<u>SUPREME COURT OF NOVA SCOTIA</u>
(Family Division)
Citation: Strecko v. Strecko, 2013 NSSC 49

Date: 20130207
Docket: 1201-063118
Registry: Halifax

Between:

Jane Wagner Strecko

Applicant

and

Brian Frank Strecko

Respondent

Judge: Associate Chief Justice Lawrence I. O'Neil

Date of Hearing: November 19, 20 and 21, 2012

Counsel: M. Jean Beeler, Q.C., counsel for Ms. Strecko
B. Lynn Reierson, Q.C., counsel for Mr. Strecko

By the Court:

Introduction

[1] The parties married on August 3, 1985, separated October 21, 2008 and were divorced by order dated March 17, 2011. They were in a common law relationship for two years prior to marrying.

[2] They have two sons, Jarek, born in January 1991 and Stefan, born in October 1992. The older boy will begin a full year of employment with Suncor on December 29, 2012 as part of the co-op engineering program at Dalhousie

University. He will earn between $60,000 and $90,000 in 2013. The younger son is in his second year of studies, also at Dalhousie. He refuses to communicate with his father. He lives with other young people in the Bedford area and spends weekend time at his mother's in the Boutilier's Point area, a region just outside the City of Halifax.

[3] The parties' Corollary Relief Order 'CRO' also issued March 17, 2011. It incorporates Minutes of Settlement dated April 29, 2010 hereinafter referred to as 'Minutes'. The 'CRO' did not issue until March 17, 2011. The 'Minutes' were arrived at following a settlement conference. Mr. Strecko was ordered to pay spousal support of $3,500 and child support of $2,525.26 reflecting an income of $333,383. Ms. Strecko's income was set at $60,000 (inclusive of $42,000 spousal support).

[4] Under the heading 'Spousal Support' clause 26 of the 'Minutes' provided that . . . "On or after July 2012, issues of spousal support entitlement, quantum and duration may be reviewed".

[5] The subject proceeding was initiated by a Notice of Variation Application filed by Ms. Strecko on November 29, 2011. Pursuant to s.17 of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) she sought changes to child support and spousal support. A later Notice of Motion for Contempt Order filed January 25, 2012 was withdrawn by her. Mr. Strecko filed a Response to the Variation Application on January 20, 2012. He sought changes to the child support obligation and a termination of spousal support effective July 1, 2012.

[6] Issues

1. What is Mr. Strecko's ongoing obligation to provide child support for the parties' younger son? (para. 7):

   (a) the general circumstances of the two adult children (para 7)
   (b) child support guidelines (para 15);
   (c) Mr. Strecko's income (para. 62); and
   (d) Stefan's current and past residence and educational expenses (para 73).

2. What is and has been the obligation, if any, of each party to provide funding for the younger child's post secondary education expenses? (para. 83)

3. Does Mr. Strecko have an ongoing spousal support obligation? (para. 87) A related issue is whether income should be imputed to Ms. Strecko? (para 104)

4. If ongoing spousal support is ordered, what is the quantum and duration?

5. Are there arrears of child support owed by Mr. Strecko? If so, what is the amount? (para. 112)

Issues One and Two: Ongoing child support and special expenses

(a) circumstances of the two adult children

- the older son

[7] The older son Jarek is independent. Mr. Strecko has provided assistance to him through his university training. This son attended a year of university studies in British Columbia, then returned to Dalhousie and is enrolled in the co-op engineering program. His work term will be one year commencing December 29, 2012 and it is anticipated that he will earn $60 - $90,000 during this time, working for Suncor in Fort McMurray, Alberta.

[8] The parties 'CRO' relieved Ms. Strecko of any obligation to contribute to the cost of Jarek's university education. Mr. Strecko agreed to meet the obligation on terms agreed to with Jarek. I note Mr. Strecko did not pay for all of his son's university education. Jarek contributed from summer earnings and borrowed on a Scotiabank line of credit, co-signed by his father. In addition, a modest contribution of less than $1,500 was made from an RESP.

- the younger son

[9] The younger son Stefan is a second year student at Dalhousie. In his first year he was a member of the Dalhousie football team. He suffers from cystic fibrosis, a condition characterized by mucus build up in organs, most notably lungs. In early 2012, Stefan was hospitalized and had a 'lung tune up' which means his lungs required special treatment. This treatment is common for cystic fibrosis patients. However, it was the first time Stefan was required to undergo the treatment. Also, in early 2012, Stefan was found to be carrying an often lethal bacteria, Cepacia and focussed medical treatment was required to treat his condition.

[10] On a daily basis, Stefan must care for himself. Self care involves the preparation and scheduling of medications he must inject. He must self administer daily masks for inhalation therapy and practice ‘lung physio’.

[11] Notwithstanding the foregoing, neither party suggested Stefan is not currently capable of being a fully productive citizen. Photos of him provided to the Court (Exhibit #9) and taken during a trip to the Dominican Republic in early 2012, show a 21 year old enjoying spring break.

[12] A determination of the appropriate level of ongoing child support payable and related to Stefan is not straightforward. He is over the age of majority and attending university in Halifax. He shares an apartment in Halifax. His mother says he spends weekends with her. As a result, she says Mr. Strecko should be required to pay her the full table amount of child support of $3,186 per month, reflecting an income of $408,750 in 2012.

[13] She also argues that 80% of Stefan’s university expenses should be paid by Mr. Strecko. Mr. Strecko counters that Stefan lives on his own, that he is essentially ‘away’ at university and no child support should be paid by him. Mr. Strecko agrees Stefan does not currently reside with him.

[14] Ms. Strecko claims ongoing child support for 2012 to the end of November 2012 of $35,046 less $27,778.96 already paid, for a shortfall of $7,267.14 to the end of November 2012. Mr. Strecko says his child support obligation did increase but the ‘MEP’ office returned his cheques for the higher amount because the office had commenced garnishment proceedings to get the disputed payments attributable to October and November of 2011. He agrees, the garnished amount is less than that which he must pay because of changes in his income. ‘MEP’ is acting on the 2010 order (‘CRO’). No other order is in place and ‘MEP’ will not on its own initiative recalculate. Consequently Mr. Strecko’s cheques for a higher amount were returned to him.

(b) child support guidelines

[15] The Federal Child Support Guidelines, P.C., 1997-469 are referred to herein as the ’CSG’. The ‘CSG’ establish child support tables and these are referred to as “the tables” or some obvious modification of this description.

[16] Section 3(2) of the ‘CSG’ permits the court to deviate from the Child Support Tables when a child of the marriage is over the age of 19 and the court considers the application of the tables to be inappropriate “having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child”. A child support order for a child over 19 may not require any child support in certain circumstances or the order may require the payment of the full table amount. This might be the case when a child is at university and contributions are being made in the form of education assistance or when the child is at home and attending university. The table amount is the presumptive amount but the presumption is rebuttable (*Pollock v. Rioux* 2004 NBCA 98). Sub sections 3(1) and (2) of the ‘CSG’ provide:

> Presumptive rule
>
> 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.
>
> Child the age of majority or over
>
> (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> > (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
> >
> > (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[17] Clearly, once a child reaches the age of majority, a greater degree of court scrutiny of the child’s need is mandated than for a child under the age of majority. Such a change in approach is understandable given the desirability of holding young adults accountable; demanding financial responsibility from them and

demanding that these young adults contribute to meeting their needs. Coincidental with a parent's desire to demand more independence of their children, young adults are often clear in demonstrating independence from their parents.

[18] Nevertheless, jurisprudence requires a balancing of society's interest in assisting young adults to maximize their educational opportunities with the need to demand that adults demonstrate responsibility and the need to afford parents afforded some discretion to limit their financial obligations to adult children. For many parents there are legitimate and laudable non financial reasons a parent may want to limit assistance to an adult child. Provided the explanation is reasonable, a court should show some deference to a parents' point of view. In *Nova Scotia (Community Services) v. A.A.* 2009 NSSC 206 I was required to comment on the nature of the parental interest beginning at paragraph 11:

> -The Parental Interest
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> [11] I am mindful of the views of the Supreme Court of Canada in the *R.B. v. Children's Aid Society of Metropolitan Toronto* [1994] S.C.J. No. 24, also reported 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315. This case involved a discussion of religious freedom and whether parents could decide to withhold certain medical treatment; in that case, blood transfusions from their children. The case resulted in a discussion of whether the role of the parent or the liberty interest of the parent in that context is protected by s.7 of the Charter.
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> [12] The court was not unanimous. However, there was agreement that the role of a parent is one of the most significant roles a person can have and a parent has accompanying rights that should be protected, whether we talk of s.7 or we use other language. I reference this discussion because it reinforces the importance of fundamental justice in this case. Fundamental justice is always important. It is always important that this right be closely guarded, but when the issue under consideration is that of one's parenting choices, the courts must be particularly vigilant. At paragraph 83, Justice La Forest stated:
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>> [83] On that basis, I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent.
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> He writes in the same paragraph:
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>> This recognition was based on the presumption that parents act in the best interest of their child. The Court did add, however, that "when through a failure, with or without parental fault, to furnish that protection, that welfare is threatened, the community, represented by the Sovereign, is, on

> the broadest social and national grounds, justified in displacing the parents and assuming their duties."

[13] Chief Justice Lamer, in the *Minister of Health and Community Services v. G.(J.)* 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46 at paragraph 61 stated:

> [61] I have little doubt that state removal of a child from parental custody pursuant to the state's parens patriae jurisdiction constitutes a serious interference with the psychological integrity of the parent. The parental interest in raising and caring for a child is, as La Forest J. held in *B. (R.), supra*, at para. 83, "an individual interest of fundamental importance in our society". Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere. Further, the parent is often stigmatized as "unfit" when relieved of custody. As an individual's status as a parent is often fundamental to personal identity, the stigma and distress resulting from a loss of parental status is a particularly serious consequence of the state's conduct.

At paragraph 76 he continued:

> [76] The interests at stake in the custody hearing are unquestionably of the highest order. Few state actions can have a more profound effect on the lives of both parent and child. Not only is the parent's right to security of the person at stake, the child's is as well. Since the best interests of the child are presumed to lie with the parent, the child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship.

[19] Herein Mr. Strecko expressed concern about his son's apparent sense of entitlement to a trip to the Dominican Republic to be funded by Mr. Strecko. An adult child who remains "dependent" need not typically be viewed as without resources to help himself. That is particularly true of young adult children attending university, persons who by virtue of their status as university eligible students have achieved a level of success and presumably possess personal resources to assist them in meeting their financial needs.

[20] The parties, herein, agreed that post secondary education costs would not be an obligation of the parents after completion of one post-secondary course or university degree. As stated they also agreed that Jarek's post secondary education costs were the responsibility of Mr. Strecko and Jarek. Ms. Strecko was

relieved of an obligation as between the parties. Clause 20 and 21 of the Minutes provide:

> **Post Secondary Education**
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> 20. Jarek's post-secondary education expenses for his first degree or program shall be paid by the Father and Jarek as agreed between them. The Mother shall not be required to contribute to Jarek's post secondary school expenses. Any obligation to support a child attending a post-secondary educational institution shall cease after the child has completed one post-secondary course or university degree.
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> **S.7 Expenses**
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> 21. The parties shall each pay their proportionate share of s.7 expenses for the children (except Jarek's University expenses as set out above). Expenses for Stefan's Canada Games level training is acknowledged to be a shareable s.7 expense. Each parent shall be consulted about and approve any such expenses prior to the expense being incurred, such approval shall not be unreasonably withheld.

[21] The parties have asked the court to determine what contribution each parent must make to the cost of Stefan's university education. This requires the court to determine his financial need and his parents' incomes. Ms. Strecko provided some information as to Stefan's need with her affidavit (Exhibit #1, para, 55, tab k).

[22] Section 7(1)(e) of the 'CSG' provides as follows:

> Special or extraordinary expenses
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> 7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> . . . . .
>
> (e) expenses for post-secondary education; and
>
> . . . . .

[23] Sections 7(2) and (3) of the 'CSG' suggest that the s.7 expense be shared proportionately between parents and that the amount of the expense be determined after considering subsidies and tax benefits, etc. Section 7(2) also requires the court to deduct, "from the expense, the contribution if any, from the child":

> Sharing of expense
>
> (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
>
> Subsidies, tax deductions, etc.
>
> (3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

[24] As noted, the parties agree that the special university expenses for Stefan are to be proportionately shared (para. 20 *supra*).

[25] The language of s.7 of the guidelines dealing with the payment of special expenses for a child, is very different from the mandatory calculations of s.3 and s.4 when the amount of child support is to be determined.

[26] The s.7 amount is (1) discretionary, the word "may" is used. The amount may be (2) for all or a portion of the expense and the court (3) may assess the necessity of the expense and its reasonableness, given the means of the parents. The amount arrived at is also to be (4) shared on a proportionate basis by the parent after (5) deducting any contribution from the child.

[27] This litigation focuses *inter alia* on what should be ordered as a contribution, by the parents, to their son's post secondary educational costs, a special expense described in s.7(1)(e).

[28] The Court must also determine the quantum of child support because the presumptive rule of s.3 of the Guidelines is impacted by the fact that the son is (1) over the age of majority; (2) attending university; and (3) the payor earns more than $150,000 per year. The table amount; the presumptive amount is rebuttable.

[29] Section 4 of the 'CSG' also provides that a child support order may be in an amount different than the table amount where, "the income of the spouse against whom a child support order is sought is over $150,000" if certain conditions exist. Section 4 provides as follows:

> Incomes over $150,000
>
> 4. Where the income of the spouse against whom a child support order is sought is over $150,000, the amount of a child support order is
>
> (a) the amount determined under section 3; or
>
> (b) if the court considers that amount to be inappropriate,
>
> (i) in respect of the first $150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
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> (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
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> (iii) the amount, if any, determined under section 7.

[30] Herein, the payor parent has an income greater than $150,000. In her summation, counsel for Ms. Strecko says it was projected to be $430,500 in 2012. At the time of his evidence, Mr. Strecko said his 2012 earned income was projected to be approximately $300,000 plus taxable dividend income of $90,000. His 2011 line 150 income was $466,431.05. His 2012 income was approximately $430,500.

[31] The Supreme Court in *Francis v. Baker* 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250 recognized that a child support payment based on the tables may be so far in excess of the children's needs, even when the paying parent can afford the large amount, that the payment no longer qualifies as child support. It is acknowledged that the reasonableness of need is also a function of what the paying parent can afford. A trial judge has a broad discretion when deciding, in the case of very high income earners, whether the budgeted expenses are so high as to "exceed the generous ambit within which reasonable disagreement is possible".

[32] I am required to determine whether any child support should be payable to the payee parent even when the child is away at university.

[33] Our Court of Appeal in *Lu v. Sun*, 2005 NSCA 112 discussed principles governing a determination of child support when the subject child is attending university. The Court upheld a trial Judge's ruling requiring that one half the table amount be paid while the child is away at university.

[34] In *Niles v. Munro*, 2010 NSSC 221 and *Provost v. Marsden*, 2009 NSSC 365, I was required to consider the payment of child support and special, i.e. university expenses for adult children, as in this case, when the payor parent's income is greater than $150,000 and the child is away at university for all or part of the week and university year.

[35] In *Provost v. Marsden*, 2009 NSSC 365 (CanLII), 2009 NSSC 365, counsel proposed that child support would be payable over the summer, i.e. between semesters while the child was living with a parent but not if the child was living elsewhere. I accepted counsel's submission. It was an obvious and fair recommendation. Counsel in that case also recommended that during the school year, either child support or the parents' proportionate sharing of the university expenses for a child was a fair resolution of the child support/special expense issue. I was also in agreement with that suggestion. In that case, the child lived away at university. In the language of s.3(2) of the 'CSG', a straight application of the Guidelines would have been "inappropriate".

[36] In *Niles v. Munro*, the Court assessed the son's contribution to meeting the cost of his university education as 70% of his take home pay while working 'over the summer' assuming he was living at home. If he lived on his own over the summer, his contribution was set at 25% of his take home pay. No child support was ordered for the period when the son was away at university. However, it was ordered for the period he was at home, if any, over the summer.

[37] In a recent decision, Justice Wilson was called upon to consider the child support obligation of a parent earning more than $150,000; to determine the earning capacity of the payor parent given the existence of shareholder's loans and finally, to determine the appropriate level of child support, if any, for an adult child away at university (*Eyking v. Eyking*, 2012 NSSC 409).

[38] Justice Wilson concluded no Schedule III adjustments to the payor's "total income" shown in the T1 General Form were necessary.

[39] Justice Wilson imputed income of $309,726 which represented the payor's 2009 income. The payor's income in 2010 was $175,000; $225,000 in 2011 and $364,596 in 2008. Justice Wilson found the reduction in income shown after 2009 was not reasonable and the payor had a higher earning capacity than that shown on his most recent tax return.

[40] Justice Wilson reduced the monthly child support obligation by $500 per month when the minor children were away at university (para. 46). (In *Eyking*, the payee parent agreed that the full table amount was inappropriate for minor children away at school.)

[41] However, with respect to the calculation of child support for the adult children, Justice Wilson concluded as follows at paragraph 56:

> [56] I find the amount of child support requested by the Petitioner of $500.00 per month per adult child while attending university away from home and $1,000.00 per month per child while residing with her during breaks from school to be reasonable. I note that these amounts are only 27% and 54% of the table amount for two children based on the Respondent's income.

[42] As stated, the Court's jurisdiction to deviate from the table amount presumed by s.3(1) of the Guidelines is found in s.3(2) which limits the mandatory direction to children under the age of majority and which empowers the Court to exercise discretion when the payor's income is over $150,000 (s.4 of the Guidelines).

[43] As stated, Mr. Strecko is responsible for Jarek's post-secondary education costs for his first degree, as agreed to with Jarek. Jarek has contributed to meeting that cost with employment earnings and borrowing on a line of credit.

[44] The obligation to pay child support and to contribute to special expenses for a child, when a child is attending university are related obligations. A contribution under one heading may eliminate or reduce an obligation that would otherwise exist under the other heading. For example, contributing to the cost of a child living away from home is a contribution to the shelter costs of the child and

the potential cost to the other parent and relevant to determining what, if any, child support is payable.

[45] Mr. Strecko argues that any support he is ordered to pay should be paid to his son directly. The authority for doing so is reviewed in *Glaspy v. Glaspy* 2011 NBCA 101. It is acknowledged that it is unusual to order child support to be paid directly to a child. The policy basis for the Court's reluctance is a desire to avoid involving children in this issue and the accompanying conflict and the need for the parent incurring the expenses related to rearing a child to be receive a contribution for the other parent.

[46] I agree that the Court must be reluctant to order child support to be paid to the child, given that the child support payments are to meet some of the parenting costs of the payee parent and associated with the child 'living' in the payee's parent's home all or part of the time. I comment more on this issue beginning at para. 73 following.

[47] Clause 17 of the parties' Minutes ('CRO') provided for the payment and ongoing recalculation of child support for Stefan, the younger child:

> Child Support
>
> 17. In accordance with the Child Support Guidelines table and based on his income as set out in paragraph 5 of this agreement, the Father shall pay child support to the Mother for Stefan in the amount of $1,529.00 per month payable on the first and fifteenth of each month in equal installments for the months of January through July. On or before August 1, the Father shall advise the Mother of his annualized income for the year (from his base salary plus bonus and dividends paid prior to August 1st). The Father shall "top up" the child support in a lump sum payment on August 1st for the months of January through July and monthly child support payable on the first day of August through December shall be based on the Father's annualized income for the year. The Father shall provide a copy of his T-4 to the Mother along with any further "top up" of child support for the previous calendar year. If upon receipt of the Father's T-4 it is determined that he has over paid child support for the previous year the amount of the overpayment shall be paid by the Mother to the Father in twenty four (24) equal bi-weekly installments. The table amount shall cover all of the Father's obligation for Stefan's expenses not otherwise set out in this agreement. So long as Stefan lives at least 40% of his time with the Mother then the table amount of child support shall be payable by the Father to the Mother.

[48] The 'CRO' that ultimately issued almost one year after this agreement called for the payment of child support of $2,525.26 payable monthly by Mr. Strecko, effective August 1, 2010. The increase from $1,529 payable monthly reflected the inclusion of bonus and dividend income when determining the table amount of child support.

[49] Clause 17 provides that the table amount of child support shall be payable so long as Stefan lives at least 40% of his time with his mother. Clause 17 does not describe how this will be determined. The parties accept that it will be on a calendar month basis. I am prepared to accept their conclusion as a reasonable interpretation of their agreement.

[50] The 40% 'trigger' of clause 17 is relevant to an assessment of Mr. Strecko's child support obligation over the fall of 2011 when Stefan lived with his father and also to the current period when Stefan is 'living' in the city of Halifax and attending University and spending some week end time with his mother.

[51] As stated, the 'CRO' provided that Mr. Strecko's 2010 income for child support purposes was $333,383.00 and Ms. Strecko's income for purposes of calculating her contribution to special expenses was $60,000 in 2010, consisting of $18,000 in employment income and $42,000 of spousal support.

[52] As stated, Mr. Strecko's child support was set by the 'CRO' at $2,525.36 commencing August 1, 2010 plus a separate contribution to special expenses.

[53] The evidence establishes that Mr. Strecko did provide some direct financial assistance to the older son; that he also co-signed a line of credit to assist the older son in financing his post-secondary education and finally the older son is charged with contributing to meeting a part of the cost of his post secondary education. No complaint was made, as far as the Court is aware, about the manner in which the older son's post-secondary education costs were met by Mr. Strecko. In my view, the sharing of responsibility with the older son as evidenced by this arrangement was within the acceptable range of possibilities and a clearly reasonable sharing of responsibility within this family.

[54] The arrangement followed and accepted for the payment of the university costs for the older son is of value as a reference when the sharing of financial responsibility for the younger son's university costs must be determined. Clearly,

in this family an onus is placed on the children to contribute to the cost of their university education.

[55] I have concluded that Stefan is principally and ordinarily resident in the City of Halifax while he attends university. He is not and could not be the financial burden to his mother that he would be if still living with her. Nor am I persuaded that his mother's decision to continue to live in the former family home can be justified as made necessary by a need to provide for Stefan.

[56] I am not able to conclude how much time Stefan spends at his mother's home on week-ends or to put it differently, how many partial or full weekends he spends there during the school year. I am satisfied that over the academic year he does not live with his mother 40% of the time as that language is used in clause 17 of the 'CRO' supra. I am satisfied that Ms. Strecko agreed that the full table amount of child support would not be payable in such a circumstance.

[57] Not all parenting expenses can be the subject of a court order requiring the other parent to cost share. It is not reasonable for parents to be asked to contribute twice for a child's weekend living costs.

[58] For the period of the university academic year, September-April, I am not prepared to order both child support and a proportionate sharing of university costs, which costs include room and board in an apartment, within commuting distance of his mother's residence.

- school year

[59] The payment of the table amount of child support to Ms. Strecko for all months during the school year is inappropriate as a consequence. However, I am prepared to order child support payable for December 2012, February 2013 and April 2013 at a rate of $1,000 per month to reflect Stefan's anticipated increased time at his mother's home over the Christmas break, the winter break and during the month of April, when exams are typically written. I take judicial notice that during these three periods of the academic year students spend more time at home because the school obligations are lessened. I consider this to be an appropriate award of child support in the circumstances. This obligation is effective January 1, 2013. I am satisfied that ordering Ms. Strecko to repay any overpayment of child support relating to the period prior to January 1, 2013 would represent a

hardship. However, the over payment found to exist for the period September 2012 to December 2012 may serve as an offset to her claim for arrears, should those arrears be found to exist.

- summer break

[60] For other months during the academic year, September - April, child support will not be payable by Mr. Strecko. For the months of May - August inclusive, the full table amount of child support will be payable by Mr. Strecko if Stefan is living full time with his mother. The amount of child support will be calculated as provided for by clause 17 supra. If Stefan is not living full time with his mother, he shall receive child support directly from his father at the rate of $1,000 per month for this four month period and the other eight months of the year, this amount is to be paid directly to him as a contribution to Stefan's education expenses.

[61] The task of determining Mr. Strecko's income for child and spousal support purposes and determining his contribution to Stefan's university expenses remains.

(c) Mr. Strecko's income

[62] The parties disagree on what Mr. Strecko's income was for each of a number of recent years. Ms. Streko argues that Mr. Strecko's income should be the sum of his salary; bonus and grossed up taxable dividends. She does not seek the inclusion of Mr. Streko's non taxable dividends in the calculation. I am prepared to accept that method of calculating Mr. Streko's income.

[63] Mr. Strecko explains dividend income included in his line 150 income is not actually "received" by him. He is required to apply it to the repayment of loans from the company, which loans are used to purchase the shares. At paragraph 50, 52, 54, 55 and 56 of his affidavit (Exhibit #11) Mr. Strecko describes how his income is calculated from time to time:

> 50. My income is comprised of my base salary, yearly profit sharing and dividends paid out on my EllisDon Shares. I typically receive a three percent raise every year in my base salary.
>
> . . . .

> 52. The Atlantic Region has had a huge swing (up and down) in profit sharing over the last several years. In 2007 my profit sharing (which was paid in June 2008) was $75,000.00. In 2008 my profit sharing (which was paid in June 2009) was $75,000.00. In 2009 my profit sharing (which was paid in June 2010) was $100,000.00. In 2010, my profit sharing (which was paid in June 2011) was $170,000.00. In 2011, my profit sharing (which was paid in June 2012) was $100,000.00. Based on current projections, my anticipated profit sharing for 2012, which will be paid in June 2013, will be less than $30,000.00.
>
> . . . . .
>
> 54. EllisDon provides employees with the opportunity to purchase shares at certain intervals in their career. The shares are financed by 10-year interest-free corporate loans, which are repaid by dividend payments. Dividends are paid in January and July every year; however, the dividends are not actually paid to the shareholder until the corporate loan has been repaid in full. I currently owe EllisDon approximately $212,150.00 for the loans I have used to finance my various share purchases. Therefore, I do not actually receive the dividends - they go directly back to the company. However the grossed up dividends are included in Line 150 of my Tax Return and are included in the calculation of child support. It will be at least several more years before I receive the benefit of the dividends.
>
> 55. As the paragraph above demonstrate, the only income that I can fully count on to pay my expenses is my base salary, which is $193,700 for 2012. Given past company yearly salary adjustments I anticipate that I will receive a three percent raise in June 2013, retroactive to April 1st, which will bring my salary to $199,511. Based on 2012 tax rates, my net monthly pay in 2013 will be $10,113.33. I will also receive profit sharing in June, which based on current projections should be approximately $15,000.00 after tax. My dividends will go back to the company to repay the corporate loan.
>
> 56. I currently pay $3,500.00 in spousal support. Child support based on my 2013 projected total income of $285,000.00 will be $2,246.00. The combined totals payable to Jayne will therefore be $5,746.00, more than 50% of my available income.

[64] Ms. Strecko (Exhibit #1, para 66) describes Mr. Strecko's income progression:

> 66. Mr. Strecko's income(s) since 2005 has been $149,325.00 (2005), $159,849.00 (2007), $236,410.00 (2008), $299,385.00 (2009), $363,651.00 (2010), $466,431.00 (2011).

[65] In early 2012, Mr. Strecko had $5,050.26 of his income garnished ; an amount representing child support for the months of October and November 2011.

This was arrived at on the basis of the 2010 order that required him to pay child support of $ 2,525.36. The garnishment did not apply to the spousal support.

[66] The 'MEP' records the amount due as $3,012.68 payable each month (Tab J of Exhibit #1).

[67] Section 16 of the Guidelines provides:

> Calculation of annual income
>
> 16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

[68] Section 16 directs that a spouse's income is determined by using the sources of income set out under the heading "Total Income" in the T1 General Form and as adjusted in accordance with Schedule III. The T1 General Form identifies the sources which make up total income as:

(a) employment income;
(b) other employment income;
(c) old age security pension;
(d) Canada or Quebec Pension Plan benefits;
(e) disability benefits;
(f) other pensions or superannuation;
(g) unemployment insurance benefits;
(h) dividends; *(emphasis added)*
(i) interest and other investment income;
(j) partnership income;
(k) rental income;
(l) capital gains;
(m) registered retirement savings plan income;
(n) other income;
(o) business income;
(p) professional income;
(q) commission income; (*emphasis added*)
(r) farming income;
(s) fishing income;
(t) workers' compensation payments;
(u) social assistance payments; and
(v) net federal supplements

Source: Income Tax Act, R.S.C. 1985, c.1 (5th Supp.) as amended: Part 1-Income Tax: Division B - Computation of Income

[69] Schedule III at s.3.1, 5 and s. 13 provides as follows:

3.1 **Special or extraordinary expenses** - To calculate income for the purpose of determining an amount under section 7 of these Guidelines, deduct the spousal support paid to the other spouse and, as applicable, make the following adjustments in respect of universal child care benefits:

(a) deduct benefits that are included to determine the spouse's total income in the T1 General Form issued by the Canada Revenue Agency and that are for a child for whom special or extraordinary expenses are not being requested; or

(b) include benefits that are not included to determine the spouse's total income in the T1 General form issued by the Canada Revenue Agency and that are received by the spouse for a child for whom special or extraordinary expenses are being requested.

. . . . .

5. **Dividends from taxable Canadian corporations** - Replace the taxable amount of dividends from taxable Canadian corporations received by the spouse by the actual amount of those dividends received by the spouse.

. . . . .

13.(1) **Employee stock options** - Where the spouse has received, as an employee benefit, options to purchase shares of a Canadian-controlled private corporation, or a publicly traded corporation that is subject to the same tax treatment with reference to stock options as a Canadian-controlled private corporation, and has exercised those options during the year, add the difference between the value of the shares at the time the options are exercised and the amount paid by the spouse for the shares, and any amount paid by the spouse to acquire the options to purchase the shares, to the income for the year in which the options are exercised.

. . . . .

[70] Once a spouse's annual income is determined under s.16, it may be determined that the method:

"would not be the fairest determination of that income and the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation of income or receipt of a non-recurring amount during those years". (s.17(1) of the Guidelines)

[71] In *Provost v. Marsden, supra*, I declined to consider bonus income received on the basis that it was non recurring. In *Leet v. Beach*, 2010 NSSC 433 capital gains and RRSP income were found to be non recurring. Mr. Strecko receives profit sharing, i.e. bonus income and he receives dividend income annually. These are appropriately considered as income for purposes of determining his child and spousal support obligations. They are recurring.

[72] The parties herein have provided a mechanism for factoring bonus and dividend income into the calculation of Mr. Strecko's child support obligation. The mechanism is described in Clause 17 of the 'CRO' (*supra* at paragraph 46).

(d) Stefan's current and past residence and educational expenses

Stefan's residence: September to November 2011; December 2011 to December 2012

[73] The evidence establishes on a balance of probabilities that for the period September - November 2011 inclusive, Stefan was residing with his father. No child support is payable by Mr. Strecko for this period. During this period, Stefan was a member of the Dalhousie football team.

[74] Mr. Strecko says Stefan discontinued living with him in late 2011 because Ms. Strecko pressured him to leave Mr. Strecko's home by telling him that if she lost child support, she would lose her home.

[75] I am satisfied that Stefan is caught in a financial battle between these parents. Each has a significant financial interest in this Court's child support ruling. As stated, the child support sought by Ms. Strecko is $3,186 per month for Stefan, this being the table amount of child support for a payor parent earning $408,750. This would be a tax free payment to Ms. Strecko and the payment of after tax income by Mr. Strecko. Mr. Strecko argues none is payable because Stefan lives independently.

[76] In early 2012, Stefan discontinued communication with his father. Prior to this period, I am satisfied that Stefan and his father had a good father son relationship with the bumps that come with it. Stefan's social habits were an ongoing concern for Mr. Strecko. However, over the summer of 2011 they visited

Boston and Toronto together and I am satisfied they had good trips. Over the fall of 2011, Stefan lived primarily with his father. Mr. Strecko took a keen interest in his son's participation on the Dalhousie football team.

[77] Late in 2011, the issue of where Stefan was living i.e. with his mother or father was placed squarely before him to decide. He became aware from both parents that his choice had significant financial implications for both parents. The resulting choice undoubtedly created stress for Stefan. In early 2012, his father refused to cost share Stefan's planned spring break trip to the Dominican Republic. Ms. Strecko picked up that portion of the cost.

[78] Stefan became increasingly ill in January and February, 2012. Mr. Strecko was not informed of his deteriorating health or subsequent hospitalization. He learned of both after the fact. When Stefan was hospitalized in late February 2012 after returning from his trip, he refused to welcome or communicate with his father. He declined later requests from Mr. Strecko to communicate.

[79] Getting caught in the middle is a description Courts often use to describe the vulnerability of children much younger than Stefan. However, the description aptly applies here. His estrangement from his father is inconsistent with their historical relationship and coincided with the emergence of the child support issue between his parents in late 2011. I am satisfied that the parents conflict over child support has significantly and negatively affected Stefan's relationship with his father.

[80] One is forced to ask what the impact of the parental conflict is on his health. I have no evidence on this point. One must also ask what impact Stefan's anxiety about his health has on his capacity to cope with being 'caught in the middle'. In addition to the daily challenges of living with cystic fibrosis, Stefan lives with the knowledge that his life expectancy is into his forties and knowledge that until then, he will continue to experience ongoing health problems. One can confidently infer that concern about his health is a significant burden for Stefan to carry.

[81] Mr. Strecko and Stefan should agree to counselling to reconnect. Based on the evidence presented they have a strong foundation for repairing their relationship. Extricating him from his role in determining whether his father pays child support or his mother receives it, is in his best interests. This can be

accomplished without diluting the policies and principles underlying the Child Support Guidelines.

[82] It is hoped that as a result of direct payments to him, Stefan will have the necessary financial and emotional independence to distance himself from any sense of responsibility to relieve either parent of the financial pressures they may be facing. The parents are directed to leave him out of their conflict and to seek financial relief without burdening Stefan with the implication for each of them when he decides on where to live.

- university costs for Stefan

[83] Mr. Strecko shall pay support of $1,000 per month directly to Stefan while he is attending university, and living away from his mother's residence. This shall also be paid between university years and is contingent on Stefan remaining a full time student. During the academic year this is characterized as a contribution to Stefan's special university expenses when he lives away from 'home'. Stefan will be responsible for paying his room and board to the university or a landlord. I note that Ms. Strecko's current partner contributes $1,000 per month and lives with Ms. Strecko full time.

[84] Mr. Strecko's additional support for Stefan shall be in the form of a partial payment of university expenses for Stefan. As stated supra, these are estimated to be $11,935 less $5,600 leaving a balance of $6,335.40 (Exhibit 1, tab K). Mr. Strecko shall pay $2,000 of this amount; Stefan $2,000 and Ms. Strecko $2,000. As stated, Mr. Strecko will also be paying $1,000 per month towards Stefan's room and board.

[85] To accurately determine what Stefan's contribution should be, an assessment of Stefan's need and available resources (including summer earnings) must occur. The Court does not have complete information and reserves the right to make a revised determination to permit a more exact assessment by the parties and by this Court if necessary.

[86] A parent seeking a contribution to special expenses for a child has a responsibility to provide the other parent with all financial disclosure relevant to the claim. To that end Ms. Streko is directed to provide a copy of Stefan's notice of assessment and tax return for the preceding year on or before June 1 of each

year; she is to also provide proof of enrolment for the forthcoming year; a copy of Stefan's academic record for the preceding year; a budget and statement of Stefan's current and proposed living arrangements.

Issues Three and Four: Spousal Support

[87] Mr. Strecko is asking that his obligation to pay spousal support be terminated. He argues that Ms. Strecko agreed to transitional support, a commitment later incorporated into the 'CRO'. He argues *inter alia* that this outcome was anticipated when the parties 'CRO' was issued and 'Minutes' signed. Clauses 25 and 26 of the 'Minutes' provide:

> **Spousal Support**
>
> 25. The parties acknowledge that the Wife requires spousal support. The support provided for in this agreement shall not be varied prior to the review date regardless of any change in either parties circumstances, including the Wife obtaining full time employment and/or an increase or decrease in the Husband's income.
>
> 26. Commencing for January, 2010, and continuing twice per month in equal installments coinciding with the Husband's pay deposits from Ellis Don, the Husband shall pay to the Wife, as an allowance for her maintenance and support, monthly periodic payments of $3,500.00. On or after July 1, 2012, issues of spousal support entitlement, quantum and duration may be reviewed. The Wife acknowledges her obligation to become economically self-sufficient so far as it is practicable and to make diligent and reasonable efforts in this regard. The parties are optimistic that the Wife will be self-sufficient on or before the review date. In order to facilitate the Wife achieving self-sufficiency as soon as possible, the Husband shall pay the sum of $1,200.00 US for the Wife's course so that she will be able to start the program at the earliest opportunity. The Wife shall provide a statement for the payment of the course fee upon receipt.

[88] In addition to his reliance on the language of the 'Minutes' Mr. Strecko points to submissions by counsel prior to this language being included in the Minutes by the settlement conference before Justice Campbell in December 2009. Mr. Strecko argues spousal support herein was to be 'transitional' as agreed to between the parties. Ms. Strecko counters that spousal support should be indefinite and based on Mr. Strecko's current income.

[89] Ms. Strecko characterized the parties agreement in her affidavit as follows (Exhibit #1, para. 27):

> 27. In 2010 I began an advanced program of study in Rheumatology to increase my knowledge and improve my credentials. I had discussed this and committed to it at the Settlement Conference of December 2009. It was my goal to attempt to achieve self-sufficiency by creating a specialty role for myself by becoming either a nurse practitioner or a specialized Rheumatology nurse.

[90] Both parties have agreed that the Court may consider submissions relevant to an interpretation of the spousal support provisions of the 'CRO' and which were made to the settlement conference Justice following the settlement conference when a disagreement developed between the parties as to the language of the proposed 'CRO' (Exhibit #30). I do not find it necessary to look outside the 'CRO'/the agreement.

[91] The general principles governing spousal support were outlined in *Burchill v. Savoie*, 2008 NSSC 307 beginning at paragraph 31:

> [31] Section 15.2 (4) (a)- (c), (5) & (6) (a)- (d) of the Divorce Act, supra, requires the court to consider the condition, means and circumstances of each spouse and provides that a spousal support order should address four statutory objectives:
>
> > 15.2(1) Spousal support order - 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) Factors - In making and 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) Objectives of spousal support order - 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 an 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.

[92] The words of Justice McLaughlin in *Bracklow* [1999] S.C.J. No. 14 at paras. 30-31 are on point:

> [30] The mutual obligation theory of marriage and divorce, by contrast, posits marriage as a union that creates interdependencies that cannot be easily unravelled. These interdependencies in turn create expectations and obligations that the law recognizes and enforces. While historically rooted in a concept of marriage that saw one spouse as powerful and the other as dependent, in its modern version the mutual obligation theory of marriage acknowledges the theoretical and legal independence of each spouse, but equally the interdependence of two co-equals. It postulates each of the parties to the marriage agreeing, as independent individuals, to marriage and all that it entails -- including the potential obligation of mutual support. The resultant loss of individual autonomy does not violate the premise of equality, because the autonomy is voluntarily ceded. At the same time, the mutual obligation model recognizes that actual independence may be a different thing from theoretical independence, and that a mutual obligation of support may arise and continue absent contractual or compensatory indicators.
>
> [31] The mutual obligation view of marriage also serves certain policy ends and social values. First, it recognizes the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly. When this happens, it is not unfair to ask the partners to continue to support each other (although perhaps not indefinitely). Second, it recognizes the artificiality of assuming that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of single life, indicating the potential necessity to continue support, even after the marital "break". Finally, it places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls.

[93] Justice L'Heureux Dube in *Moge v. Moge* 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, [1992] S.C.J. No. 107 directed that spousal support must strive to achieve some equitable sharing upon the dissolution of the marriage. At paragraph 73, she stated:

> [73] The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse.

[94] Nevertheless, in the words of Justice MacLachlin in *Bracklow supra*, 1999 CarswellBC 532 :

> 21. When a marriage breaks down, however, the situation changes. The presumption of mutual support that existed during the marriage no longer applies . Such a presumption would be incompatible with the diverse post-marital scenarios that may arise in modern society and the liberty many claim to start their lives anew after marriage breakdown. This is reflected in the Divorce Act and the provincial support statutes, which require the court to determine issues of support by reference to a variety of objectives and factors.
>
> . . . . .

[95] In *Bracklow, supra*, MacLachlin J. defined the concept of quantum in reference to spousal support to include both the amount and duration of the support. She stated further that the factors relevant to entitlement also have an impact on quantum. At para. 53, when addressing the significance of any agreement the parties had, she states:

> ". . . Finally, subject to judicial discretion, the parties by contract or conduct may enhance, diminish or negate the obligation of mutual support . . . "

[96] I am satisfied that any understanding that Ms. Strecko had agreed that her entitlement to spousal support would terminate on July 1, 2012 is wishful thinking. Clearly, such an agreement would have been a valued concession had it been granted by Ms. Strecko. However, she clearly did not agree to such a term. Ms. Strecko's obligation "to become self sufficient so far as it is practicable and to make diligent and reasonable efforts in this regard" existed regardless.

[97] Mr. Strecko's case to terminate spousal support on July 1, 2012 if it is to be accepted, must be founded on other grounds.

[98] Mr. Strecko argues that he has provided significant assistance in the form of spousal support and educational assistance that, but for Ms. Strecko's resistance, would have resulted in her being fully employed as a nurse and therefore, self sufficient.

[99] Ms. Strecko argues that self sufficiency has not been possible. She argues that her pursuit of specialty nursing employment in the area of rheumatology has been reasonable. She maintains that she now has part time work in this area and should be permitted the opportunity to make it full time.

[100] A couple of reasonable inferences can be made from the evidence including the text of the parties 'Minutes', now part of the 'CRO'. The Minutes make no reference to the Spousal Support Advisory Guidelines as a tool for determining spousal support. In addition, the quantum of spousal support agreed upon, i.e. $3,500 is less than the quantum recommended by the Spousal Support Guidelines.

[101] A second significant feature of the agreement is that the parties agreed, i.e. were optimistic that self sufficiency could be achieved before July 1, 2012. Given all of the evidence, this is a recognition that self sufficiency would be achieved when Ms. Strecko became fully employed, earning a salary equivalent to that earned by a nurse.

[102] It was open to the parties to make such an agreement and I am satisfied that they agreed that within these two wide parameters, the parties resolved the issue of spousal support. The *quid pro quo* of the agreement must be accepted and I accept it.

[103] I am mindful of Justice Bastarache's comments in *D.B.S. v. S.R.G.* [2006] S.C.J. No. 37, at para.76:

> 76. In Miglin v. Miglin, 2003 SCC 24 (CanLII), [2003] 1 S.C.R. 303, 2003 SCC 24 and Hartshorne v. Hartshorne, 2004 SCC 22 (CanLII), [2004] 1 S.C.R. 550, 2004 SCC 22, I (along with Arbour, J. in the former case) discussed the importance of encouraging spouses to resolve their own affairs, as well as the complimentary importance of having courts defer to that resolution. These cases dealt with spousal support issues, but many of the same considerations apply in the child support context. Prolonged and adversarial litigation is just as troubling - if not more so - in the child support context as in the spousal support context.

Ms. Strecko's Income

[104] The Court is being asked to impute income to Ms. Strecko on the basis that she could be working full time as a nurse, earning a salary significantly greater

than that she is currently earning. It is argued that at her imputed income, Ms. Strecko is self sufficient and spousal support should consequently be terminated.

[105] The Court's authority to impute income is codified in the 'CSG'. Similar considerations govern when the Court is asked to impute income for purposes of determining spousal support and contributions to special expenses for children.

[106] The Court is mindful of the distinction that can be made when the Court is determining income for purposes of child as contrasted with spousal support (see *Richards v. Richards*, 2012 NSCA 7).

[107] Justice Forgeron in *Marshall v. Marshall*, 2008 NSSC 11 (CanLII), 2008 NSSC 11 provides a helpful summary of the state of the law on this issue. At paragraph 17-18, she wrote:

> 17 The discretionary authority found in section 19 of the Guidelines must be exercised judicially in accordance with the rules of reason and justice - not arbitrarily. There must be a rational and solid evidentiary foundation in order to impute income in keeping with the case law which has developed. The burden of proof is upon Ms. Marshall and it is proof on the balance of probabilities: Coadic v. Coadic 2005 NSSC 291 (CanLII), (2005), 237 N.S.R. (2d) 362 (SC).
>
> 18 In reviewing the factors to be considered when a party has requested imputation, the court stated at paras. 14 to 16 of Coadic:
>
>> [14] In making my determination as to the amount of income to be attributed to Mr. Coadic, I am not restricted to the actual income which he earned or earns, rather I am permitted to review Mr. Coadic's income earning capacity having regard to his age, health, education, skills and employment history.
>>
>> [15] In Saunders-Robert v. Robert, [2002] N.W.T.J. No. 9, 2002 CarswellNWT 10 (S.C.), Richard, J., stated at para. 25:
>>
>>> [25] When imputing income, it is an individual's earning capacity which must be considered, taking into account the individual's age, state of health, education, skills and employment history. In the circumstances of the respondent, in my view it would not be unreasonable to impute, at a minimum, one-half of the income that the respondent earned in 1995 and 1996, say $50,000. I note that the respondent's present income, according to his own evidence, is approximately $42,500.00."

[16] In R.C. v. A.I., [2001] O.J. No. 1053, 2001 CarswellOnt 1143 (Sup. Ct.), Blishen, J., reviewed the principle that income is based upon the amount of income which a parent could earn if working to his/her capacity and further adopted the factors to be applied when imputing income as proposed by Martinson, J., in Hanson v. Hanson, [1999] B.C.J. No. 2532 (S.C.). Blishen, J., stated at paras. 79 to 80:

> [79] By imputing income, the court is able to give effect to the legal obligation on all parents to earn what they have the capacity to earn in order to meet their ongoing legal obligation to support their children. Therefore, it is important to consider not only the actual amount of income earned by a parent, but the amount of income they could earn if working to capacity (Van Gool v. Van Gool 1998 CanLII 5650 (BC CA), (1998), 166 D.L.R. (4th) 528).
>
> [80] In Hanson v. Hanson, [1999] B.C.J. No. 2532, Madam Justice Martinson of the British Columbia Supreme Court, outlined the principles which should be considered when determining capacity to earn an income as follows:
>
> > 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para. 30).
> >
> > 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
> >
> > 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
> >
> > 4. Persistence in unremunerative employment may entitle the court to impute income.
> >
> > 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

> 6. As a general rule, a parent cannot avoid child support obligations by a self- induced reduction of income.'"

[108] An income of $30,000 is attributed to Ms. Strecko. At a minimum, she is capable of earning this amount. Nevertheless, I am satisfied that Ms. Strecko requires additional time to achieve self sufficiency. Having been now advised by this Court that she is under a special duty to accept any available employment in nursing, outside the part time area in which she currently works, and after being satisfied that she can be fully employed as a nurse, I order a termination of the ongoing spousal support obligation in twenty-four months (March 2015). This is more than two years beyond July 1, 2012 and almost five years after the parties entered 'Minutes' of Settlement in April 2010 and six and one half years post separation. Spousal support will terminate at that time unless Ms. Strecko satisfies the Court, that notwithstanding her broad job search, she has been unable to secure full time employment in nursing or achieve a level of income comparable to that earned by a nurse working full time. The onus is on her to establish that this is the case. She must serve notice of her intention to make this case on or before September 1, 2014.

[109] Spousal support will continue at its current level of $3,500 per month up to and including March 2015. As stated, an application to continue the spousal support obligation will be scheduled for March 2015 at the request of Ms. Strecko and her application to continue the spousal support beyond March 2015 must be filed before September 1, 2014. Spousal support is presumed to end in March 2015 subject to an obligation on Ms. Strecko to make the case that it should continue. The Court has determined that Ms. Strecko is capable of securing full time employment as a nurse and is giving her time to transition to it as agreed to by the parties and evidenced by the 'CRO'. The lengthy period of time granted for her to do so reflects the length of the parties' relationship, their agreement and disparity of income.

[110] In coming to this conclusion I have considered the directions of the *Divorce Act*; the guidance of the Supreme Court of Canada as enunciated in *Moge supra* and *Bracklow supra*, and I have considered the parties' agreement/CRO. I have considered their role and responsibilities through the marriage.

[111] I have also considered the Supreme Court of Canada's directions for trial Judges asked to rule on variation applications (*L.M.P. v. L.S.*, 2011 SCC 64 and *R.P. v. R.C.*, 2011 SCC 65).

Issue Five: Retroactive Child and Spousal Support

[112] The burden of proof upon Mr. Strecko is to offer evidence to satisfy me on a balance of probabilities (1) that the award of child support should not be made retroactive to the day the application was filed, and (2) why his child support obligation should not be reassessed based on his actual income since the order was put in place. (*Coadic v. Coadic*, [2005] N.S.J. No. 415 (SC); *Robertson v. Robertson*, [2007] N.S.J. No. 195; and *McCarthy v. Workers' Compensation Appeals Tribunal (N.S.) et al* 2001 NSCA 79 (CanLII), (2001), 193 N.S.R. (2d) 301 (C.A.) at para. 574).

[113] The Supreme Court in *D.B.S. supra* addressed the issue of whether a court can make an order for retroactive child support and in what circumstances it is appropriate to do so. Three situations were described:

1. Awarding retroactive support where there has already been a court order for child support to be paid. (para. 61-74)
2. Awarding retroactive support where there has been a previous agreement between the parents. (para. 75-79)
3. Awarding retroactive support where there has not already been a court order or history of payment of child support. (para. 80-85)

[114] Justice Bastarache then reviewed factors that could curtail the power of judges to make retroactive awards in specific circumstances. These are:

1. Status of the child. (para. 86-90)
2. Federal jurisdiction for original orders. (para. 91-99)
3. Reasonable excuse for why support was not sought earlier. (para. 100-104)
4. Conduct of the payor parent. (para. 105-109)
5. Circumstances of the child. (para. 110-113)
6. Hardship occasioned by a retroactive award. (para. 114-116)

[115] He also commented on how the amount of a retroactive child support order is to be determined (para. 117) including the date of retroactivity and the amount or quantum.

[116] Justice Bastarache summarized the governing principles as follows:

> 131. Child support has long been recognized as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based approach, a child's right to increased support payments given a parental rise in income can be deduced.
>
> 132. In the context of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increased significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.
>
> 133. In determining whether to make a retroactive award, a court will need to look at all the relevant [page 288] circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.
>
> 134. Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.
>
> 135. The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

[117] The situation before the court is not identical to any of the four fact situations considered by Justice Bastarache. Nevertheless, the principles

enunciated and matters he directed courts to consider are a helpful guide when considering whether to order retroactive child support.

[118] The award of a retroactive maintenance award is a discretionary remedy. (Roscoe, J.A. in *Conrad v. Rafuse*, 2002 NSCA 60, para. 17-20). Judicial discretion was described by Justice Bateman in *MacIsaac v. MacIsaac*, [1996] N.S.J. No. 185 (N.S.C.A.) at para. 19 and 20. Discretionary decision making within the judicial context confers an authority to decide "according to the rules of reason and justice, not according to private opinion". There is a burden on Mr. Strecko to persuade the court that a retroactive award should not be made to the date of the filing of the application on November 29, 2011 should he advance that position. The Applicant argues that the filing of the application to vary herein was effective notice of her claim.

[119] There is no basis for not ordering a recalculation of the child support obligation to reflect Mr. Strecko's actual income in 2010, 2011 and 2012. In fact, Mr. Strecko has expressed a desire to pay the table amount and topping it up as agreed to with Ms. Strecko, and outlined in the parties' 'CRO' at paragraph 17 of the 'Minutes' forming part of the 'CRO'.

[120] The differing positions of the parties as to the result of the agreed upon recalculation is outlined below. The calculations provided are not clear and are based on information that contained inconsistencies. They must be read with this in mind. Counsel are asked to consider whether a need to clarify the data exists.

2010

[121] Ms. Strecko says Mr. Strecko's total 2010 payments for child support purposes were $2,775.03 short in 2010. Mr. Strecko says he underpaid by $2,611.70.

[122] I conclude the underpayment is $2,700.

2011

[123] Mr. Strecko's November 16 submission at page 2 says the recalculated child support obligation for 2011 was $3,483/month. However, some of his

calculations for 2011 use $3,247. I have concluded the monthly obligation for 2011 was $3,483.

[124] Ms. Strecko calculates Mr. Strecko's income for child support purposes in 2011 was $466,430. In his pre-hearing brief at p.5 Mr. Strecko says his income was $466,431.05. Ms. Strecko says this resulted in a monthly obligation of $3,483 and $41,796 for the year. She says she was paid $24,737.08.

[125] Mr. Strecko says he paid $34,275.60 for the year. He says he owed $31,347 after the months of September, October and November were excluded because Stefan was living with him during this period and after crediting himself with a payment on special expenses in the amount of $1,089.

[126] Ms. Strecko claims an underpayment of $17,058.92 and Mr. Strecko claims an overpayment of $2,928. <u>I am satisfied Mr. Strecko's 2011 child support obligation was 9 * $3,483 = $31,347.</u> He is to be credited with two payments garnished in 2012 but attributable to October and November 2011. This further increases the amount paid for 2011.

[127] The amount due reflects Ms. Strecko using the monthly amount due as $3,483, and Mr. Strecko used $3,247 and her calculating on the basis of 12 not 9 months.

2011	**Her position**	**His position**
His income	$466,430.00	$466,431.05
Table amount	$ 3,483.00	$ 3,483.00 (not $3,247.00)
# of Months	12	9 (less Sept – Nov inclusive)
Owed	$ 41,797.00	$ 31,347.00
Paid	$ 24,737.08	$ 34,275.60 ($5,050.72 garnished)
	$ 17,058.92 (underpayment)	$2,928.00 (overpayment)

(The Court is unclear on why the parties have such a wide disparity in the amount paid for 2011.)

2012

[128] Ms. Strecko says child support should be based on Mr. Strecko's 2012 income of $430,500. This results in a child support obligation of $3,352 per

month or $36,872 for the year. She claims $32,108.04 was paid, leaving a shortfall of $4,763.96 to the end of November 2012.

[129] Mr. Strecko claims his obligation for the year was $2,967.09 per month and for the year it was $32,637.99. At the time of trial, he had already paid $29,943.88 and was owing $2,694.11.

2012	**Her position**	**His position(Nov. 16 submission)**
His income	$430,500.00	$309,643.00
Table amount	$3,352.00	$2,967.09
# of Months	11 (to Nov)	12
Owed	$36,872.00	$32,637.99
Paid	$32,108.04	$29,943.88
	$7,267.14 (underpayment)	$2,694.11 (overpayment)

[130] I have concluded that the income for child support purposes includes salary; bonus and grossed up taxable dividends. For 2012, Mr. Strecko's income was $430, 500. Child support for 2012 should be calculated on this basis. The parties are directed to do the calculations.

[131] The court's formula for recalculating the ongoing child support obligation is effective September 1, 2012. Any over payment by Mr. Strecko for the period after September 1, 2012 is a credit to be applied to any arrears found to exist to that point. As stated, the court is not prepared to order any repayment by Ms. Strecko for the period ending January 31, 2013 should an overpayment be found to exist. That would represent a hardship.

[132] Mr. Streko has paid child support for the five months ending January 31, 2013 based on the existing order. Stefan did not live with his mother for this period for more than 40% of the time. For this period Mr. Strecko's obligation to support Stefan was child support of $1,000 payable to Ms. Strecko for December 2012 and $5,000 payable to Stefan i.e. 5 * $1,000 (September 2012 - January 2013) because he was at university away from home. The payments to Stefan are deemed to be paid by virtue of the payments to Ms. Strecko for this period.

[133] Given the foregoing Mr. Strecko has the following credits to the end of January 2013 calculated as follows:

- three months of child support during the fall of 2011

- child support paid for the period September 2012 to January 2013 inclusive less $5,000 payable to Stefan for this period and $1,000 payable to Ms. Strecko;

[134] The parties are directed to do recalculations based on the foregoing principles. The court reserves the right to hear the parties further should that be desired by either party.

[135] Should Stefan return to live with his mother during the academic year, this will represent a change in circumstances warranting a reassessment of the quantum of the child support obligation and in particular, whether income greater than $150,000 should be used for purposes of determining Mr. Strecko's child support obligation and secondly, the Court will assess what impact that change would have on Mr. Strecko's obligation to contribute to special educational expenses for Stefan. All of this would only be necessary if Stefan continued to be a child of the marriage.

ACJ