SUPREME COURT OF Nova Scotia
Citation: *CDD v PRD*, 2017 NSSC 369

Date: 2017-12-22
Docket: 1204-006310
Registry: Kentville

Between:

CDD

Petitioner

v.

PRD

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	November 28 to 30, 2017, in Kentville, Nova Scotia
Final Written Submissions:	December 15, 2017
Oral Decision:	December 22, 2017
Counsel:	Heidi Foshay Kimball, for the petitioner Debbi Bowes, for the respondent

By the Court:

Oral Decision

[1] Counsel, I intend to have this decision typed and edited for grammar to make it more coherent, without changing any of the analysis or figures.

The Proceeding

[2] This is a divorce decision following a three-day hearing. The primary issues are:

a) Dad's access to their two sons, born in 2009 and 2011,

b) Prospective and retroactive child support, both s. 3 basic and s. 7 special expenses, and

c) Division of assets.

Background

[3] Before getting into the particulars of those three issues, I have prepared some background.

[4] CDD (aged 39) ("Mom") and PRD (aged 41) ("Dad") met and commenced a relationship as teens in their home province of Newfoundland.

[5] PRD graduated first, trained as a paramedic, and was so employed mostly outside of Newfoundland.

[6] CDD graduated from nursing school in 2001 and immediately commenced working full time as a nurse in St. Johns.

[7] The family appears to have lived apart as much as together because of PRD's off-island employment. They purchased a home together near St. Johns in 2005, at the same time as PRD commenced working on a contract basis as a flight paramedic in the North-West Territories. They married on July 15, 2006.

[8] CDD says their relationship was never strong. In hopes of improving it, they moved to the Northwest Territories in 2007, when PRD was hired on a full-time basis as an Advanced Flight Care Paramedic. CDD obtained full-time employment

in her profession. PRD's employment often caused him to be away on medical emergency flights throughout the North during their residency there.

[9] As a result of three traumatic incidents, two involving the deaths of babies being transported on flights, PRD was diagnosed with severe depression and PTSD. He has since been on medications and has received intensive counselling, but he has not recovered. He has not worked since, and while not clear, it appears - since 2014. In addition, he suffers from several physical ailments, including diabetes, for which he is insulin dependent. CDD says he is an alcoholic. He says he has not consumed alcohol for more than a year.

[10] The Northwest Territories Workers' Safety and Compensation Commission determined that PRD had a "100% permanent total disability" and they currently pay him monthly compensation of about $5,600.00. CPP awarded him a disability pension of about $1,000.00 per month for himself and about $475.00 per month for their children. CDD receives the children's portion of that pension directly from CPP.

[11] CDD states that it was always their joint plan to remain in the North for about five years, and they planned to return to southern Canada. She applied for several jobs in Atlantic Canada and, in 2014, succeeded in an application for a senior position in healthcare at Kentville, Nova Scotia. By this time, PRD was not working, so they moved to the Annapolis Valley.

[12] CDD says that their marriage, which was not in good standing from the beginning, did not improve with their move to Nova Scotia. She described episodes of drinking, misconduct and indifference. She says PRD's mental health has worsened.

[13] After a dispute in October 2015, PRD left the home and, for a while, lived in their trailer on a neighbor's property. They have not cohabitated since October 20, 2015.

[14] In December 2015, an Interim Consent Order was issued by this court, first granting CDD interim exclusive possession of their home, and primary care of the children with fixed access to PRD supervised by the neighbours. This order was shortly thereafter amended to remove the requirement for supervision. I heard that interim application. At that time, there was medical evidence before the court with regards to PRD's medical and mental health condition.

[15] Late one evening in February 2016, PRD showed up at the family residence, apparently in a drunken condition. When he was refused admission, he returned and set a fire to their travel trailer, parked in the driveway. He was arrested, charged and eventually plead guilty to mischief and criminal harassment. By a Consent Order dated February 18, 2016, his access to the children was suspended, and he was ordered to pay $805.34 per month child support.

[16] By Consent Order dated December 23, 2016, PRD was granted one-hour per week of supervised access at Apple Tree Landing, under the court's "Supervised Access and Exchange Program" ("SAE Program").

[17] PRD, in mid-2016, I believe effective October 1, 2016, voluntarily increased the child support he paid to $961.00 to reflect the approval of his CPP disability pension.

Divorce

[18] With respect to this proceeding, the court is satisfied that there is no reasonable prospect of reconciliation. The family have established that: they have been ordinarily resident in Nova Scotia since August 2014; they were married to each other on July 15, 2006 and they have been living separate and apart, by reason of the breakdown of their marriage, since October 20, 2016.

[19] Therefore, I grant a divorce judgment.

Parenting

[20] Respecting parenting, it is not contested that the children will remain in the joint custody of both parents and in the primary care of CDD. Much of the evidence of this trial dealt with PRD's depression, PTSD and alcoholism, including its impact upon his relationship and access to their two sons. In addition to the parties, the court heard from the most recent access supervisor at Apple Tree Landing and the head of the court's SAE Program.

[21] CDD described PRD's parenting of their sons before separation in less glowing terms than he described them. She basically suggested that he was indifferent and, likely because of his depression and PTSD, was not reliable. Even before their separation, when PRD was not working, the children went to daycare when CDD was at work.

[22] Since shortly after their separation and since February 2016, when PRD attended at the residence and burned the travel trailer, his access to their two sons has been severely restricted. From mid-February 2016 to December 24, 2016, PRD had no physical access with their children. December 24th was the date supervised access at Apple Tree Landing for one-hour per week commenced. This continued until August 2017.

[23] On January 25, 2017, PRD missed an access visit without prior notice because of a medical appointment for which he was hospitalized.

[24] On February 23, PRD was sentenced in criminal court to nine-months house arrest and a further nine-months curfew, with two years' probation, for the mischief and criminal harassment conviction. In August 2017, he was found in breach of his house arrest condition (he was found at a restaurant without prior approval). As a result, he spent several days on remand before appearing in court and pleading guilty. Apparently, he was sentenced to "time served". As a result, he missed and did not receive the telephone messages from Apple Tree Landing with respect to the fact that he missed access periods on August 8th and August 15th.

[25] Pursuant to their policy, Apple Tree Landing cancelled the rest of his supervised access visits. I am satisfied that the misses of the scheduled access visits were not intentional and do not indicate any lack of interest by PRD in having access to his children. His absences were explained.

[26] By court order, PRD's supervised access was reinstated. His access resumed on a one-hour per week basis on October 23, 2017. If my calendar is correct, that will be two months ago tomorrow.

[27] In her pre-trial brief and oral evidence, CDD seeks the continuation of supervised access at Apple Tree Landing until the expiration of the SAE Program funding in February 2018, at which time she seeks a review of this access. In her post-trial brief, she sets out a proposal in greater detail.

[28] PRD seeks supervised access to their sons in his residence, under the supervision of his friends and family, as well as the opportunity to attend some of their extra-curricular activities in a normal fashion. On her post-trial submissions, Ms. Bowes, on behalf of PRD, expounds more on that issue.

[29] Access, and parenting generally, is governed by s. 16 of the *Divorce Act*, and the case law that has interpreted and applied s. 16. Sections 16(8), (9) and (10)

provide the particular language upon which issues of parenting, including access, are determined:

> **Factors**
>
> **(8)** In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> **Past conduct**
>
> **(9)** In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
>
> **Maximum contact**
>
> **(10)** In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[30] In MacDonald, James and Ann Wilton, *The 2010 Annotated Divorce Act*, (Toronto: Carswell, 2017) p. 571, the authors interpret s. 16(10), as decided in the cases. They quote then-Justice McLaughlin, until last week Chief Justice of the Supreme Court of Canada, in a Supreme Court Decision *Young v Young*, [1993] 4 SCR, as stating that: "It is presumptively in a child's best interest to have maximum contact with both parents in the absence of any reasons indicating otherwise."

[31] The maximum contact principle reflects the view that maximum contact with both parents is generally in the best interests of the child. While the maximum contact principle is not absolute - it is not mandatory, emphasis must be placed on the critical importance of the bonding, attachment and stability in the lives of children. While the *Divorce Act* promotes maximum contact, the *Act* does not create a presumption of shared parenting and no onus is placed on a party to prove that shared parenting should not be ordered.

[32] The issue in this case stems entirely from PRD's mental health issue and how it impacts the best interests of their two boys. PRD suffers from severe depression and PTSD. This is an illness, not a crime, and in-and-of-itself, it is not blameworthy. But to the extent that it may impact upon the emotional and physical well-being of the boys, it is relevant.

[33] I described at the beginning of this decision the impact that PRD's illness has had upon his access to their children since separation. The court received medical evidence at the first interim motion in December 2015, but none since. There is conflicting evidence in this proceeding as to the extent and the effect that PRD's mental health condition has had upon his conduct.

[34] The conflicting evidence includes, as between PRD and CDD, not just the extent to which his problem with alcohol has stabilized, but also his ability during the supervised access visits with their children to avoid interactions (statements) that might be interpreted as emotionally problematic with regards to CDD's parenting.

[35] I have read carefully both counsel's post-hearing briefs, which focus on a proposed access plan for PRD. I am briefly going to read or paraphrase from both submissions.

[36] From PRD's post-trial brief, and I am paraphrasing and quoting:

> PRD proposes to continue with the supervised access and exchange program until the hours expire, projected to be the end of February 2018.
>
> PRD proposes that his friends supervise access subsequent to the scheduled end of the SAE Program. PRD has no problem with Ms. Reimer reviewing his visits with her until this time, under the more interactive program she described - I take that to the attachment program that Ms. Reimer talked about in her evidence.
>
> PRD proposes to have his friends complete a criminal record check and sexual abuse registry check and have them attend at the SAE Program so the children can become familiar with them. CDD can also make arrangements to meet the proposed supervisors.
>
> It is now almost two-years post-camper fire. PRD remains under conditions not to consume alcohol.

> PRD also proposes attending the activities of the children at least once per week and building upon this.
>
> PRD proposes both he and CDD meet separately with Trevor Moore until Mr. Moore believes it is appropriately to joint commence counselling sessions to learn how to communicate and co-parent their boys. A prerequisite for this counselling is the recommendation of PRD's probation officer and variation of the Probation Order to facilitate it.
>
> PRD also seeks Christmas access for a four-hour period in his home – he asked that the court set a review date to expand his parenting time and conditions in six months' time, unless both parties advise the court that a review date is not necessary.
>
> To avoid further costs and delay, in the event PRD is able to expand his parenting time with the SAE Program to two hours to visit, he asked the court to reauthorize a further block of time for that program to ensure the continuity of access after the end of February 2018.

[37] Counsel for CDD made submissions on access. It appears that the parties appear to have closed the gap considerably; that is, both counsel's submissions closed the gap considerably from what their positions appeared to be before the hearing, and, in my view, that is commendable. Ms. Foshay Kimball's brief reads in part:

> There is no contest on the issue of CDD having primary care. She is seeking that the respondent has supervised access upon the SAEP and participate in the attachment program. … PRD suffers from PTSD and takes a plethora of medications. … An interim hearing was held over three days in December and January 11, 2016. Evidence was given by his treating physicians and psychologists, and PRD was granted unsupervised access.
>
> A month later, in the early morning hours of February 10th, he attended at the matrimonial home . . . and we have the pounding [on the door, the yelling and the eventual fire].
>
> PRD has anger, control, and impulse control issues. … [As a result,] he did not see the children for approximately 10 months when supervised access was set up through the SAE Program. PRD had telephone calls with the children in the fall of 2016 and saw them through the SAE Program for the first time on December 24, 2016.

> [Counsel then asks:] Is PRD, at this time, equipped to deal with two young children, ages 6 and 8, and is it in the children's best interests at this time?
>
> CDD believes it is the child's best interests not only to have to have supervised access through the SAE Program but for PRD and the children to engage in the attachment program, which is a program designed to reintroduce secure attachments between children and parent.
>
> [Court comments added during the rendering of the oral decision]

[38] She then goes on to set out a detailed proposed order, paragraphs (a) to (i):

a) To maintain consistency for the children, with a focus on reintroduction, continue with SAE Program through Kids Action Program

b) PRD to begin and finish the parent attachment program through Kids Action Program. This will increase his time with the children and also help ease and assist with the reintroduction and integration of the children.

c) Once the SAE Program and attachment programs are completed, the program experts (Debbie Reimer) decide on a go-forward plan and any need for further supervised visits and recommendations for parenting.

d) If a decision is made for future supervisors, Kids Action to decide if SAE Program continues or if a third-party supervisor can be implemented. If the decision for third-party supervisors is made, Kids Action Program to vet the proposed supervisors from either party, covering costs of the criminal record and vulnerable sector checks to ensure appropriate supervisors.

e) Trevor Moore, the children's counsellor at Bower Jacquard Psychological Services is agreeable to meet with PRD to assist in reintroduction plan with the children, with a focus on the children's best interests and need to maintain consistency for them.

f) Twice weekly phone calls with the children.

g) Once the parent attachment program is completed by PRD, and progress with reintroduction has been made, a plan will be developed to attend extra curricular activities between the parties.

h) An SAE Program visit has been set up to occur on December 23rd at Apple Tree Landing for three hours, during this time PRD can deliver and watch the children open any Christmas gifts that he may have for them.

i) At such time as in-residence supervised access by a third-party occur, neither party nor third-party individuals are to make any derogatory remarks about the other parent in the presence of the children or while the children are in residence.

[39] Ms. Bowes and Ms. Foshay Kimball, on behalf of their clients, are close in their proposals. Ms. Foshay Kimball's is a little more detailed.

[40] With respect to supervised or restricted access, McLeod, James G. and Alfred A. Mamo, *Annual Review of Family Law*, *2016 – 2017*, (Toronto: Thomson Reuters, 2017), the most current edition now edited by Alfred Mamo, beginning at p. 278, makes relevant observations:

> Supervised access is ordered only if necessary to protect a child and where a parent has parenting problems. Sometimes, when inappropriate parenting behaviour is identified, clinical input is desirable in order to determine a parent's ability to get over past deficiencies and access is ordered to be supervised by a professional, who can then provide guidance to the court. The onus is on the person who seeks to limit access to prove that a proposed restriction is in the best interests of a child and somehow promotes the child's interests.

[41] To the extent that what I have read from counsel's post-hearing submissions differ, it is only with respect to the extent and certainty of the processes that must occur before PRD is able to exercise what I call "normal" access. Supervised access is never intended to be a permanent state of affairs; it is intended to be a transition to deal with issues that are transitory or temporary in nature.

[42] It is trite to state - from the case law and opinion evidence that courts receive on a regular basis, that children do best when they have a substantial, positive and normal relationship with both of their parents.

[43] It appears not to be disputed that PRD's illness has caused him to have control issues in respect of his behaviour and conduct. It appears to the court from the evidence given a few weeks ago that CDD does not trust PRD with the children. In my view, that mistrust is founded upon PRD's conduct and actions. As

I said earlier, his mental health issue is an illness, not a crime and not blameworthy. But it is, based on the evidence I have heard, a real concern.

[44] There is some conflicting evidence, and the court does not have up-to-date medical evidence, that would suggest that his 100% permanent disability, founded upon his PTSD, is not resolved to the extent that there remains an issue with what might happen, not necessarily physically but emotionally, to their two boys if he were given unsupervised access or access supervised by people who are not professionally trained. I note that both sides say that the SAE Program should be continued to the end of the available funding at the end of February 2018.

[45] Both briefs suggest that PRD should be required to attend the attachment program with Ms. Reimer. This court does not have extensive experience with that program, but from Ms. Reimer's evidence and the submissions of counsel, I conclude that PRD should, as a condition of his access to the children, participate in that program.

[46] Both parties appear to agree that separate from the attachment program, PRD should attend on the children's counsellor Trevor Moore.

[47] CDD is proposing twice weekly phone calls with the children.

[48] CDD's proposal differs on the issue of the extent to which third-party supervisors may be introduced, in part due to the fact that she has no knowledge whatsoever of whom the proposed supervisors are other than 'PRD's friends'. She has some concern, which concern is, in my view, appropriate. I agree with the suggestion that any future supervisors should be vetted or at least interviewed by the independent professionals; in this particular case, by Ms. Reimer's organization.

[49] My concern with the timelines and the detailed proposal in CDD's brief is that it leaves the matter of returning to a more normal access arrangement up in the air. There is clearly a heavy onus on PRD to control his conduct - even if he cannot remedy his mental health issue in such a way as to expedite the time when he may have access at his home with supervisors vetted by SAE Program and further participate by attending and watching his two boys in their normal activities before too much more time passes.

[50] Without trying to interfere and reword significantly proposals (a) to (i) in CDD's post-brief submissions, I am prepared to incorporate them in an order with

a caveat. The caveat has to do with my concern that it is open ended and a lot of time could pass before the parties either agree (because one party drags their feet or the other pushes too hard) to have more normal access occur between PRD and their two boys.

[51] From the evidence of the supervisor Ms. Strickland, PRD and Ms. Reimer, I find that the children look forward to their access to their dad. I am concerned how long that will continue when the access is in an artificial environment. The children have the right to know the lifestyle of both their parents.

[52] While it is not essential to this court's decision, I am going to say two things about CDD. I am absolutely satisfied that it has been extremely difficult for her to deal with a person who has the mental health issue PRD has. Anyone who has not been through it cannot appreciate the stress and the resulting mistrust it creates.

[53] A second observation is that I am absolutely satisfied that, to the extent that she can control it, she has attempted to protect the two boys from becoming aware of some of the inappropriate actions of PRD that have lead to the mess that is before the court.

[54] In other words, I am satisfied based on her evidence, and obviously, courts make assessments of witnesses who are on their best behaviour, and recognizing she is a person affected by this whole process, that she is not attempting in any way, directly or indirectly, to alienate the children from their dad.

[55] Because of my concern about the open-endedness of (a) to (i), my caveat is that there be a review of the progress made in the attachment program that both sides agree PRD will participate in, and the counselling with Mr. Moore that both parties say he should participate in.

[56] PRD is in a hurry to get access in his home, and I understand that desire. I am not sure he is aware of the importance of supervisors who are trained and whose priority is to avoid inappropriate events during access periods. Friends do not count, because they are not normally trained, and their inclination is to give the benefit of any doubt to their friend - a priority which is not necessarily that same as the best interests of the children.

[57] I prefer to do have a review at any earlier date than suggested by CDD. I direct that there be a review of the progress with regards to items (a) to (i) in CDD's brief before March 31st.

Child Support

[58] I am now going to move onto the issue of child support, and I break this analysis into six parts:

1. determine the respective incomes of PRD and CDD.

2. determine prospective basic child support from December 1, 2017 and prospective s. 7 special expense claims from December 1, 2017.

3. review of counsel's calculations of the retrospective claims made by CDD, and my own calculation.

4. review the calculation of retrospective basic or table s. 3 child support.

5. summarize the analytical process that this court is required to apply to retroactive claims, both s. 3 and s. 7 as a result of the Supreme Court of Canada's decision in the famous quadrilogy *DBS v SRG; TAR v LJW; Henry v Henry*; *Hiemstra v Hiemstra*, [2006] 2 SCR 231 ("*DBS*").

6. apply the *DBS* analysis to the retrospective claim.

Part 1: Incomes

[59] CDD has not produced her 2014 income tax return. Her 2015 income tax return showed income of $94,160.00. Her 2016 income tax return showed income of $89,099.00. Her income, as of November 11, 2017, was $81,135.00.

[60] Her counsel suggests that the rate of income will slow down from November 11th and projects her 2017 income was $89,104.00. Ms. Bowes, on behalf of PRD, uses the normal proration and shows her projected income should be higher by about $5,000.00.

[61] PRD's income, as shown on his 2015 income tax return, was $62,473.00 in the form of the WCB pension. His 2016 income on his tax return consists of WCB pension of $62,249.00 and CPP disability pension of $19,368.00. I accept and will deal with shortly the fact that $19,368.00 was a T4A slip for more than he received in 2016 because CPP made a retroactive award; I am apportioning that $19,368.00 as between 2016 and 2015, which is going to change the arithmetic on counsels' respective child support calculations.

[62] PRD's 2017 projected Workers' Compensation income was stated in CDD's post-trial brief as $67,334.00, and in PRD's brief as $65,334.00. His projected CPP disability income is projected to be $12,104.00.

[63] With the award of a CPP disability pension to PRD, the government awarded an accompanying additional disability pension benefit to the children. The award was made retroactive. The exhibits before the court show and confirm PRD's evidence that he passed on to CDD $4,278.43, initially paid to him as the retroactive award of CPP for the children, and CDD was received since then directly from CPP other amounts, which in all total, to and including October 27, 2017, $11,464.44.

[64] These benefits are income of the children, in whose name, at least for the year 2016, T4A slips have been issued.

[65] The parties and the court itself have come to different conclusions on how to calculate the gross up of PRD's WCB pension for the purposes of calculating child support. CDD's calculation grosses up PRD's 2015 tax-free pension of $62,473.00 to $85,964.00. She grosses up his 2016 pension of $62,249.00, about $200.00 less than in 2015, to $98,593.00.

[66] I note that if the gross up of the higher 2015 pre-gross-up income is $85,900.00, I do not rely upon CDD's 2016 gross up of a lower income can convert to a much larger grossed up income of $98,000.00.

[67] The 2017 projected income of PRD is $67,334.00. Grossed up it converts to $100,988.00.

[68] CDD's brief, both pre- and post-trial, cites former Justice Campbell's tip to counsel #17, for the appropriate analytical method to determine the gross up amount of a tax-free payment. I note in reviewing Tip #17, and in reviewing the Child View program, that the formula of Justice Campbell was described as being approximate and only includes a taxpayer's basic deduction.

[69] The court has done its own analysis of the determination of PRD's income.

[70] PRD received in 2016 retroactive and current CPP benefits totalling $19,368.00, all of which were for tax purposes included in his 2016 income. In 2017, it is acknowledged that he is going to receive a CPP disability pension of $12,104.00.

[71] I infer that he did not receive more for the year 2016 than he is getting for the year 2017. The 2016 CPP disability payments included retroactive payment for part of 2015; therefore, I have attributed $12,000.00 of the CPP payments received in 2016 to the year 2016, and the balance that he received in 2016 ($7,368.00) I attributed to 2015.

[72] I have grossed up his 2015 Workers' Compensation of $62,473.00, using the Child View Program for Judges, as being $87,779.00, to which I have added the CPP of $7,368.00, and have determined that PRD's grossed-up income for the year 2015 is $95,147.00, which is about $10,000.00 more than CDD's calculation, not including CPP.

[73] For the year 2016, I have taken WCB income of $62,249.00 and, per the Child View for Judges program, converted it to a grossed-up income of $87,422.00. It means that PRD has a total income for child support purposes for 2016, when the taxable CPP disability pension of $12,000.00 is added, of $99,422.00.

[74] For the year 2017, even though I have some reservations about CDD's projection of the actual WCB pension being $67,334.00, I have used that figure. If I am wrong, it can be adjusted after, when we have the actual figures. Assuming he receives by the end of the year in actual cash $67,334.00, I gross that up to $95,912.00, which is about $4,000.00 less than CDD's projection, to which I add CPP of $12,104.00, for a total income for the purposes of child support for the year 2017 of $108,016.00.

[75] Applying the new child support table that came into effect at the end of November 2017, on a go-forward basis, and using $108,016.00 as PRD's equivalent income for the purposes of child support, he is required to pay basic or s. 3 child support of $1,481.19 per month. That is effective as of December 1, 2017.

[76] With respect to the retroactive claim, applying my grossed-up income calculation for 2015, the table amount of child support would be, for the two months' post separation, $1,290.79; and for the year 2016, $1,343.22; and, for the year 2017, to November 30 (applying the old table), $1,447.20. I have rounded out the pennies.

Part 2: Prospective Child Support

[77] I also determine that he should, on a go-forward basis, be paying basic child support of $1,481.19, based on my calculation of his 2017 income.

[78] It is normal in child support proceedings, to provide some efficiency to the process, that his projected income for 2017 would, absent evidence that he expected a change in his 2018 income, continue to be the basis for determining child support until June 1, 2019 – that on or before May 31, 2019, he would provide his full income tax returns for 2018 and, if available, the notice of assessment, at which time his child support obligation would be varied effective June 1, 2019 to reflect his 2018 income.

Part 3: Review the calculation of CDD's retrospective s. 7 claim

[79] Exhibit #11 is CDD's statement of s. 7 expenses for 2016 and 2017 to November 3, 2017. It itemizes the 2016 claimed gross expenses of $9,719.00. Of this, the gross amount for child care and after school fees was $7,880.00, to which were added extracurricular activities for summer camp, gliders, basketball and swimming that total $1,839.00.

[80] For 2017, Exhibit 11 showed after school expenses of $5,310.00 and activity expenses, including summer camps, swimming, taekwondo and baseball, totalling $3,298.00.

[81] In post-trial submissions, CDD produces Child View summaries for the years 2016 and 2017 that differ from Exhibit #11. For 2016, they show gross child care expenses of $7,048.00, not $7,880.00, and they show net expenses after available taxable benefits of $4,086.00. For activities, it shows expenses of $2,098.00, versus the $1,839.00 shown on Exhibit #11. The net amount claimed under s. 7, as shown on the Child View calculation, attached to CDD's post-trial brief, is $6,184.00 and she claims 56% or $293 per month from PRD.

[82] The 56% is based on PRD's income in 2016 being $117,961.00. It included all the $19,000.00 CPP received in 2016 and included a different gross-up figure of $98,000.00 for the $62,000.00 that PRD received in 2016. I have determined PRD's income differently.

[83] For 2017, CDD's Child View summary, attached to her post-trial brief, shows gross child care expenses of $7,048.00 versus Exhibit #11 which showed

$5,310.00. The Child View printout shows net child care expenses, post-benefits of $3,847.00. It shows other activities as being the same $2,098.00 that was claimed in the Child View program for 2016 as opposed to the $3,298.00 claimed on Exhibit #11. Effectively, the net claim was $5,945.00, for which she seeks 54% or $270.00 a month from PRD.

[84] PRD's post-trial brief states that during the hearing his counsel understood CDD discontinued her retroactive s. 7 claim. I do not read CDD's brief as having done that, regardless of what might have been stated during oral submissions when I engaged counsel with my initial observations, which may have lead counsel to make statements that they retracted in their post-trial briefs.

[85] Before entering into the *DBS* analysis, I am going to give my analysis of what are and are not claimable as s. 7 retroactive amounts.

[86] Based on the recalculation of the parties' incomes, as set out above, I am not satisfied that the children's extracurricular activities, enumerated in Exhibit #11, have been proven to be 'extraordinary' as defined in the *Federal Child Support Guidelines* and the case law.

[87] CDD has proven, by Exhibit #11, chid care expenses in 2016 of $7,880.00 gross, or $4,086.00 net; in 2017 of $5,310.00 gross, and $3,847.00 net.

[88] For the year 2016, CDD's income is $89,099.00; I have determined PRD's to be $99,422.00. His income is 52.7% of the total; he is liable for 52.7% of the net child care cost for the year 2016 or $2,153.00, subject to any comments that I make with respect to the application of *DBS*.

[89] With respect to 2017, CDD projects her income to be $89,104.00. PRD's income has been projected by me, assuming he makes $67,334.00 in Worker's Compensation, to be $108,016.00. His proportion of their combined income is 58.4%. Taking the net amount claimed for child care expenses by CDD of $3,847.00, PRD's share would be $2,104.00, subject to the court's *DBS* analysis.

[90] Subject to the *DBS* analysis, PRD's share of the allowed s. 7 expenses for the year 2016 and 2017 is $4,257.00.

[91] During the trial, I directed counsel to some case law from Nova Scotia and Ontario that dealt who should get "credit", and I use that word loosely, for the CPP

payments paid to the children, resulting from PRD's CPP disability entitlement. The case law was not consistent.

[92] Since that hearing, CDD's post-trial brief has cited case law that suggests the benefit belongs to the child and is not a benefit of the pensioner and, effectively, PRD should get no credit against retroactive child support, either in the basic amount (s. 3) or the s. 7 special expenses by reason of the payments. However, in *Vickers v Vickers*, 2001 NSCA 96, the court endorsed the approach taken in *Corkum v Corkum*, 1998 CarswellNS 57 (NSSC), to the effect that a court should consider a child's resources when apportioning the cost of s. 7 or special expenses.

Part 4: Retroactive basic support

[93] I am not calculating the retroactive basic (s. 3) child support claim.

[94] CDD claims, based on her estimate of PRD's past income, arrears under s. 3 of $17,054.00. PRD's counsel applies different grossed up figures, and says the arrears total $11,998.00, but should not be ordered for several reasons, including that (1) the children have benefitted from the CPP disability payments paid during this period, and (2) the hardship to PRD, including consideration of the debts he incurred in setting up his own household when CDD would not share.

[95] My calculation of the arrears – this is calculation of the arrears, subject to an analysis of the *DBS* factors (and whether to award a retroactive claim) is as follows:

- For the two months of 2015, PRD's grossed up income has been recalculated to $95,147.00, giving rise to a child support obligation of $1,290.00 per month.
- In 2016, the court calculated his grossed-up income as $99,422.00, which gives rise to child support of $1,343.00 per month.
- For eleven months in 2017, it is projected, based on CDD's submission of PRD's actual income, but applying my grossed-up income of $108,016.00 that PRD's obligation would amount to $1,447.00 per month.

[96] PRD paid in 2016 child support at the rate of $805.00 for nine months, totalling $7,245.00 and three months at $963.00, totalling $2,889.00, for a grand total of $10,134.00. Effectively, that was $5,982.00 less than my recalculation for 2016.

[97] For the first eleven months of 2017, he paid $10,593.00. The calculation, based on $108,016.00, would have him pay $15,917.00. Effectively, the shortfall, based on my recalculation back to the date of separation, would be $13,886.00.

[98] With respect to child support, there are six parts to the analysis. I am now at the last two: describing the *DBS* analytical framework for determining retroactive claims and applying them.

Part 5: *DBS* Analytical framework

[99] The Supreme Court of Canada, in a decision respecting four appeals heard together respecting retroactive child support was determined in 2006. It goes by the abbreviated name of *DBS*. In that decision, the court set out some fundamental principles with respect to the analytical process.

[100] To facilitate a short-cut of the analysis, I am going to praecipe some of what is written in the *2018 Annotated Divorce Act*, beginning at p. 166.

[101] The fact of parentage itself places a legal obligation on parents. On separation, parents are obliged to provide their children with, to the extent possible, the same standard of living they enjoyed before. Each parent has a free-standing obligation to pay for the support of their children according to their income.

[102] Retroactive child support is discretionary. On the one hand, it is not reserved for rare, exceptional circumstances, but on the other hand, it is not automatic, unlike prospective basic child support. Courts are required to take a holistic approach and decide each case on its own facts.

[103] In *DBS*, the court set out four factors that it thought were important in analyzing whether, and the extent to which, any retroactive child support claim should be awarded. The court indicated that the list of the factors is not closed, but the court in *DBS* focused on four, and most of the case law in this country focuses on the four primary considerations that influenced the Supreme Court.

[104] For the majority, and for the court, Justice Bastarache stated that a payor spouse, who knowingly avoids or diminishes his obligation, should not be allowed to benefit from it. The court said that where an order or an agreement exists and is being honoured, even if not for the correct amount of child support, such may mitigate against or reduce a retroactive award.

[105] The court said that a retroactive award should not be such as to create significant hardship, whether as defined in s. 10 of the *Federal Child Support Guidelines* or otherwise. The court said that an award should only be retroactive to the time when effective notice of the inadequacy of child support is given to the payor.

[106] There are more principles. I have highlighted a few of the basic ones. As noted in the *2018 Annotated Divorce Act*, on an application for retroactive support, the court must consider at least the four factors in the context of the case:

i. Whether the recipient parent has supplied a reasonable excuse for delay in seeking a higher amount;

ii. The conduct of the payor parent;

iii. The circumstances of the children; and,

iv. The hardship the retroactive award might entail.

Part 6: Application of *DBS* in this case

[107] I am going to deal with these factors in the order that were just enumerated.

[108] In November 2015, CDD commenced a Petition for Divorce and, in the Petition, she identified PRD's income as $62,400.00 and claimed child support of $868.12. In November 2015, the same month, PRD filed a sworn Statement of Income, in which he attached some recent Workers' Compensations benefits monthly cheques and, for the years 2012, 2013 and 2014, copies of his Income Tax Information Returns. The returns identified the source of his income: in 2012 both employment income and Workers' Compensation income; and in 2013 and 2014, the Workers' Compensation income.

[109] In 2015, CDD applied for interim exclusive possession of the home; interim custody of the children and child support. The hearing extended over the Christmas holiday and into January. The parties agreed (it was not litigated before the court at that time) that child support would be based on an income of about $57,000.00, as shown on PRD's sworn Statement of Income, and based on his current cheques, in the amount of $805.00. I understand it was paid commencing on January 1, 2016.

[110] Both parties were represented by competent family counsel. I cannot find any where in the court's file where anyone raised the issue that the income that

PRD disclosed was tax free and should be grossed up. It appears that that issue only arose in preparation for this trial.

[111] I am satisfied that PRD paid child support, not knowing that he was underpaying, nor attempting to hide or diminish his income for the purposes of calculation of child support.

[112] The fact that when he became entitled for the Canada Pension disability some time in 2016, he initiated the disclosure and the resulting increase in his child support payments to take into account his new income from Canada Pension disability corroborates his intention. He commenced paying $963.00 on the first of October, based on what he and his then-counsel believed to be the proper amount.

[113] There is nothing before the court to suggest that anyone suggested at any time up to this trial that he was not paying the full amount that he was required to pay. The reality is that no one addressed the issue of grossing up.

[114] I am satisfied that PRD never hid his income nor failed to disclose any change in his income; throughout, both parties were represented by competent counsel.

[115] In summary, these facts address the first two factors that the court, under the *DBS* analysis, is required to consider. The first factor is whether the recipient parent has supplied a reasonable excuse for delay. Her retroactive claim is first made at the time of this trial, and not at the time of the prior interim proceedings. The parties were represented by counsel. There is nothing in the file about a dispute with respect to PRD's income, which income was disclosed.

[116] These facts also affect the second factor, the conduct of the payor parent. The payor parent acted in good faith in paying the amount of table child support that he was advised that he was obligated to pay; he did not fail to disclose his income. He initiated an increase when he started receiving a CPP disability pension.

[117] Moving to the third factor - the circumstances of the children, I make these two observations:

1. There is no evidence that, as a result of the underpayment of child support, there has been an adverse affect on the children. CDD has had exclusive possession of their home without occupation rent. The children have had the

benefit of $12,000.00 in CPP disability payments made to them, or to their guardian, which payments are not taxable to either parent. In my view, that is a relevant consideration in determining the financial circumstances of the children in the context of a retroactive claim.

2. CDD makes a substantial income herself; this reinforces the absence of evidence that the children have suffered financially as a result of the underpayment of child support. That is not always the case.

[118] The fourth factor is the hardship that ordering a retroactive award might entail.

[119] Counsel in her submissions on behalf of PRD points out that when he left the home he took nothing with him; although later I understand he took a trailer load of stuff. There is some dispute as to what was taken; it clearly did not include much in the way of furnishings. He incurred expenses to refurnish a place so that the children, with whom he initially had unrestricted access, could visit him.

[120] It is clear that he has no financial resources at present to pay arrears.

[121] PRD's counsel submitted that a retroactive award would impose a hardship in the context of PRD's 'well being'. It was an unusual phrase. I take it to mean this: PRD has a mental health issue. He has severe depression and PTSD, which I repeat again is an illness, not a crime.

[122] I was concerned on the parenting issue as to the impact it may have on the children when I basically endorsed the program outlined by CDD for the reintegration of dad with the children.

[123] I can infer, or it is common knowledge, that severe depression and PTSD create instability that could affect ongoing long-term child support obligations. A retroactive award that PRD perceived he could not pay may affect PRD's health and prospective child support.

[124] Those are the four factors that are most often considered by courts in determining whether, and the extent to which, a retroactive award should be made.

<u>Conclusion – Retroactive Child Support</u>

[125] Based on application of the four *DBS* factors to the evidence, I am of the view that only a portion of my calculation of the retroactive claim should be ordered.

[126] I have previously indicated that the claimed s. 3 or basic child support obligation, based on my gross up of PRD's income, would lead a retroactive award of $13,883.00, and that the s. 7 claim with respect to child care expenses, would lead to a retroactive obligation over the last 23 months of $4,257.00.

[127] Both parties knew from the beginning approximately what PRD's income was and agreed to amount of interim child support based on that. PRD did not knowingly underpay. The interim orders were consent agreements.

[128] I accept that PRD voluntarily increased child support when he received CPP disability. I am satisfied that the children have benefitted from the receipt of the CPP disability payments to the extent of $12,000.00 during the period and did not suffer financially.

[129] I am satisfied that the award of s. 3 retroactive child support would create a hardship for PRD in two senses, both directly financially and possibly upon his well being.

[130] I decline to order payment of the retroactive s. 3 amount, but I do order repayment of the retroactive s. 7 claim with respect to child care, which I calculated at $4,257.00.

[131] The amount of that retroactive claim, which was only advanced for the purpose of this trial, filed in November 2017, accrued over 23 months. I give PRD 23 months to pay his share of those child care expenses.

[132] My quick arithmetic dividing $4,257.00 by 23 months comes to the round figure of $185.00 a month and I order PRD pays his share of the child care expenses – the net child care expenses, after whatever credits and benefits are available, as defined in the *Federal Child Support Guidelines*, commencing December 1, 2017 at the rate of $185.00 a month until they are repaid.

Division of Matrimonial Property

[133] The last part of this decision has to do with the matrimonial property claim.

[134] There are three basic issues that the court must consider in analyzing a property claim:

1. What is in and out of the pot that is divisible?

2. What is the value of the respective assets?

3. Whether either party is seeking an unequal division.

Unequal Division

[135] I will deal with the last one first. Neither party claimed that there should be an unequal division of matrimonial assets. I therefore conclude, based on the evidence as to the length of the marriage and the merger of their finances during the marriage, that there should be an equal division. That is not the real issue in the case.

What is "in the pot"?

[136] There was a small contest with regards to whether everything was in the pot. I dealt with who a trailer used for the snow mobile (or hauling goods) belonged to – whether it belonged to PRD's father or not. The only direct evidence I heard in respect of that was from PRD. I accept that that the trailer is not in the matrimonial pot.

[137] The primary contest was with respect to who had other items and what they were worth. Considerable amount of time was spent on Exhibit #15, a list prepared by CDD that identified what she says PRD took on December 5, 2015, and their respective evidence of whether he or did not take it; and, if he did take it, who should have it or who wanted what.

[138] I am not going to go through that evidence, because I believe at the end of the trial, regardless of what was circled or not circled on Exhibit #15 as having been taken, there was an understanding that it was much to do about little.

[139] I was not completely satisfied as to what existed, who has what items, and, in any event, it does not substantially affect the dollars that I am to deal with.

Valuation

[140] For the purposes of determining values, and who has what, I primarily follow the spreadsheet contained in Ms. Bowes' December 14th brief, the last three pages. I reviewed to see whether the figures she put down were consistent with the evidence given at trial, or at least the evidence I heard, and whether I agreed or not.

[141] I found that it was a good outline of items and the evidence on values. For the purposes of this calculation, I made a few minor changes to her figures.

[142] What it had not referred to is the RESP. I believe there was no dispute that CDD would control the RESP for the children. It was not identified in the spreadsheet as part of the division of assets as between the parties.

[143] The matrimonial home will be sold with the proceeds to be divided after the payment of – I think there were two debts against the property, a line of credit and mortgage. CDD was not being charged occupancy rent, but she is getting, to the extent there was a reduction of principal, the benefit of it.

[Discussion between counsel and the court)

[144] There was only the one mortgage. There was the VISA, which is accounted for in the spreadsheet. There was the trailer loan, which was paid as a result of the fire. And, there was the truck loan, which is accounted for in the spreadsheet.

[145] I am ordering, and it is not disputed, that the house will be sold, and CDD is entitled to occupy it until it is sold. CDD will pay the expenses with respect to the house, including the mortgage, but she will get the benefit of the reduction in the mortgage principal in the meantime.

[146] Occasionally, there are issues as to whether serious efforts are being made to sell the property. If, at any point, PRD is not satisfied that *bona fide* efforts are being made to sell the property, I am prepared to hear a motion to give further directions with regards to the sale of a property. It is not an uncommon occurrence when one party has occupancy of a premise and it is not to their benefit to have it sold quickly.

[147] Following the spreadsheet that Ms. Bowes attached to her recent brief, and moving on from the matrimonial home.

[148] The Toyota Matrix, it was agreed at trial that it was worth $5,000.00, and I believe there were two Statements of Property of CDD that it had respectively

appraised at $4,000.00 and $6,000.00. I agree to split the difference. I believe counsel had already agreed to that.

[149] With regards to the Harley Davidson, the Honda Rincon and the skidoo, the court heard evidence from a Mr. Sabean, who recently appraised them, and who, on cross-examination, updated his appraisals to reflect their values at the time of separation.

[150] I am satisfied that he gave objective and reasonable evidence, the best evidence the court could have before it, for the value of those assets, and I accept his evidence. I am satisfied that Ms. Bowes placement in what she calls her Revised Division of Asset Statement reflects the evidence of Mr. Sabean, and I adopt it.

[151] The Harley Davidson - he said it was worth $10,300.00 plus $750.00 by two years or $11,800.00. The Honda Rincon, which I think is a four-wheeler, was $1,500.00 plus $500.00 a year for two years since separation, for $2,500.00. Apparently the 24-foot trailer was agreed between the parties at $5,300.00. The skidoo was appraised by Mr. Sabean at $2,800.00 plus $750.00 for two years since the date of separation or $4,300.00.

[152] Mr. Carey gave evidence with respect to the Ram truck. I am satisfied it should be part of the divisible matrimonial assets.

[153] Often in marriage, parties disagree as to how money is going to be spent or what is going to be bought and not bought. Until separation, those parties are part of a joint financial enterprise and, save certain very unusual circumstances, there is no reason that a truck bought before they moved to Nova Scotia in 2014 should be excluded from the divisible assets with respect to a separation that occurred in October 2015.

[154] I accept the appraisal of Mr. Carey, plus the addition of the $5,000.00 for the cover, and accept the valuation in Ms. Bowes' spreadsheet. The truck loan balance at the time of separation is properly identified.

[155] I have already addressed the snow mobile trailer and excluded it from the divisible assets.

[156] With regards to the other personal property, the evidence, supported by his 2016 income tax return, was that PRD apparently had a $58,705.00 RRSP. He

cashed in $50,000.00, as reported on his tax return, which, by inference, meant he retained $8,700.00 in his RRSP. The $50,000.00 was reduced, after tax, to $31,200.00. I accept that calculation.

[157] The RRSP adjustment: I had the evidence that CDD had two RRSPs that had a value of $8,450.00 and that PRD had, by inference, an RRSP that had $8,700.00, and I do not understand why there is a $200.00 credit to CDD.

[158] I think it should be the other way around. It is one of the adjustments I make. The $200.00 should be shown in favour of PRD.

[159] With regards to the bank and other accounts, the figures that Ms. Bowes used for the most part were taken straight out of Ms. Foshay Kimball's brief. There appears to be no differences between them, as far as I could tell. I include the amount the VISA debt calculation. I accept that the evidence supports these figures. Other than the TD savings ($342.00) they were exactly as identified by Ms. Foshay Kimball in her pretrial brief.

[160] It was previously agreed that there would be an equal division of all pensions; that is normal in law. It would be unusual to divide them unequally. There are apparently three pensions, all held by CDD. They will be, as everything else, divided equally and, presumably, at source or however counsel indicate they can be divided.

[161] The next item, and last individual item on the spreadsheet, refers to personal and household property on an attached two-page document. I heard considerable evidence about it.

[162] I accept and incorporate the calculation on that document with the following changes:

- I add $1,000.00 to the $5,800.00 that Ms. Bowes calculated or proposed as the value, based on the evidence I heard, of what PRD received.

- I am reducing by $1,000.00 the amount that was allocated to CDD from $16,150.00 to $15,150.00.

[163] My conclusion includes where my notes respecting a few items differs from Ms. Bowes figures. There were no appraisals with regards to these items and there was some conflicting evidence even as to who had what. I have taken that into consideration when I reduced the amount that CDD is said to have retained.

[164] I compared the values assigned with the claims made by the parties in their sworn Statements of Property. My calculation is that the amount shown as having been retained by PRD should be $6,800.00, not $5,800.00; the amount retained by CDD should be reduced to $15,150.00.

[165] When I add this to the RRSP adjustment, the equalization payment owed by PRD to CDD is $7,771.00.

[Discussion between counsel and the court on the figures]

[166] Now, part of the problem I had in this case is that I did not have good current information from CDD as to what her income is at present, so I rounded. If there are any gaps [absence of income disclosure] in the actual income or other figures before the court, they were usually respecting CDD's income, not PRD's income.

[167] That does not matter. I tried to apply, as simply as I could, the arithmetic. I took the $5,800.00 and made it $6,800.00; I made the $16,150.00, $15,150.00 and I deducted the $200.00 that was shown as the difference in the RRSP and called it a wash.

[168] I have CDD having on her side of the spreadsheet $28,647.00 after adjustments. I have PRD now having $46,389.00 on his side of the spreadsheet. When you input those two figures, PRD owes CDD $8,871.00 as an equalization payment.

[169] This does not take into account the matrimonial home. The proceeds will be divided equally after the payment of the mortgage.

[170] This does not take into account the pensions which are going to be divided equally at source.

[171] I think I have taken care of everything else, except the RESPs, which are being held in trust for the children by CDD.

[172] The long and the short of it is that I basically adopted Ms. Bowes' spreadsheet, with the exception of the minor adjustments I have identified.

Costs

[173] Counsel, that is the end of my notes made with respect to this oral decision. I have not dealt with costs. If counsel is unable to agree on costs – which may be difficult given that there were moving targets [that is, parties changing positions] on both sides through this process, from the pretrial briefs - to the trial itself - to the post-trial briefs, then I will hear you.

[174] If within 30 days you are unable to agree on costs, I ask you to make written submissions and I will deal with costs in writing.

[175] You will have two weeks after that for any response to the other's brief. I am not sure who thinks they "won". I think I said at the beginning of the divorce hearing that nobody wins.

Warner, J.