SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Tynes v. Tynes, 2011 NSSC 18

Date: 20110120
Docket: 1201-063377
Registry: Halifax

Between:

Jennifer Tynes

Petitioner

v.

Gordon Tynes

Respondent

Judge:	The Honourable Justice Douglas C. Campbell
Heard:	October 28 & 29, November 18 & 22nd, 2010, in Halifax, Nova Scotia
Counsel:	Deborah Conrad, for the petitioner Lloyd Berliner, for the respondent

By the Court:

[1] The petitioner (hereinafter referred to as "the wife") seeks a divorce, custody of the daughter, (subject to access to the respondent), child support, spousal support and costs pursuant to *The Divorce Act*, R.S., 1985, c.3 (2nd supp.). She pleads the *Matrimonial Property Act* S.N.S. 1980, c.9 (hereinafter referred to as the "MPA"), for exclusive possession of the matrimonial home, a division of matrimonial assets and such other relief that may be just.

[2] The Respondent (hereinafter referred to as "the husband") pleads for a division of property, a *Pension Benefits Act* division, costs and such other relief as is just.

Divorce Judgement and Corollary Relief Judgement

[3] I find that all procedural and jurisdictional matters have been addressed and that the permanent breakdown of the marriage has been proven by virtue of the passage of more than one year during which the parties remained separated.

Accordingly, I hereby grant the divorce order. I also grant the corollary relief judgement on terms consistent with this judgement.

[4] The parties were married more than 31 years ago on May 26, 1979. Both of the parties were 54 years of age at the time of the trial.

[5] Only one of the two children of the couple meets the definition of "child of the marriage" pursuant to *The Divorce Act, supra.* Her name is Nicole (hereinafter referred to as "the child"). She is 21 years of age. She has Down Syndrome. The father contends that she could live independently. The mother testified at length as to her restrictions and special needs. I am satisfied on that evidence that she could not live independently and that she meets the definition above noted.

[6] The husband is an engineer and has worked as a consultant in addition to attempting to develop certain inventions referred to below with the hope of finding a commercially viable process by which these could be manufactured and marketed. In addition he has built private homes for sale at various times.

[7] The wife is a nurse and worked in the early years of the marriage retiring from that profession in 1999. She has worked in other fields on a part-time basis from time to time.

PARENTING ISSUES

[8] The parties have agreed on a joint and shared custody arrangement whereby the child lives with each parent for a period of one week on an alternating basis with the changeover occurring at approximately 8:00 p.m. on Sunday of each week. The Corollary Relief Order should be specific as to which parent has the child for the week following the date when the order is drafted. The parties have not agreed on certain peripheral parenting issues.

[9] The mother would prefer to specify in the Corollary Relief Order that each parent shall have the child for two periods of three hours each during the week when the other parent has the child. The father does not disagree with that parenting time occurring but takes the position that the child should decide when and whether and for how long such contact should occur. I have concluded that since both parents agree to such contact there is no harm in specifying that

agreement in the court order. Given the child's special needs, there is some room for problems between the parties if the decision is left to the child despite her age. Therefore, the Corollary Relief Order shall provide for those contacts by both parents as requested by the mother.

[10] The parties disagree on certain specific decisions with respect to the child's activities including, whether she would be encouraged to continue to participate in certain track events leading to her role in Special Olympics and whether she should be on a waiting list for the Dartmouth Adult Service Centre as examples. The father suggests that the child should be allowed to decide about activities and that she should not be enrolled in the Service Centre. The mother disagrees.

[11] These decisions are simply examples of decisions that currently need to be made. Given the child's special needs, decisions are likely to be needed frequently and continuing over the long term. The fact that the parents cannot agree on these current issues suggests to me that one parent should have the final decision making authority after consultation with the other parent. Taking into account that the mother has been at home with the child since 1999 and that the father has a history of working long hours, I have concluded that it would be fitting that the

mother would make the final decisions. Accordingly, the Corollary Relief Order shall contain a provision to the effect that neither parent will make any significant decisions about the child's education, medical attention, religious upbringing, enrollment in activities or sports or programs or work commitments or volunteer commitments or other matters affecting the general welfare of the child without first having meaningful consultation with the other spouse and further that, in the event of an impasse, the mother's decision shall prevail.

[12] The parties have raised an issue with respect to travel with the child outside Canada. I have concluded that both parties should be permitted to travel with the child outside of Canada provided that the other parent is supplied with all known travel plans including itinerary and telephone contact numbers. I would direct that, when needed, the wife would obtain a passport, paid for equally by the parties. She would maintain possession of the passport except for those occasions when the husband is travelling outside Canada with the child in which case he would have possession of the passport for the duration of the travel period and for up to 24 hours before and after the journey.

[13] On behalf of the child, the mother took steps to obtain Income Assistance from the Department of Community Services and in the process she signed as "guardian" for purposes of that application. I have concluded that this is merely an administrative requirement of the department and that it is entirely appropriate that she continue to be the guardian for that purpose since she was the person who initiated the claim. There is no request before the court to appoint anyone as guardian for any other purpose.

SEPARATION DATE

[14] The parties disagree as to the separation date essentially because there was a period of time when they were not behaving as spouses despite the fact that both were living in the matrimonial home. The husband moved out of the matrimonial home on or about July 1st, 2008 but returned very shortly thereafter. While he spent large amounts of time away from the matrimonial home, it continued essentially to be his residence until an exclusive possession order with respect to the matrimonial home was granted in favor of the wife in May of 2010. The case law is clear that spouses can be considered to be separated while living in the same home if they behave, except for the commonality of their residence, as being

separated. I am satisfied that the separation took place on or about July 1st, 2008. It follows, for example, that the petitioner's ground for divorce based on marriage breakdown proven by separation for a period of one year has been established.

[15] It should be noted that very little else flows from this finding. The parties continued to intermingle their finances in various ways until May of 2010. Because of that fact, certain other legal implications that sometimes flows from a finding of separation date may not apply.

SUPPORT ISSUES

The Husband's Income:

[16] The husband's income situation over the last number of years is complicated. At various specific times he had three main sources of income. The first was consulting fees paid by a local company established to provide construction management services and training within the province of Nova Scotia specifically targeting members of the Black community. It's official name is

Adepa Management Inc. and I will hereafter refer to it as “Adepa”. The husband is entitled to a consulting fee of $4,000 per month plus HST from Adepa.

[17] The second client to which the husband provides consulting services is a company which operates in the United States and in the Netherlands whose short name is “Teijin”. He was retained to consult with that company to assist its client in developing a product similar to one of his inventions. For 2007, his consulting fee was over $8000 per month. In 2009 it was reduced to just over $4000 per month. The combination of these two sources of income provided the husband with just over $12,000 and just over $8000 per month for the years 2007 and 2008 respectively.

[18] The husband’s third potential source of income at various times was from the building of private residences for sale.

[19] The husband took a significant tax advantage in respect of the first two sources of income in the following way. His company, Tynes Koppernaes Engineering Ltd. was carrying on its balance sheet a shareholder’s loan in favor of the husband in the amount of $248,541. Because the company had no operations,

there had been no cash from which the company could repay the shareholder's loan to the husband. When consulting fees became available from Teijin and Adepa, he arranged for the consulting fees to be payable to his company. This gave the company cash, first at the rate of over $12000 per month and then in 2008 of over $8000 per month from which the company could begin to repay the shareholder's loan to the husband. Such a repayment is not income because it is a repayment of capital. Although this new found revenue left the company with net income in each of those years, the husband was able to obtain those substantial amounts of cash on a tax free basis.

[20] The flow through of these consulting fees continued through 2009 to the point that the shareholder's loan was completely retired and indeed overdrawn such that the husband owes money to his company. It appears that the husband failed to appreciate that once the shareholder's loan was exhausted, any cash taken out of his company from the consulting fees that he flowed through that company does not represent a refund of capital and would therefore have to be treated as either salary, bonus or dividends. He followed his accountant's advice and recorded them in his 2009 tax return as dividends totalling $116,250. Counsel for the wife, relying on the fact that the husband had denied such an income in 2009,

takes the position that he was being deceitful and that that fact should cause the court to impute income of at least the amount of the 2009 line 150 income both retroactively and prospectively. I am satisfied that the husband did not learn that the cash flow he had taken from his company in 2009 was income until the early months of 2010 when the tax return was being prepared which was long after the date when he denied, under oath, having that income.

Income:

[21] It is absolutely clear that the cash flow received by the husband in the above fashion for the years 2008 and 2009 is not income within the meaning of the Income Tax Act and therefore was properly not part of his line 150 income. It is equally clear that it is not income from an accounting point of view because it was a refund of capital.

[22] Having concluded that the husband was not being untruthful when he indicated that his income for 2007, 2008 and 2009 was nil, his disclosure in that regard was not as complete as it could have been. He was well aware that he had substantial cash flow for those years and it would have been more honourable for

him to explain the difference between cash flow and income thereby creating a more accurate picture of his financial circumstances. On the other hand, for many months those cash flow amounts were being deposited to the parties' joint account and each of the parties took part in spending it.

[23] Section 15.1 of the *Divorce Act, supra* gives the court the authority to order a spouse to pay child support. Subsection 3 of that section states that the court "shall do so" in accordance with the applicable guidelines.

[24] That subsection is a mandatory direction to the court to base the child support exclusively on the provisions of the applicable child support guidelines in their entirety. That is not a direction to apply the "table amount" which is sometimes the interpretation given since the unfortunate practice has developed in the legal community of referring to the table amount as the "the guideline amount". In fact, this subsection requires the court to apply the various principles in the Child Support Guidelines and restricts the court to these principles. It therefore means that we would ordinarily not look to capital assets such as the subject shareholder's loan to establish child support. That is so because there is

nothing in the Child Support Guidelines that allows the court to look to any resource other than income.

[25] I make the latter point recognizing that Section 19 authorizes the court to impute income. It could be argued that the discretion to impute income is sufficiently broad to allow the court to look to capital assets to establish a child support order. In my view this should rarely, if ever, be done. The capital side of the marriage on a marriage breakdown is dealt with by the division of property. If the subject asset is a matrimonial asset, there would be a prima facie assumption that it would be divided equally subject to the applicability of Section 13. If it is a non-matrimonial asset it would normally not be divided. Whether it is divisible or not, the legislature has spoken through the *Matrimonial Property Act*, *supra* as to how assets are dealt with and Parliament has spoken through the *Divorce Act, supra* as to how incomes are dealt with by way of spousal and child support. There should rarely, if ever, be overlap between the two in my opinion.

[26] Indeed in the subject case, (and this will be discussed below,) counsel for the wife asks me to treat the shareholder's loan as a matrimonial asset and make it the subject of a division. That would amount to double dipping contrary by

analogy to the principle in *Boston v. Boston*, 2001 S.C.C. 43 where it was held that an already divided pension cannot be the source of spousal support.

[27] In this subject case, the shareholder's loan has been spent and a significant portion of it was actually spent through the parties' joint account.

[28] In the case of spousal support, while there is no similar statutory direction to look only to income, the same reasoning about double dipping and division of authority as between incomes and capital in marriages should apply.

[29] This causes me to conclude that the husband's income was nil for 2007 and 2008 and was $116,250 for 2009.

[30] The husband's income for 2010 presents another opportunity for debate. He contends that his company's income from Teijin ended at December 31st, 2009 and that accordingly he had no such income in 2010. Exhibit 22 at tab 5 contains a memo from the comptroller of Teijin which states: "Please note that (Teijin) had a contract with Tynes Koppernaes that expired on December 31, 2009. We have not signed any agreement for 2010." (Tynes Koppernaes is the husband's company).

[31] Counsel for the wife urgently contends that the income source from Teijin is continuing throughout 2010 and that the court should so conclude notwithstanding the above letter. She contends that the letter is a way of telling the truth without the whole truth by which she means that while there may not be a contract signed, the letter does not state that there is no consulting fee being paid. She argues that in the past the contract was often signed well into the relevant year.

[32] Counsel also argues that because the wife found a Fedex delivery slip from Teijin to Tynes Koppernaes late in 2010, I should conclude that cheques are still being sent to the husband. I have concluded that the existence of a courier slip proves nothing more than the fact that communication from Teijin occurred.

[33] The husband testifies that he continues to stay in touch with Teijin updating them in a fifteen minute phone conversation once a month. His motive is that he hopes to eventually have them assist in developing his invention that he is trying to make commercially viable.

[34] I have concluded that the words used in the memo from Teijin indicating that there is no contract for 2010 should be interpreted as a manner of speaking that addresses the fact that there is no consulting fee arrangement for 2010. To leap to the conclusion suggested by the wife that fees are being paid would be unconscionable. I have accepted the husband's evidence therefore that no such source of income exists in 2010.

Future disclosure:

[35] Counsel for the wife argued earnestly at trial that I should disbelieve the husband's evidence regarding his income. I have concluded that that assertion is too speculative and is based purely on suspicion rather than proof on a balance of probabilities. I expressed concern that the husband could have been more honorable about disclosing his cash flow as opposed to conveniently relying on the definition of "income". For that, and other reasons, I direct that there shall be a clause in the corollary relief order requiring the husband to disclose all personal income tax returns, all personal notices of assessment and re-assessment and all financial statements prepared in respect of any company in which the husband has

an interest for each and every year until such time as there is no support payable to the wife either for child support or spousal support.

[36] The husband continues to be entitled to receive $4000 per month from Adepa. He invoices this amount each month. However, his invoices have not been paid during calendar year 2010 because of a shortage of cash flow for Adepa. This is confirmed by a letter dated August 23, 2010 from the financial manager of Adepa which is found at exhibit 44 tab I. The husband is hopeful that these invoices will be paid and therefore has continued to work for this client through all of 2010.

[37] Despite this lack of payment, the husband is prepared to proceed on the basis that he is earning $48,000 per year in 2010. In fact he has had a cash flow of $4000 for each of the months so far in 2010. His evidence is that he is borrowing this monthly sum from a company called S & P Durable Enterprises Inc. This is a company that he started with a business partner to develop and commercialize a product similar to his invention. By doing it through a Canadian company the research and development costs could attract tax credits to the benefit of Teijin. Accordingly, he testified that substantial research and development cash was

deposited in that company's account for research purposes. It is from these funds that he withdraws the sum of $4000 per month which he states is a loan and must be paid back. He plans to do so when he receives the money from Adepa. (His shares in this company have been transferred to his business partner and to his brother).

[38] The wife does not accept the notion that the husband is not getting paid in 2010 from Teijin or from Adepa and her counsel urges me to impute income for 2010 at the same level as his tax return indicated for 2009, being $116,250.

[39] The husband has sworn under oath that his income in 2010 from Teijin is nil. He has supported that contention by the above referenced letter from the comptroller of Teijin, his client. There has been no reliable evidence to the contrary. I am being asked by counsel for the wife to conclude that the circumstances are suspicious and that the consulting fees continue to flow from Teijin to the husband.

[40] When evidence has been given and corroborated, the onus shifts to the doubting party to prove on a balance of probabilities that the evidence is false. It is

impossible for the husband to prove a negative; that is to prove the absence of an income or cash flow stream from Teijin other than in the way he has done. The court cannot base its decision on mere suspicion even if that suspicion exists. There must be proof on a balance of probabilities.

[41] I take it to be a concession on the part of the husband that he earns at the rate of $4000 per month during 2010 given that he has satisfied the court that the invoices rendered to Adepa have not been paid during that year and that he has satisfied me that the cash flow from S & P Durable Inc. is a loan and must be repaid. In the event that Adepa does not pay the invoices eventually, it is hard to imagine how the husband will repay that company and put it in a position to honour its research and development commitment to Teijin. If this does not unfold as the husband is hoping, he and that company will be in very dire straits beyond that which he already faces.

[42] In summary, I have concluded that, technically, the husband had no actual income in 2007 or 2008 although he had substantial cash flow in each of those years, that he had an income of $116,250 in 2009 and that he has an income of $48,000 in 2010.

Retroactive and prospective child support:

[43] The wife urges me to make an order for child and spousal support retroactive to July 1st, 2008 which is the date at which I found the parties had separated from a legal point of view. However, they continued to operate their finances together for a period of time. Initially, the husband would bring home his cash draws and deposit them to the joint account. He was attempting to make payments on his various business commitments as well as to support the family.

[44] There is evidence that starting with July, 2008, the wife would make a list of expenses that she foresaw and the husband would pay these amounts. They varied each month. For the final six months of 2008 they averaged $2,149 per month. For the first four months of 2009 they averaged $1,239 per month. After that date, the process of having the wife provide a list of expenses stopped.

[45] The parties disagree on what happened after that date. The husband contends that he simply paid the bills as best he could in light of his other financial commitments. The wife contends that he did not pay a sufficient amount to relieve

him of an obligation for retroactive support for this time frame. The husband concedes that he stopped paying household bills as of May, 2010 and his counsel concedes that there should be some retroactivity to that date. Retroactive support to the date of separation is by no means automatic.

[46] In the passages below I will describe the relatively desperate finances of this couple over the years of the separation and several years prior to it. I am satisfied that in light of that situation, both parties must share the discomfort of insufficient funds and the pressures that were coming from creditors for many years.

[47] For the first ten months of separation, the husband was paying the list of expenses that the wife was presenting. It would have been open to her to ask for more. He paid what she asked for. For the next months until May of 2010 the husband contends that he was paying bills. I do not have reliable evidence of the extent of those payments but the fact of the matter is that both of the parties managed to get through those difficult months. I must also take into account that for 2010, the husband's income was very substantially reduced as indicated above.

[48] There is an acknowledgement that the husband paid nothing after May 2010 and that he should have done so. Based on an income of $48,000 the one child table amount is $418 per month. I am being urged to have that set off against the one child table amount based on the wife's income because there is equal shared custody.

[49] The Child Support Guidelines offer setoff as one option when there is shared custody but not a mandatory option.

[50] In this case the wife earns only $14,000 per year which is an insufficient income for her to support herself. It would be a contradiction to say that she can afford child support when she does not have sufficient income to support herself. Therefore, I order that the husband shall pay $418 per month without setoff retroactive to the 1st day of May, 2010 and continuing prospectively on the 1st day of each and every month thereafter until further order of the court.

[51] I direct that the retroactive portion of this award shall be paid by a tax free rollover from the husband to the wife of a sufficient amount of RRSP to generate

an after tax amount equivalent to the retroactive portion. I direct that this be done forthwith.

Rollover:

[52] It is unclear as to what tax rate should be used to calculate the gross up on the RRSP rollover such that the after tax value of it would be equal to the retroactive child support. In 2010, the wife was earning approximately $14,000 which would place her in the lowest tax bracket of 24%. She is intending to retrain as a nurse and will be without income for her training time but may expect to earn a larger amount for the balance of the year which may or may not place her in a higher tax bracket. I have concluded that it would be reasonable to assume that her marginal rate is 30% and I direct that such percentage be followed in calculating the gross up.

[53] Assuming that this rollover occurs in the month of January 2011, there will have been nine months of retroactivity for a total of $3,762 which when divided by 70% (the reciprocal of her tax rate) would produce a grossed up amount of $5,374.

[54] To explain that math, I point out that multiplying the retroactive amount by the marginal tax rate produces an erroneous gross up. The correct calculation is to divide the retroactive amount by the reciprocal of the marginal tax rate,(i.e. 100% - 30% = 70%).

[55] The income assistance being received by the mother on behalf of the child is currently being shared equally by the parties at the husband's insistence. For the same reasons that I declined to set off table amounts for child support, notwithstanding equal time sharing, I conclude that the income assistance money should not be shared. Commencing with the next available income assistance cheque and continuing each and every month thereafter until further order of the court, the mother shall be the recipient of the entire entitlement.

Retroactive and prospective spousal support:

[56] By virtue of the same reasoning given with respect to child support, I have concluded that spousal support should be made retroactive to May 1st ,2010. I am being urged by counsel for the mother to make use of the Spousal Support

Advisory Guidelines. I have found in applying these advisory guidelines that they often produce an unrealistic and unreliable amount. I do not find them to be helpful. They often produce an amount beyond the payor's ability to pay and that is the case here.

[57] Given the wife's low income, I have concluded that the case must turn on identifying the husband's maximum ability to pay since the wife will need more than he can reasonably afford.

Divorce Act Need v. Ability:

[58] While the *Divorce Act*, in section 15.2 (6) provides the court with competing objectives of spousal support, the quantification process ultimately turns on a balancing of the need for support by the recipient spouse against the ability to pay of the paying spouse. This is so because of section 15.2(4) which states:

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

[59] Having reviewed all of the financial evidence, I have concluded that spousal support in the amount of $500 per month retroactive to May 1st, 2010 and prospectively is in order. With regard to the retroactive portion, there is no argument for a gross up because both the rollover and spousal support are taxable to the wife (eventually).

[60] The wife is enrolled in a program designed to reinstate her credentials as a nurse. She will have a loss of income for the period that she is taking that course. In light of the husband's child support and spousal support obligation, and his other financial stresses, he is not in a position to pay substantial periodic or lump sum support to assist with that retraining. Below, it will be seen that I have assigned the matrimonial home proceeds entirely to the wife and relieved her of an obligation to pay an equalization payment. While I feel that can be justified under the principles of the *Matrimonial Property Act, supra* it can also be rationalized at least in part by the lump sum need for support for retraining.

[61] It is argued by counsel for the husband that, upon retraining, the wife shall be able to earn a self sufficient income. She plans to work on a part-time basis. In any event, her actual income once retrained and the commencement date of her

employment cannot be accurately predicted at this time. It would have been preferable to deal with that in order to avoid the possibility of a further application to vary spousal support once the wife is employed. That cannot reliably be done.

[62] Instead, I will offer the observation that because I have concluded that the spousal support is dramatically less than the wife needs and is confined as such because of the husband's inability to pay more there will be some level of employment income greater than that which she has earned in the recent past that should not result in any reduction in spousal support. It is not possible to comment with greater specifics until the circumstances of both parties' incomes, if they change, are known. Suffice it to say that I would not expect to see an application to vary spousal support downward unless the wife has significantly more income than she presently has had or that it can be shown that she is unreasonably underemployed after all of her circumstances are considered.

State of the parties' finances:

[63] The husband takes the view that, in recent years, the parties' finances have been acutely strained, that they lived beyond their means, that monies were being misdirected and juggled for example by using a draw on a construction project to pay for living expenses when the money should have been paid toward building supplies, and that generally the finances are troubled.

[64] The wife takes the position that the husband has dissipated the matrimonial assets. Her counsel used the word "dissipate" repeatedly. While that word does not appear in the *Matrimonial Property Act, supra*, Section 13, which authorizes an unequal division of assets, lists "the unreasonable impoverishment by either spouse of the matrimonial assets" as a factor. Given that "dissipate" has a somewhat similar meaning and that some decisions of various courts have provided a remedy for dissipation of assets, the alleged dissipation may be relevant to the division of assets part of this claim and therefore may have an impact on the support issues in this claim.

[65] The Canadian Oxford Dictionary gives several definitions for the word "dissipate". The most applicable one would be to "squander or fritter away (money, energy etc.)".

[66] A number of years ago, the parties had a substantial net worth. They had a home that ultimately sold for $305,000 which had been mortgage free. By the time of the post-separation closing, the house was so substantially encumbered that there was just over $5000 for the parties.

[67] As mentioned above, for 2007, the husband enjoyed a tax free cash flow of just over $12,000 a month. For a time this was deposited to the joint account and was spent by the parties on their various business and personal financial affairs. By 2008, the tax free scheme had reduced to $8000 per month. By 2009 the husband continued what he believed to be a tax free cash flow only to find out after the year was over that the shareholder's loan which provided the vehicle for the tax free status was no longer available and that in fact he was required to report $116,250 of that year's cash flow as income.

[68] Prior to these years the husband had unpaid Canada Revenue Agency debt. He filed his returns on the basis that he could claim certain business losses which initially were accepted and later reversed by Revenue Canada. A line of credit was taken out by the couple to pay the early Revenue Canada debt and later

refinanced when more debt had been accrued. In the end, when the matrimonial home was sold post-separation, the parties' line of credit secured by the matrimonial home had to be paid out at the closing in the amount of $103,209.

[69] When the husband's income source was discontinued due to the loss of a substantial client a number of years ago, he returned to his habit of building houses for sale. He purchased the supplies for the construction from Payzant's Building Supplies. He testified that there was simply not enough money to pay everything that needed to be paid and in the result the Payzant account went largely unpaid. With interest, the balance was over $140,000 and that creditor took a judgement which charged the matrimonial home. Because there were insufficient proceeds from the recent sale of the home to pay all of the encumbrances, Payzant's settled for $100,000. This was paid from the recent closing proceeds of the house. This debt was incurred between 2003 and 2006.

[70] Over recent years, the Canada Revenue Agency obligation was not met (beyond that which had been paid out by the financing and refinancing of the line of credit earlier). This resulted in a judgement that was paid out of the house proceeds. It was $70,801.

[71] In the result, the parties equity in the matrimonial home was depleted to about $5,000.

[72] There was another venture that resulted in the parties losing assets that might have been shareable.

[73] The husband had invented a fibre reinforced plastic product. In 1994, he started to set up a firm to supply this product to a US company which, after about two years of successful dealings, lost its customer. With a partner, the husband then attempted to develop their own similar product which they named “tenlam”. A company was formed named High Tech Wood Products. In or about 2003 that company became insolvent, was placed in receivership and its assets were lost to the process. The husband then started to build houses through another of his companies which had no other operation at the time. He testified that it was necessary to liquidate most of the assets to get through these difficult times. Three lots of land were sold one of which had a house located on it. All RRSP’s that were not locked in were cashed and debts were consolidated on the line of credit

which was later increased in November 2004 when the family was unable to meet its monthly commitments.

[74] As mentioned above, the wife contends that this was all part of a scheme to "dissipate" the family assets in order to leave her with insignificant net worth. The court has been supplied with a very large amount of documentation in an attempt to support the above noted contention. The court did not have the benefit of any forensic accounting evidence.

[75] Counsel for the wife compared the large sums of cash flow above referred to that were available to the family in the years 2007 and 2008 and compared that to the recorded household expenses which the wife presented each month to the husband for payment. The difference between these two sums was several thousand dollars each month which she refers to as a surplus. That analysis is incomplete because the surplus so calculated was not available to the separated family because of the multitude of other debts and commitments that were required to be paid.

[76] It is important to note that although the family had access to a cash flow that was substantial for the years 2007 and 2008, it had already incurred the substantial debts to Revenue Canada and to Payzant's and had come through some years when the family had very little income. The separation occurred in mid-2008. Having just come through with the high income year of 2007, it is not difficult to understand how the wife might perceive the situation as one in which the husband was hiding assets.

[77] However, there are many non-disputed objective facts that suggest that the family was going through a serious financial nightmare, and that the husband was scrambling to protect assets from creditors and to get the finances of his business ventures and family ventures on a more positive course. The following events occurred:

1. High Tech Wood Products went into receivership in 2003 and lost its assets.

2. Canada Revenue Agency obtained a substantial judgement.

3. A third party demand by Canada Revenue Agency was issued on the husband's Adepa income.

4. The line of credit balance was increased twice to pay creditors.

5. The husband transferred shares in S and P Durables Inc. to his brother and his partner for $1.00.

6. The research money in that company was borrowed by the husband with no real guarantee as to how he would pay it back.

7. The husband faced the news that Adepa would not be in a position to pay his invoices for what has turned out to be 11 months of 2010 as of the trial date.

8. Mechanics liens were incurred on properties that the husband was building houses for non-payment of a subtrade or supplier.

9. The husband sent many cheques in the amount of $10,000 payable to Payzant's which were returned for insufficient funds.

10. The husband borrowed from his mother and family and friends.

[78] All of these are the types of events that would normally be associated with business failure. It would be difficult for me to conclude that any business man or woman would put themselves through this stress and incur the consequence, stigma and credit limitations that these events would bring on in order to deprive his wife of an asset division. No one can dispute that the equity in the home has disappeared and the assets that were liquidated have not been replaced. In order for the theory of squandering assets to make any practical sense from the point of view of the husband, he would need to have succeeded in using the cash flow available to him to invest somewhere in hidden assets. Given the amounts of money being spent through the joint bank account it is not very likely that such a scenario existed. In any event, there is no evidence, let alone proof on a balance of probabilities, that the husband has hidden assets.

[79] The sad and unfortunate fact is that this is a story of a couple who were together for 31 years and chose to support themselves by a number of entrepreneurial, risky and in some cases long term ventures which might well have had the happy ending of providing handsomely for the spouses both in terms of income and asset accumulation but instead ended in financial ruin. Counsel for the wife argues that after 31 years of marriage, the wife has very little net worth. More accurately, it should be said that after 31 years of marriage, neither of them have very much to show for their collective efforts.

[80] I have concluded that the husband did not dissipate assets; rather, the couple applied their assets and their credit to these various ventures out of a legitimate belief that it would work out financially for them. It did not. While I agree that the husband was the major decision maker in this regard, nothing turns on that fact. If there had been financial success, the wife would expect to share that success in some way.

DIVISION OF ASSETS AND LIABILITIES

[81] There is agreement on the classification and valuation of certain assets and not with respect to others. In her brief, counsel for the wife suggests a division of assets and debts that would require the husband to pay to the wife the sum of $190,159. In summation, she offered a number of asset and debt division charts presenting various assumptions and producing substantially lower equalization requirements.

Shareholder's Loans:

[82] There are two shareholder's loans in two companies payable in favor of the husband. In the Tynes Koppernaes Engineering Ltd. the loan was $248,541 in early 2007, and it has since been paid in full as described above.

[83] There is a shareholder's loan in S & P Durable Inc. payable in favor of the husband for $20,000 which has not been paid. The wife contends that these are matrimonial assets.

[84] With respect to the larger account, the evidence is that three parcels of land, one of which contained a dwelling, along with the liquidation of RRSP accounts

were used to invest in the company to create the shareholder's loan. Counsel for the wife argues that this history makes the asset a matrimonial asset.

[85] I am aware of certain cases which adopt such an analysis and, with respect, I take the view that this is an incorrect approach.

[86] In addressing a claim pursuant to the *Matrimonial Property Act, supra*, there are various well known steps to be taken. First the assets are classified as between matrimonial and non-matrimonial assets by reference to the definition sections in the Act. Then they are valued, assigned to each of the parties and, with respect to the matrimonial assets, an equalization payment is calculated to be paid by one spouse to the other to make the overall division of matrimonial assets equal. If any of the factors in Section 13 demand an unequal division of matrimonial or non-matrimonial assets, the court has discretion to do so.

[87] Section 4 of the *Matrimonial Property Act, supra* defines "matrimonial assets" as "...the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during the marriage, with the exception of..." . The one category of non-matrimonial assets that would apply to

the subject case is “business assets” which has a definition in Section 2 of the Act that says “business assets” means “real or personal property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose...”

[88] Although it may seem attractive to take into account the fact that a particular business asset derived from the liquidation of matrimonial assets, that is a consideration that has no relevance at the classification stage of the analysis. In appropriate cases, that history may be relevant when Section 13 of the *Matrimonial Property Act, supra* is addressed.

[89] A spouse invests in an incorporated business either by acquiring shares of the company or by lending money to the company. When money is lent, the company carries an account on its balance sheet as a “shareholder loan” typically. That is what occurred in this case. Clearly, the investment by way of a lending of money to the company fits squarely within the above quoted definition of business assets. It has a commercial, business, investment or profit producing purpose. I will exclude it from the prima facie division but I will have more to say about that history when I attempt below to apply Section 13 of the Act.

[90] In my opinion, courts should strive to apply the definition sections of the Act at the classification stage of the analysis and should do so in strict accordance with the wording of those definitions. There is ample opportunity for discretion in Section 13 if fairness and conscionability demands a reference to the history of that business asset's acquisition. There is no concept in the *Matrimonial Property Act, supra* that permits the court to trace the assets from their origin for purposes of classifying them as between matrimonial and non-matrimonial assets. One instructive way to illustrate that truth is to make the reverse analysis. Consider a situation where a company has some net worth and its shareholder directs that corporate assets be liquidated in order to purchase, in the name of one of the spouses, a family cottage which is used exclusively as such. It would be an unsupportable argument to suggest that the family cottage is a business asset because its funding can be traced back to business assets. The reverse argument, that a business asset can be reclassified as a matrimonial asset because it was funded from the liquidation of a matrimonial asset is equally unsupported by the wording of the legislation.

[91] Starting in 2007 which is prior to the separation and continuing until 2009, the larger shareholder loan was paid back in full. Being the return of capital, it was not treated as income for tax or any other purpose. Ironically, the wife's counsel urges me to acknowledge that as income for purposes of retroactive support and at the same time divide it as part of the *Matrimonial Property Act, supra* division. That would be double dipping. As mentioned above, I would, however, be inclined to recognize it as part of the *Matrimonial Property Act, supra* analysis (as opposed to be relevant to support issues).

[92] Had I not excluded these assets as business assets, I would have ignored them in any event because the money has been spent and funded the living expenses of the couple and the business debts above noted.

Patent:

[93] The husband is the owner of a certain invention for which the patent is already more than halfway through its legal life and has not been able to be commercially utilized. The wife contends that it is a matrimonial asset. A patent is achieved exclusively for the purpose of protecting the invention for commercial,

business, investment or income or profit producing purposes thereby fitting squarely within the above quoted definition of business assets. Counsel for the husband relies on the Ontario Superior Court of Justice case of *Booth v. Booth*, (2003), 40 R.F.L. (5th) 22. That court accepted the husband's evidence that it is not possible to establish a value for a patent when there are no sales of the underlying product. The court accepted that the value of a patent is linked to the success of the product. I agree that given that there are no sales of the subject product that it has no value. Counsel for the wife has not suggested or presented any evidence of value.

Pultrusion Machine

[94] This machine was invented by the husband as part of his business plan to make a commercial use of it. It falls squarely within the definition of business asset. Its value is unknown. It was lost in the receivership of High Tech Wood Products Inc. and it was repurchased from the receiver by the husband's business partner. It might be possible to conclude that the partner holds it in trust for himself and the husband but it is not necessary for me to make that conclusion

because the asset if it has any value would be excluded from division because it is a business asset.

Contents of home, tools and equipment:

[95] The parties have agreed that the current physical division of these items is roughly equal and needs no further accounting with one exception. The husband has in his possession a chest which contained silverware and was given to the wife by a relative. I order that he return that item in good condition to the wife. I will place no value on it since it is part of the overall contents division.

Matrimonial home:

[96] The matrimonial home was sold and the closing occurred during the course of the trial. The sale price was $305,000. From the price there was deducted the usual credits to the purchaser, the line of credit secured by a mortgage in the amount of $103,209.30, the real estate commission, legal and migration fees including HST, standard disbursements and the payout of a judgement in favor of Payzant's Building Supplies for $100,000 along with the payout of Canada

Revenue Agency of the husband's personal tax bill of $70,801.16. This produced a figure of $5,195.47 as the net proceeds of the sale of the matrimonial home. That is the value which I will assign to the equalization chart attached as Schedule A to this decision but I will comment below with respect to the Canada Revenue Agency debt and the Payzant Building Supplies debt that was paid from house proceeds.

Vehicles:

[97] The parties agree that the Acura has a value of $500 and that will be assigned to the husband in the equalization chart. The parties have agreed that the Yamaha Road Warrior motorcycle has a value of $8,170 and that will be assigned to the husband in the equalization chart.

[98] I accept the husband's evidence that the Chevy van and the Ford van have no value since they are inoperable. The wife suggests that they had value at the date of separation but I did not receive any reliable evidence to confirm those facts. The parties agree that the Toyota Camry has a value of $5000 and I will assign it to the wife in the equalization chart.

[99] There is great dispute with respect to the Toyota Supra which is 19 years old. This car belonged initially to the husband but it was transferred to the wife. At some point when the couple were facing severe financial crisis, the husband contends that the wife agreed to sign this vehicle over to his mother in recognition of money that she had provided to them. The wife disagrees but acknowledges signing the ownership papers. Those papers were not registered with the motor vehicle office for more than a year. The papers had been signed in blank by the wife. Eventually the husband filled in the blank spaces naming his mother as owner and registered it as such. The husband continues to drive the vehicle but contends that it is not a matrimonial asset since it is owned by his mother.

[100] I have concluded that this vehicle is beneficially owned by the husband notwithstanding its ownership papers. I was not given a valuation of this vehicle. Instead I was given pages from a publication called “Auto Trader” which listed a number of vehicles of similar make, model and year. Counsel for the mother suggests that I should value this vehicle at $18,995 which is the average of those examples. Given that the lowest of the examples was approximately $6600, given that the subject vehicle has more kilometres, substantially more in some cases,

than the comparisons and given that it is a 19 year old vehicle described by the husband as being in serious need of repair, I am not prepared to accept the wife's number. I will place it in the equalization chart assigning it to the husband at a value of $10,000.

Canada Savings Bonds:

[101] The parties agree that the Canada Savings bonds are worth $115.00 and should be assigned to the wife which I have done.

Black Business Community Investments:

[102] The parties have agreed that this investment has a value of $6,000 and each of the parties seeks ownership. Largely because it was an investment chosen by the husband and related to his connection to the black community, I have assigned this to him.

The wife's RRSP:

[103] The parties have agreed that the after tax value of the wife's RRSP is $69,660. Using the discount for tax purposes of 24% this will be assigned in the equalization chart to the wife.

The Husband's RRSP:

[104] The parties have agreed that the husband's RRSP has an after tax value of $31,773 using the same tax discount and I have assigned this item to him.

Bank Accounts:

[105] The parties have agreed that each will keep their respective bank accounts without further accounting.

Miscellaneous debts:

[106] The parties have agreed with respect to the value of the various miscellaneous debts but disagree as to how they should be assigned. Obviously, assigning the debt to a particular spouse affects that spouse's entitlement/obligation with respect to the equalization payment.

[107] It is not unusual to assign the debts according to which spouse is responsible to the creditor and divide those debts that are jointly held. For reasons that will be discussed below, I am concerned about the wife's security for her future. Given that the husband is trained as an engineer, it is likely that he has the greater opportunity to re-establish himself financially in the future. On the other hand, I did not consider it to be reasonable to assign all of the miscellaneous debt to the husband. Therefore, I have assigned the Royal Bank credit card to the wife. It is in her name alone. I have assigned all the other miscellaneous debts to the husband.

Equal vs. Unequal Division:

[108] The equalization chart attached as Schedule A to this decision calculates that, after assigning the assets and debts as I have decided to do, the division would be equalized by the wife paying $21,218.24 to the husband.

[109] Section 12 of the *Matrimonial Property Act, supra* creates a prima facie presumption that an equal division of matrimonial assets would occur. However Section 13 of the Act states that "...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: ....

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

[110] I did not have any evidence that the miscellaneous debts should operate in such a way as to trigger the operation of the above noted subsection. However, counsel have strenuously argued for special attention to the Canada Revenue Agency debt and the Payzant's Building Supplies debt both of which were paid out of the closing proceeds of the matrimonial home.

[111] There are a number of cases that have classified personal income tax debt to Canada Revenue Agency as being matrimonial debt. I agree and therefore consider it to have been appropriate that the wife has shared in the pay out of this debt through disbursement of the matrimonial home proceeds.

[112] The *Matrimonial Property Act* does not define "matrimonial debt". Various cases have attempted to consider the impact of debt on the equalization process by use of the above noted subsection. I prefer not to do that. In my opinion, the intention of the legislature in creating the *Matrimonial Property Act* was to provide for the prima facie equal division of the parties' net worth. Therefore, Section 12 in providing for the equal division of "matrimonial assets" must be read to mean matrimonial assets, net of matrimonial debts. To do otherwise in those many cases where the parties are not jointly indebted to the creditor and the one spouse has more debt than the other, would always result in their being an unequal division of the matrimonial net worth. This would be contrary to the purpose of the statute. Following the above interpretation, a "matrimonial debt" would be a debt that was incurred either to purchase a matrimonial asset or to pay for some other family event such as a vacation.

[113] The Payzant Building Supplies debt was incurred by the husband alone. The judgement was in his name alone.

[114] In happier circumstances, this debt being a business debt, I would have assigned it to the husband and in the case that it had already been paid out of matrimonial funds, direct that the husband account for it in the equalization payment. This would mean that he would need to pay the wife $50,000.

[115] As will be seen from the equalization chart attached, the sad truth is that each of the parties would only be left with approximately $54,000 of net worth if these assets were equalized. The husband has no means with which to pay the wife for this debt.

[116] I considered ordering the husband to transfer his entire RRSP to the wife thereby making her equalization to the husband about $45,000 and then forgiving the payment by her to him in compensation for the Payzant Building Supply debt. On balance, I concluded that this would be unnecessarily harsh given the substantial loss of assets that both parties have sustained in the process of

attempting to earn their living. A more balanced approach would be to forgive the wife's obligation to pay the equalization payment outlined in Schedule A. I order that each of the parties shall own the assets assigned to them respectively in the attached chart and neither shall pay any equalization payment to the other. I do so based on section 13(b) of the *Matrimonial Property Act,* above quoted, noting that the circumstance by which the Payzant business debt became an encumbrance on the matrimonial home and reduced its equity.

[117] My decision as can be seen in the attached chart will result in the wife getting a division of assets of about 70% of those assets that remain available for division and that inequality is justified by the fact that in coming to that percentage she, by no choice of her own, assumed responsibility for 50% of the business debt to Payzant's Building Supplies.

MISCELLANEOUS ISSUES - SECURITY FOR SUPPORT

[118] The wife seeks to be named as beneficiary of the husband's life insurance to secure against the loss of spousal and child support in the event of the death of the

husband. The husband has already named their adult son as beneficiary. The wife argues that the son would not be the one looking after Nicole, who has special needs, and that therefore Ms. Tynes should be named. I agree. The policy shall name the wife as trustee for the child.

Costs:

[119] Counsel for the wife has asked that I make an order for costs relying in part on the alleged lack of disclosure by the husband. I must note that the wife's demands were very substantially more than that which was awarded to her. As a result, there will be no costs to either party.

Campbell, J.

SCHEDULE "A"

Equalization Chart

Assets:	**Value**	**Husband**	**Wife**
Net proceeds of Sale of House	5195.47		5195.47
Acura	500.00	500.00	
Yamaha Road Warrior	8170.00	8170.00	
Chevy Van	0.00	0.00	
Ford Van	0.00	0.00	
Toyota Camry	5000.00		5000.00
Canada Savinds Bonds	115.00		115.00
Black Business Comm. Investments	6000.00	6000.00	
Wife's RRSP($91,658 less 24%)	69660.00		69660.00
Husband's RRSP ($31,773 less 24%)	24151.00	24151.00	
Toyota Supra	10000.00	10000.00	
Total Assets	**128791.47**	**48821.00**	**79970.47**
Debts:			
Laurentian Bank	-5116.00	-5116.00	
Visa	-3102.00	-3102.00	
RBC credit card	-4337.00		-4337.00
Canadian Tire	-5226.00	-5226.00	
HBC credit Card	-480.00	-480.00	
Accomodatiions for Purchaser	-1700.00	-1700.00	
Net Assets	**108830.47**	**33197.00**	**75633.47**
Equalization Payment		21218.24	-21218.24
Net after Division		**54415.24**	**54415.24**