spending time between both homes. The difficulties have not been significant, and those that have existed will be lessened by AJ and his parents having greater certainty as to where he will be, and which parent has the responsibility for various aspects of AJ's care.

[47] In the circumstances of this case, I find that it is in AJ's best interests that he be placed in the joint custody of both parents, on an equal shared parenting basis. In that regard, I order as follows:

(a) Commencing the Sunday following the release of this decision, AJ shall be in the care of his father, Mr. Cunningham, from 6 p.m. Sunday to 6 p.m. the following Sunday, when he will be returned to Ms. Cunningham's care;

(b) The parties will continue to alternate on a week-on/week-off basis. The parent who has had AJ for the preceding week will be responsible for transporting him to the other parent's care.

[48] It is the expectation of the Court that given the maturity of these parties and the age of this child, that the parties will be able to reach agreement with respect to the sharing of holidays, and the multitude of other day to day arrangements which must be made to maintain AJ as a happy, healthy and well-adjusted little boy. The Court can be asked to assist, if necessary.

[49] Although a journal may be helpful to communicate with respect to school work and extra-curricular activities, it is suggested that email communication may be a more effective and efficient means of communication. This is especially so for issues that may not be appropriate to have AJ potentially read about in the journal. Again, I have every confidence that now that some certainty has been reached with respect to the overall parenting arrangement, that these parents will be able to move forward in a civil and co-operative fashion.

[50] For greater certainty, the parent who has AJ in his or her care will be responsible for transporting him to extracurricular activities, as well as medical or dental appointments. Of course, each party is to keep the other informed of all events occurring during the week, and shall consult with each other in terms of all major educational, social and health decisions which are required.

[51] Although the parties can certainly agree to more, there shall be a minimum of one evening visit between AJ and the parent who does not have him in their care each week. Each parent shall have reasonable telephone contact with AJ during his time with the other parent.

DIVISION OF ASSETTS AND DEBTS:

Position of the Parties:

[52] The parties have reached agreement with respect to the value of various assets and debts. There is disagreement however, as to the proper characterization of certain assets as being matrimonial in nature, and if matrimonial, whether they should be divided equally. By asset, the parties' positions are summarized as follows:

(a) Matrimonial home – Mr. Cunningham owned the matrimonial home prior to the marriage. He expanded the home from two bedrooms to four, to accommodate Ms. Cunningham and the three older children. He asserts he re-mortgaged the property to pay for the renovations, and continued, during the marriage, to solely pay the mortgage from his own earnings. It would appear that the parties agree to the home's value ($114,000), as well as the balance of the mortgage at the date of separation ($9796.61).

Mr. Cunningham seeks to have the property divided unequally, given he owned it prior to the marriage and paid the mortgage exclusively. Ms. Cunningham argues that the property, as a matrimonial asset should be divided equally, and that Mr. Cunningham has not met his burden to establish that an unequal division is warranted in these circumstances.

(b) Garage – Prior to the marriage, Mr. Cunningham built a garage adjacent to the matrimonial home. Both structures are on the same deeded lot. Mr. Cunningham operates his business, Cunningham Construction from the garage, and asserts that it has not been used, at all, for family purposes. He seeks to have it excluded as a matrimonial asset. Ms. Cunningham disagrees. Although she certainly acknowledges that the garage is used for business purposes, she also testified that it was used for family usages, such as the storage of gardening tools and children's toys. The parties have, however, agreed on its value ($10,000).

(c) Vacant lot – Mr. Cunningham is the owner of a vacant lot situated across the road from the garage. He purchased it from his grandmother prior to the marriage. He testified that given its swampy nature, its only practical usage is

for the storage of staging and vehicles he uses in his business. He asserts it is not a matrimonial asset, a position challenged by Ms. Cunningham. They also agree with respect to its value ($1000.00).

(d) RRSPs and Insurance Policies – Prior to the marriage Mr. Cunningham was the holder of certain RRSP investments. He did not make any contributions during the marriage. The parties agree as to the value ($14,576.14). Mr. Cunningham seeks to have this asset divided unequally in his favour, which is opposed by Ms. Cunningham.

Mr. Cunningham also had two life insurance policies, prior to the marriage. Both now name Kristi and AJ as beneficiaries, and Mr. Cunningham would like to keep that designation in place. Prior to the separation, Ms. Cunningham was the designated beneficiary on both policies. Mr. Cunningham asserts that the cash surrender value of the policies, which is agreed between the parties, should be divided unequally in his favour. Ms. Cunningham asserts the values should be divided equally. The cash surrender values are $15,170.26 and $8296.64 respectively.

***The Law*:**

[53] The characterization and division of assets in this case is governed by the **Matrimonial Property Act**, R.S.N.S., c. 275, s.1. Several provisions are relevant to the issues under consideration. Relating to the characterization of assets, "business assets" are defined in section 2(a), as follows:

> (a) "business assets" means real or personal property primarily used or held for or in conjunction with a commercial, business, investment or other income-producing or profit-producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation of for household, educational, recreational, social or aesthetic purposes;

[54] Non-residential usages of the matrimonial home are addressed in section 3(2), which provides:

> (2) Where property that includes a matrimonial home is used for other than residential purposes, the matrimonial home only includes that portion of the property that can reasonably be regarded as necessary for the use and enjoyment of the family residence.

[55] As to the characterization of assets as "matrimonial", section 4(1) provides:

> 4(1) In this **Act**, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of
>
> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
>
> (b) an award or settlement of damages in court in favour of one spouse;
>
> (c) money paid or payable to one spouse under an insurance policy;
>
> (d) reasonable personal effects of one spouse;
>
> (e) business assets;
>
> (f) property exempted under a marriage contract or separation agreement;
>
> (g) real and personal property acquired after separation unless the spouses resume cohabitation.

[56] A claim for an unequal division of marital assets is governed by section 13. It provides:

> 13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:

(a) the unreasonable impoverishment by either spouse of the matrimonial assets;

(b) the amount of debts and liabilities of each spouse and the circumstances in which they were incurred;

(c) a marriage contract or separation agreement between the spouses;

(d) the length of time that the spouses have cohabited with each other during their marriage;

(e) the date and manner of acquisition of the assets;

(f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;

(g) the contribution by one spouse to the education or career potential of the other spouse;

(h) the needs of a child who has not attained the age of majority;

(i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

(j) whether the value of the assets substantially appreciated during the marriage;

(k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;

(l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;

(m) all taxation consequences of the division of matrimonial assets.

[57] The interplay between sections 12 and 13 has been considered on numerous occasions. This has been succinctly described by Dellapinna, J. in **Coxworthy v. Coxworthy** 2006 NSSC 205 as follows:

47 Section 12 of the *Matrimonial Property Act* presumes an equal division of assets that are categorized as matrimonial. However should the Court conclude that an equal division is unfair or unconscionable taking into account the factors listed in section 13, the Court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset. The onus is on the party who seeks a greater than equal share to prove that an equal division would be clearly unfair. MacKeigan, C.J.N.S. in *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414 (A.D.) said at paragraph 7:

> Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the Act and prescribed by s. 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair – not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be made.

48 See also *Ritcey v. Ritcey* (2002), 206 N.S.R. (2d) 75 (F.D.).

49 Bateman, J.A. in *Young v. Young*, [2003] N.S.J. No.193, 2003 NSCA 63 said at paragraph 15:

> "...the division of matrimonial assets is prima facie equal, with unequal division permitted only in limited circumstances. The inquiry under s. 13 is broader than a straight forward measuring of contribution. The predominant concept under the Act is the recognition of marriage as a partnership with each party contributing in different ways. A weighing of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Since the introduction of the *Act*, it has been repeatedly stressed by this Court, that matrimonial assets will be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable."

50 And further at paragraph 18:

> "...It is not sufficient, for an unequal division of matrimonial assets, that one of the s.13 factors be present. The judge must make the additional determination that an equal division would be unfair or unconscionable. The terms "unfair" and "unconscionable" do not have precise meaning. Lambert, J.A. wrote in *Girard v. Girard* (1983), 33 R.F.L. (2d) 79 (B.C.C.A.) at p. 86:

> I come then to the legislative purpose expressed in the word "unfair". That word evokes ethical considerations and not merely legal ones. It is not a lawyer's word. The section does not give a judge a broad discretion to divide property in accordance with his own conscience. There can be no doubt about that. There must be uniformity and predictability of judgment. The question of unfairness must therefore be measured by an objective standard. The standard is that of a fair and reasonable person whose values reflect those generally held in contemporary British Columbia. Such a person, while not insisting that everyone adopt his or her behaviour preferences, can recognize unfairness in the form of a marked departure from current community values.
>
> As direct by *Harwood v. Thomas*, *supra*, the judge must look at all of the circumstances, not simply with the respective material contributions of the parties.

[58] I have also found instructive the sentiment expressed by Bateman, J.A. in **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47 (C.A.) at paragraphs 23 and 24 as follows:

> 23 Where the marriage is of reasonable duration, certain presumptions prevail: it is presumed that a spouse's non-monetary contribution to a marriage, through the assumption of child care and homemaking responsibilities is deserving of recognition; that in a marriage, parties generally operate as a team, pooling resources and making decisions in reliance on their joint means; that the disadvantage occasioned to a non-income earning spouse on marriage breakdown, should be alleviated to the extent appropriate through a fair distribution of the assets; that in most marriages it is unfair, undesirable and unnecessary to embark upon a tracing of the assets brought into the marriage by each party; there where one party assumes primary responsibility of the organization of the marital assets, that spouse should not be permitted to arrange the assets in a way that disadvantages the other spouse on dissolution of the marriage. This is far from an exhaustive list.
>
> 24 When, however, a marriage falls outside the norm for which the general guidelines have been developed, it is necessary to carefully scrutinize the circumstance and determine whether a different approach is required to achieve a fair result. Adherence to the general rules is not to be at the expense of equity.

***Determination*:**

[59] I turn first to consider Mr. Cunningham's claim that the garage and vacant lot should be characterized as "business assets", and thus excluded from the division of marital assets.

[60] As noted above, the garage is located on the same parcel of land as the matrimonial home. As is clear from section 3(2) of the Act, this does not automatically render the garage part of the matrimonial home. Clearly, the garage is used for other than "residential purposes". There is no real contest in terms of the evidence, that Mr. Cunningham utilized the garage for business purposes. The evidence discloses that he maintains his office within the garage, and it is the sole "workshop" in relation to the activities required for his business. It is here that carpentry projects are undertaken and equipment is repaired and stored.

[61] I do however, accept Ms. Cunningham's testimony that the garage was used for some matrimonial uses, such as the storage of lawn maintenance equipment, or the children's seasonal toys. It is clear however, that some matrimonial use may not be sufficient to render an asset matrimonial. Section 2(a) of the Act requires the Court to assess the degree of usage. A business asset is one which is "primarily" used for or in conjunction with a business pursuit. That section does

not in my view, require that the garage, in order to be considered a business asset, to have been used exclusively for business activities. Some family uses may occur, without rendering the asset matrimonial.

[62] I have considered the evidence presented. It is un-refuted that Mr. Cunningham built the garage, prior to the marriage to provide a “home base” for his business. He continued to use the structure primarily for business pursuits. In my view, the storage of garden hoses, rakes, hoes, and the children’s toboggans and skis in the rafters, do not alter the primary use of that building from business to matrimonial.

[63] I take the same view with respect to the vacant lot. I accept Mr. Cunningham’s evidence that the lot was purchased with the intent of providing parking and storage in relation to his business. That use has continued. The fact that the children have on occasion played on the lot, catching frogs in the summer and skating in the winter, does not change its “primary” usage as being business in nature. Accordingly, the vacant lot will also be excluded from the matrimonial property division.

[64] As noted above, Mr. Cunningham asserts that the remaining matrimonial assets should be divided unequally in his favour. In his pre-trial brief, Mr. Cunningham explains his rationale for an unequal division of the matrimonial home as follows:

> Mr. Cunningham came into the marriage with the home. He had owned it for 7 years, almost as long as the parties were married. It remains in his name alone. However, it was used by the family as a matrimonial home and therefore becomes a matrimonial asset. Because of the date and manner in which the property was purchased, it is submitted that Mr. Cunningham should be provided with an unequal division of the value of the former matrimonial home pursuant to sections 13, (d) and (e) of the *Matrimonial Property Act* as it would be unfair or unconscionable to order an equal division. Ms. Cunningham also had a home, which she sold after the parties got together. Mr. Cunningham did not receive any funds from the sale of Ms. Cunningham's home. She did not invest proceeds into the matrimonial home.

[65] Mr. Cunningham similarly argues that the date and manner of acquisition of the RRSP investments and life insurance policies should entitle him to an unequal division.

[66] I have considered the three cases relied upon by Mr. Cunningham in support of an unequal division: **Urquhart v. Urquhart** (1998) 169 N.S.R. (2d) 134; **Adam v. French** 2007 NSSC 57; and **Edwards v. Edwards** 2007 NSSC 84. In all three, an unequal division of marital assets were found to be appropriate based upon the

circumstances before the Court in those cases. In none of these cases, had the marriage in question been blessed with children.

[67] In my view, each claim for unequal division must be assessed based upon its own unique circumstances. The Court must determine whether in the present circumstances, with the particular facts applicable to these spouses, an equal division would be unfair or unconscionable. Mr. Cunningham has not, in my view, established that an unequal division is warranted.

[68] Mr. Cunningham points to the fact that Ms. Cunningham sold her previous home, yet did not contribute those funds to the household. I accept Ms. Cunningham's evidence that after paying the mortgage and disposition costs, there were no funds remaining after the sale. She did not "tuck away" funds for her own usage, to the detriment of Mr. Cunningham. Further, I accept Ms. Cunningham's evidence that her wages during the marriage went towards expenses such as groceries, clothing and child care. Although Mr. Cunningham may have solely paid the mortgage itself, Ms. Cunningham certainly contributed financially, as her income permitted, and in other important non-monetary fashions, to the household. The parties divided the responsibilities, financial and otherwise, in a manner they deemed appropriate during their marriage, and which neither objected to. I do not

accept that Mr. Cunningham's payment of the mortgage, in these circumstances, warrants an unequal division of the matrimonial home.

[69] In terms of Mr. Cunningham's pre-marriage RRSP investments, it is not sufficient that a litigant merely point to the fact that an asset was acquired prior to the marriage to justify an unequal division. There must be more to displace the presumption that all marital assets are to be divided equally and further that an equal division would be unfair or unconscionable. Such has not been established in the present case. With respect to the life insurance policies, which prior to the separation named Ms. Cunningham as beneficiary, the Court is of the same view – Mr. Cunningham has not met the burden of establishing that an equal division would be unfair or unconscionable.

[70] Based upon the determinations reached herein, and the valuations agreed by the parties, Mr. Cunningham will be required to make an equalization payment to Ms. Cunningham in the amount of $72,984.81. This is calculated as follows:

Nancy Cunningham		Michael Cunningham	
Assets		Assets	
- 2002 Pontiac Montana	$3,200.00	- Matrimonial home	$114,00.00
		(Less disposition costs)	
		Real estate	$6,840.00
		Legal Fees	$1,500.00
		HST	$1,084.00
		Net	$104,576.00
		- RRSP (14,576.14 less 30%)	$10,203.29
		- Vehicles total	$23,400.00
		2007 Chev 4x4	$16,00.00
		2001 Suzuki Motorbike	$1,700.00
		1982 Scooter	$600.00
		1989 Bonair Travel Trailer	$2,500.00
		1995 Ski-doo	$600.00
		2002 Suzuki	$2,000.00
		- Life Insurance CSV	
		Manulife Financial	$15,170.26
		Co-operators	$8,296.64
Total	**$3,200.00**	**Total**	**$161,646.19**
Debts		Debts	
- Vehicle Loan	$8,922.24	- Scotiabank Visa	$1,720.39
- Mastercard Canadian Tire	$5,378.28	- ScotiaLine Visa	$9,660.22
- Mastercard Canadian Tire	$1,788.69	- ScotiaLine Line of Credit	$8,007.25
- Mastercard Capital One	$4,873.59	- Joint Visa	$4,254.89
		- Mortgage	$9,796.61
Total	**$20,962.80**	**Total**	**$33,439.36**
Assets	$3,200.00	Assets	$161,646.19
Debts	$20,962.80	Debts	$33,439.36
Net	**-$17,762.80**	**Net**	**-$128,206.86**

To equalize $128,206.83 – $17,762.80 = $110,444.03
Each should have $55,222.02, therefore requires a payment of $72,984.81 from Mr. Cunningham to Ms. Cunningham.

CHILD SUPPORT:

Position of the Parties:

[71] The Court has determined that it is in AJ's best interest that he be placed in the shared custody of both his parents. The financial consequences of that determination must now be considered.

[72] Mr. Cunningham, having sought a shared custody arrangement, proposed the following in terms of child support:

> Mr. Cunningham is seeking a shared custody arrangement and therefore his position is that child support should be paid on a straight set off basis pursuant to section 9 of the *Federal Child Support Guidelines*. At the present time, Mr. Cunningham is paying all of AJ's extracurricular expenses. It is his position that section 7 expenses should be paid proportionate to income.

[73] Ms. Cunningham's submissions regarding child support did not include a consideration of the consequences of a shared custodial arrangement, but were based upon a scenario where the Guideline table amount would simply apply. The thrust of her arguments with respect to the issue of child support focused rather upon the appropriateness of imputing income to Mr. Cunningham, as well as seeking retroactive child support. She asserts that Mr. Cunningham's income should be viewed as being $100,000.00 per annum for the purposes of child support considerations. She further seeks to have that value apply from the date of separation to present, during which Mr. Cunningham either did not pay support at

all (July 2009 to June 2010), or paid less than what his higher imputed income would dictate (June 2010 to present).

[74] Mr. Cunningham asserts that his income should be accepted as being $44,000 per annum, the amount reflected in his 2010 income tax return, and that any retroactive award would be inappropriate in the circumstances.

The Law:

[75] The authority for this Court to award child support is founded in section 15.1 of the **Divorce Act, supra**. The mechanics of determining the amount of the award is contained within the provisions of the **Federal Child Support Guidelines** ("the Guidelines").

[76] Two Guideline sections, ss. 3 and 9, are particularly relevant in this instance. They read, in part:

> 3(1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (b) The amount, if any, determined under section 7.

> 9 Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the spouses;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[77] The interplay of these two sections has been described by Justice Dellapinna in **Coxworthy, supra**, as follows:

> 64 Section 3 of the *Guidelines* contains the general rule for child support but it is subject to the remaining rules contained in the *Guidelines*. Section 9 provides an exception to the general rule where the parties share the care of a child (i.e. where both parties have the care of a child at least 40 percent of the time over the course of a year). The leading case on the interpretation of section 9 is the Supreme Court's decision in *Contino v. Leonelli-Contino* (2006), 19 R.F.L. (6th) 272. According to *Contino*, all three factors listed in section 9 must be considered. The weight given to each factor will vary according to the facts of each case. There is no presumption in favour of awarding more or less than the Guideline amount.
>
> 65 In determining the appropriate amount, the Court must consider the financial circumstances of both spouses. While the set-off of the parties' respective table amounts may be used as a starting point, that must be followed by an examination of the financial circumstances of the parties and their ability to meet the needs of the child.

[78] I agree with, and adopt the above analysis.

[79] The Guidelines also provide for the imputation of income. Section 19 provides:

19(1) 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;

(b) The spouse is exempt from paying federal or provincial income tax;

(c) The spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

(d) It appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

(e) The spouse's property is not reasonably utilized to generate income;

(f) The spouse has failed to provide income information when under a legal obligation to do so;

(g) The spouse unreasonably deducts expenses from income;

(h) The spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(i) The spouse if a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

(2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

[80] The case law clearly establishes that the decision to impute income is a discretionary one, and the burden rests upon the party seeking the relief to lay a

proper evidentiary foundation. See **Coadic v. Coadic** 2005 NSSC 291 and **Young v. Marshall** 2011 NSSC 50.

[81] Regarding claims for retroactive child support, the leading decision is **S.(D.B.) v. G.(S.R.)** 2006 SCC 37. The direction provided in that decision has been recently and succinctly described by Forgeron, J. in **Young v. Marshall**, **supra**, as follows:

> 19 . . .In *S.(D.B.) v. G.(S.R.)* 2006 SCC 37, the Supreme Court of Canada reviewed the four factors to be balanced when determining the appropriateness of a retroactive child support award. The first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of an insufficient payment of child support. The second factor relates to the conduct of the non-custodial parent. If the non-custodial parent engaged in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The third factor to be balanced focuses on the circumstances, past and present, of the child, and not of the parent, and includes an examination of the child's standard of living. The fourth factor requires the court to examine the hardship which may accrue to the non-custodial parent as a result of a non-custodial parent's current financial circumstances and obligations, although hardship factors are less significant if the non-custodial parent engaged in blameworthy conduct.

[82] Like the imputation of income, the determination that a retro-active award is appropriate in a given circumstance is, after consideration of the above factors, discretionary.

Determination:

[83] I disagree with the position put forward by Mr. Cunningham that in a shared custody arrangement, support is calculated on a straight "set-off" basis. As noted above, the Court must consider the table amount of the child support for each spouse, increased costs of the shared custody arrangement, and the conditions, means, needs and other circumstances of each spouse and the child.

[84] Starting with a consideration of what the Guidelines would dictate for each parent, the Court must determine each party's income for Guideline purposes. Ms. Cunningham is in a state of uncertainty given her current status as a student. She has, however, other than for maternity leaves, worked outside the home, in a variety of positions. She is clearly capable of earning higher wages in management positions, and she is certainly not "afraid of hard work", having worked in housekeeping and other service capacities when circumstances dictated. She is currently receiving, and has during the past two academic years while attending school, living benefits in the amount of $350.00 per week. She hopes to obtain employment of some sort at the end of the current school year. Based on her past employment history, her skills, level of education and current sources of income, I find that Ms. Cunningham presently has an annual income of $18,000.00 per annum for the purpose of child support considerations.

[85] Mr. Cunningham's income for the determination of child support proves more difficult. In all of the circumstances, and based upon the evidence presented, I find that utilizing his 2010 taxable income for calculating child support is not reasonable. Significant evidence was presented in relation to the funds generated by Cunningham Construction and, in particular, Mr. Cunningham's usage of business funds for personal expenses. A series of cheques made payable on the business bank account disclosed ongoing and significant expenditure of business funds for personal expenses. By way of example in 2010, payments to or on behalf of Ms. Cunningham and the three older children were written on this account, household utilities, and over $24,000.00 in "cash" payments. There were also in excess of $68,000.00 paid in relation to debts, most of which appear to be non-business related.

[86] Ms. Cunningham submits that the sheer flow of money going through the business account for personal use, clearly establishes that Mr. Cunningham has more income at his disposal than the $44,000.00 of taxable income on his 2010 Tax Return would suggest.

[87] In an attempt to counter this argument, Mr. Cunningham called his longtime bookkeeper, Connie Pettigrew. Ms. Pettigrew testified that she prepares Mr. Cunningham's filings based upon the material he provides to her. She was adamant that his taxable income as reported to Revenue Canada would be an accurate reflection of what funds he had available to him for personal use. When shown that Mr. Cunningham had reported taxable income in 2007 of less than $3,000.00, Ms. Pettigrew continued to state that in her view, that would represent all the funds Mr. Cunningham would have available to him in that year, notwithstanding the fact he paid in excess of $6,000.00 in mortgage payments and numerous other expenses.

[88] I found Ms. Pettigrew to be rigid in her view, and an unimpressive witness. Her explanation for Mr. Cunningham's expenditure of funds on personal expenses in amounts well beyond his taxable income was explained by her as resulting in an accumulation of debt, either in the business or personally. Although such a theory may make sense (spending more than you earn inevitably creates debt), this is not borne out in the evidence. In fact, the evidence discloses that Mr. Cunningham has a history of making significant strides in paying down his debts. Since the separation, he has paid off the mortgage on the matrimonial home, and consistently pays well in excess of the "minimum balance due" on his various credit cards.

That is not indicative, in my view, of a person who is progressively going into debt by virtue of spending more than he earns.

[89] To his credit, Mr. Cunningham has also made numerous payments for the benefit of the children, which are also indicative of the fact that his financial situation is more lucrative than his bare tax return would suggest.

[90] By way of example, he has voluntarily provided Ms. Cunningham with $1,000.00 for the past two Christmas' to ensure that the "kids have a good Christmas". Additionally, since separation, Mr. Cunningham has voluntarily incurred expenses in relation to Kristi's post-secondary education as well as for his step-children. Mr. Cunningham has paid for Bobby to attend university including tuition and housing costs, and for Adam to attend Community College. The expenses for his step-children, since separation, were well in excess of $10,000.00. Such are not the actions of a man who is going in debt by overspending. I find rather, that Mr. Cunningham had the financial ability to provide "extras" by way of assistance, due to his business generating more financial resources than what is claimed on his personal tax return.

[91] Based on all the evidence, I find that Mr. Cunningham's income for the purpose of the child support determination is $70,000.00 per annum.

[92] The Guidelines were recently amended, effective December 31, 2011. Based on incomes of $18,000.00 and $70,000.00, base monthly child support for one child would be as follows:

	"Old Guideline"	"New Guideline"
$18,000.00	$148.00	$111.00
$70,000.00	$608.00	$592.00

[93] On a pure "set-off" approach, Mr. Cunningham would be required to pay $460.00 prior to December 31, 2011, and $481.00 thereafter. However, that is not the end of the analysis. The Court must also consider any increased costs associated with the parenting arrangement and the particular circumstances of the parties.

[94] Ms. Cunningham has been temporarily residing with her father. While not ideal, the arrangement has had economic benefits. It is not, however, reasonable to expect Ms. Cunningham and AJ to stay there indefinitely. They will need to find suitable housing which not only meet their needs, but is conducive to the shared

parenting arrangement. Additionally, for several more months, Ms. Cunningham's ability to seek full-time employment will be hampered by her educational pursuits. Accordingly, I do not view a straight "set-off" as requested by Mr. Cunningham as being appropriate. Accordingly, I order that effective January 1, 2012, and continuing on the 1st day of every month thereafter, Mr. Cunningham shall pay child support to Ms. Cunningham in the amount of $525.00. Recognizing that Ms. Cunningham will be seeking employment following completion of her college program, either party may, after September 1, 2012, bring the matter back before the Court to determine whether there has been a change in the parties' respective incomes. Of course, nothing prevents the parties from negotiating an agreeable variation, should they wish.

[95] I further order that effective January 1, 2012, each party shall contribute to AJ's extraordinary, extracurricular and educational expenses. At present, this shall be divided on a 75/25 percent basis, given the disparity in the parties' incomes. This determination shall also be reviewable after September 1, 2012 upon application by either party.

[96] I turn now to contemplate the issue of retroactive child support. Mr. Cunningham did not make payment from the date of separation to June 2010.

Based on income of $70,000.00 per annum, and application of the “old” Guidelines, base child support would be placed at $608.00 per month.

[97] From the evidence, I understand Mr. Cunningham had AJ on an equal basis during the summer of 2010 and paid child support during that time frame of $500.00 per month. Shortly thereafter, the parties agreed to a monthly payment of $383.00 which has continued to present.

[98] Undoubtedly, Ms. Cunningham was entitled to receive child support for AJ following the separation. None was paid, but it does not appear as if it was aggressively pursued. The Court is mindful however, that support is the right of the child, not the parent. Ms. Cunningham’s failure to aggressively pursue support during this time frame does not create a bar for its consideration now. However, it is clear from the Interim order, that retroactive support was a “live” issue between and parties.

[99] The Court, however, is also mindful of several other factors. I am satisfied on the evidence that during the same time frame following the separation when support was not being paid for AJ’s benefit, Ms. Cunningham’s son was in Mr.

Cunningham's primary care. I am further satisfied that Ms. Cunningham during a significant portion of this time, collected child support for Adam from his father in excess of $400.00 per month. At some point, it would appear in the fall of 2010, Adam started receiving financial support directly from his father. Although during this time, Adam was going "back and forth" between Mr. Cunningham and his mother, I find he still spent considerable time in Mr. Cunningham's care. Mr. Cunningham never received, nor sought from Ms. Cunningham or anyone else, financial contribution relating to the care of his step-son.

[100] Additionally, I am satisfied that since the separation, Mr. Cunningham voluntarily contributed towards the educational and post-secondary expenses of his step-children. These costs were substantial, in excess of $10,000.00. Some of these expenses were shared with their father. Clearly, Mr. Cunningham had no legal obligation to support his older step-children, but he did. This does not alleviate his primary legal obligation to support AJ; however, his contributions should not go unnoticed, as they certainly removed a financial burden from Ms. Cunningham during this period.

[101] Based upon the evidence and circumstances before the Court, I determine that an appropriate amount of retroactive support would be $1000.00. For clarity, this would be in addition to the arrears accumulated from January 1, 2012 to the date of this decision due to the increase in child support from $383.00 to $525.00 monthly.

SPOUSAL SUPPORT:

Position of the Parties:

[102] Ms. Cunningham is seeking indefinite support in the amount of $750.00 per month. She submits that her right to support is both compensatory and non-compensatory in nature. Mr. Cunningham asserts that there is no basis for spousal support in this case.

The Law:

[103] Section 15.2 of the **Divorce Act, supra**, founds a claim for spousal support. The following provisions are particularly relevant:

> 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
> …

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

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

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

…

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

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

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

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

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

[104] The Supreme Court of Canada has clarified the basis upon which a claim for spousal support can be based. In **Bracklow v. Bracklow** [1999] 1 SCR 420, the Court confirmed that entitlement to support can flow from three conceptual grounds: (1) compensatory; (2) contractual; or (3) non-compensatory. A claim for support may be based on one, some or all of these grounds.

[105] In the recent decision **Foster-Jacques v. Jacques**, 2011 NSSC 124, Justice MacDonald nicely summarizes the considerations in play with compensatory and non-compensatory claims. She writes:

> 7 Examples of circumstances that may lead to a decision that a spouse is entitled to compensatory support are:
>
> a) a spouse's education, career development or earning potential have been impeded as a result of the marriage because, for example:
>
> -- a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;
>
> -- a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;
>
> -- a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons.
>
> b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.
>
> 8 Non-compensatory support incorporates an analysis based upon need and ability to pay. If spouses have lived fully integrated lives, so that the marriage creates a pattern of dependence, the higher-income spouse is to be considered to have assumed financial responsibility for the lower-income spouse. In such cases a court may award support to reflect the pattern of dependence created by the marriage and to prevent hardship arising from marriage breakdown. L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra,* at p. 390:
>
> > Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin* (1991), [1991] P.E.I.J. No. 128, *and Linton v. Linton, supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party.

> As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "*Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)*", supra, at pp. 174-75). (emphasis added)

9 It is not clear from Justice L'Heureux-Dubé's, decision whether entitlement arising from a "pattern of dependence" is compensatory or non-compensatory. This pattern of dependence may create a compensatory claim because it can justify an entitlement even though a spouse has sufficient income to cover reasonable expenses and might be considered to be self-supporting. This often is described as the "lifestyle argument" -- that the spouse should have a lifestyle upon separation somewhat similar to that enjoyed during marriage. (*Linton v. Linton* [1990] O.J. No. 2267, 1990 CarswellOnt 316 (Ont. C.A.) A lengthy marriage generally leads to a pooling of resources and interdependency even when both parties are working. Often the recipient spouse will never be able to earn sufficient income to independently provide the previous lifestyle. This may form the basis of a compensatory claim but does not necessarily entitle a spouse to lifetime spousal support. The essence of a compensatory claim is that eventually it may be paid out. This leads to a discussion about the quantum and duration of the claim.

10 Once it is decided that a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse. In considering the condition, means, needs and other circumstances of each spouse one may examine the division of matrimonial property and consider the extent to which that division has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage and its breakdown and any continuing need the spouse may have for support arising from other factors and other objectives set forth in s. 15(2). (*Tedham v. Tedham* [2005] B.C.J. No. 2186, 2005 CarswellBC 2346 (B.C.C.A.))

Determination:

[106] In the present instance, there is no claim for contractual support. I will address however, whether there is a compensatory claim in the present instance.

[107] The parties were 36 and 37 years of age when they married. Ms. Cunningham had been married and divorced. She retained assets from that union. Perhaps more importantly, prior to the marriage Ms. Cunningham juggled the responsibilities of running a household, raising three children and working on a full-time basis outside of the home. After the marriage, this role, in my view, did not materially change. Although AJ's birth added more responsibilities, she still ran a household, cared for children and held down employment.

[108] It is also worthy of note that the employment undertaken by Ms. Cunningham during the marriage was not menial. She held management positions, and also started her own business. She also was able to undertake educational pursuits during the marriage and attended for a year at the Nova Scotia Community College in Springhill. During the marriage, there were times when Ms. Cunningham's taxable income was as high, or greater than Mr. Cunningham's.

[109] I do not accept that the role undertaken by Ms. Cunningham during the marriage was materially different than those she had undertaken before. I further cannot accept that her career or educational opportunities were impeded by virtue of the marriage or her role in it. Ms. Cunningham submits she has been limited in her employment opportunities by virtue of residing in Pugwash and caring for the

children. Given that Ms. Cunningham lived, worked and cared for children in the Pugwash area prior to the marriage, I place no weight in this argument.

[110] Ms. Cunningham before, during and after the marriage was an articulate, intelligent and hardworking individual who managed to successfully juggle children, home and work. I see no impediments created by virtue of the nine year marriage to Mr. Cunningham.

[111] I turn now to consider whether there is a non-compensatory claim for support. Based upon my earlier findings with respect to income, Mr. Cunningham clearly earns more at the present time than Ms. Cunningham. However, the analysis cannot be concluded on that factor alone. Has this marriage created a financial dependency between the parties? I find that it has not. As noted above, these parties operated in a financially independent fashion during the marriage, notwithstanding they lived under the same roof. Ms. Cunningham did not depend on Mr. Cunningham for her financial well-being.

[112] Even if I am wrong in the above assessment, the Court has been provided with little meaningful evidence to assess Ms. Cunningham's financial needs. Although her budget information reflects her minimal expenses while residing with

her father, there is no proposed budget reflective of her residing with AJ in her own residence. Further, it is clear that Mr. Cunningham will need to finance the payout of the matrimonial settlement ordered herein, and will have an increased financial obligation due to the child support ordered herein. Although the parties did not provide the Court with an analysis in this regard, it is not entirely clear that Ms. Cunningham's financial circumstances will be such that she requires support. I am not prepared to award spousal support in these circumstances.

CONCLUSION:

[113] Based upon the foregoing, I conclude as follows:

(a) The parties shall share custody of the child Andrew John Cunningham (A.J.), born January 2, 2003;

(b) Commencing January 1, 2012, Mr. Cunningham shall pay to Ms. Cunningham for AJ's support the sum of $525.00;

(c) Extra-ordinary expenses, extra-curricular expenses and school-related expenses shall be divided between the parties on a 75/25 basis;

(d) The determinations relating to monthly support and contribution towards expenses are reviewable upon application by either party after September 1, 2012;

(e) Mr. Cunningham shall pay retroactive-child support to Ms. Cunningham in the amount of $1,000.00;

(f) In order to effect the matrimonial property division as outlined herein, Mr. Cunningham shall pay to Ms. Cunningham the sum of $72,984.81; and

(g) There shall be no spousal support paid by either party.

[114] I would ask that Mr. Berliner take the lead in drafting an order. Should the parties be unable to reach agreement with respect to costs, I would request written submissions be provided no later than March 23, 2012.

J.