SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *A.N. v. J.Z.*, 2018 NSSC 146

Date: 20180626
Docket: *Halifax* No. 1201-070017
SFHD-103542
Registry: Halifax

Between:

A.N.

Petitioner

v.

J.Z.

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Carole A. Beaton
Heard:	April 17, 18, and 19, 2018, in Halifax, Nova Scotia
Written Decision:	June 26, 2018
Subject/Key Words:	Corollary Relief Order; *Divorce Act*; Family; Family-child custody; Family-child support; Family-spousal support; *Matrimonial Property* Act
Issues:	1. Parenting – 2. a) is shared parenting appropriate? 3. b) what parenting schedule is in the best interest of the 4. child? 5. Child Support – 6. a) what is the appropriate quantum of prospective child support (table and section 7's)? 7. b) what, if any, retroactive/arrears of child support is due? 8. Matrimonial property – 9. a) is the Prenuptial Agreement binding? 10. b) what is the appropriate division of property?

11. Spousal Support –

12. a) what, if any, is the appropriate quantum of spousal support?

13. b) what, if any, retroactive/arrears of spousal support is due?

Legislation: *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3
Federal Child Support Guidelines
Matrimonial Property Act, R.S. 1989, c.275

Cases: *D.B.S. v. S.R.G.*, 2006 SCC 37
Foley v. Foley, 1993 N.S.J. No. 347
Gibney v. Conohan 2011 NSSC 268
Clarke-Boudreau v. *Boudreau* 2013 NSSC 173
Murphy v. Hancock 2011 NSSC 197
Hammond v. Nelson 2012 NSSC 27
Campbell v. Campbell, 2012 NSCA 86
Miglin v. Miglin, 2003 SCC 24
Harrington v. Coombs, 2011 NSSC 34

Result:

1. Parenting –
   a) Shared parenting not appropriate given the absence of appropriate communication and integration of parenting styles.
   b) A detailed parenting schedule with parenting time for the Respondent, based upon joint custody and the child's primary residence with the Petitioner, is identified.
2. Child Support –
   a) The table amount of prospective child support and proportionate sharing of s.7 expenses ordered.
   b) No retroactive/arrears of child support payable.
3. Matrimonial Property –
   a) The Prenuptial Agreement is not binding.
   b) Matrimonial property to be divided equally.
4. Spousal Support –
   a) No retroactive/arrears of spousal support payable.
   b) Prospective spousal support claim for relief not pursued by the Petitioner.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

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Respondent

C**orrected Decision:**	The text of the original decision has been corrected according to the attached erratum dated **February 20, 2019**
Judge:	The Honourable Justice Carole A. Beaton
Heard:	April 17, 18, and 19, 2018, in Halifax, Nova Scotia
Written Release:	June 26, 2018
Counsel:	Jessica D. Chapman for the Petitioner Judith Schoen for the Respondent

By the Court:

Introduction and Issues

[2] The parties were before the Court for a three-day divorce hearing. There was no contest concerning, and the evidence met all of the requirements for a divorce pursuant to s.12 of the *Divorce Act*, R.S.C., 1985, c.3. Counsel for the Petitioner shall prepare the Divorce Order giving effect to the same.

[3] The corollary relief matters in issue during the hearing pertained to the child of the marriage, property and support, raising the following issues:

1. Parenting –

   a) is shared parenting appropriate?

   b) what parenting schedule is in the best interest of the child?

2. Child Support –

   a) what is the appropriate quantum of prospective support (table and section 7's)?

   b) what, if any, retroactive/arrears of child support is due?

3. Matrimonial property –

   a) is the Prenuptial Agreement binding?

   b) what is the appropriate division of property?

4. Spousal Support –

   a) what, if any, is the appropriate quantum of support?

   b) what, if any, retroactive/arrears of spousal support is due?

Background

[4] The parties met in 2007 while the Respondent Husband was visiting in the Petitioner Wife's native country. After a brief interlude, the Wife joined the Husband in Nova Scotia. Two months later they were engaged; a month later they married. Several days prior to the marriage they signed a prenuptial agreement ("the Agreement") giving each sole ownership of their respective assets and any future acquired assets, unless otherwise identified as jointly owned. Each was

employed throughout the eight-and-a-half-year marriage, and following its termination in October 2016. The parties only child, five-year-old N., has been in their joint custody, with a primary residence with the Petitioner since Justice Chiasson's Interim Order of March 2017. That same order required payment of child and spousal support by the Respondent. N. is followed by a pediatric specialist due to a bowel condition that affects the child's toileting habits, requiring vigilant monitoring and record-keeping by the parents.

Issue No. 1 – Parenting – a) is shared parenting appropriate?

[5] The Petitioner seeks to have the Court continue the parenting arrangement contained in the Interim Order, with N. in her primary care and the Respondent having parenting time each Tuesday after school until Wednesday morning and every second weekend from Friday at 5:00 p.m. to Sunday at 6:00 p.m. The Petitioner also proposes each parent have two non-consecutive weeks in summer, and a sharing of Christmas, Easter and the March break school holiday.

[6] The Petitioner maintains that violence by the Respondent during the marriage (which she says precipitated their separation), their strained communication post-separation, her role as primary caregiver throughout N.'s life, and the parties on-going disagreements about certain parenting decisions (in particular those concerning N.'s medical condition) all support that it is in N.'s best interests to continue the status quo arrangement. The Petitioner asserts the communication challenges the parties experience would militate against shared parenting.

[7] The Respondent provided the Court with a detailed plan for all aspects related to the week-on/week-off shared parenting schedule he seeks to have the Court impose. He asserts shared parenting should be adopted as the parties have overcome their earlier disagreements such that they can now function, in the child's best interests, pursuant to such an arrangement.

[8] The Petitioner's position stems from her view that she has historically been the primary caregiver for the child, and that the Respondent seeks to assert control over her and their child by acquiring an equal sharing of parenting time. The Respondent's position stems from his view that he is equally positioned and capable as a parent, that any historical difficulties between the parties have or can be overcome, that the child will benefit from equal time with each parent, and that the Petitioner's rejection of shared parenting as being unworkable is self-serving, put forward only to bolster her position that she should have primary care of N.

[9] Over the past ten years, the Court has produced a number of decisions identifying the conditions needed to support the implementation of a shared parenting regime. Reflecting the circumstances of many different families, these decisions, whether approving or rejecting in any given case the sought-after shared parenting construct, have recognized the importance of key characteristics: a shared parenting arrangement requires the Court to be confident that the parents are committed to, have demonstrated and will be able to continue with a high degree of integration, cooperation, respect and flexibility in and for their respective parenting styles. The parents' approaches need to leave the Court confident that the application of the requirements of section 16 of the *Divorce Act, supra*, and the so-called "*Foley* factors" (*Foley v. Foley*, 1993 N.S.J. No. 347) to the particular circumstances, along with the ultimate assessment of what is in the best interests of the child(ren), can lead to a conclusion that a shared parenting arrangement is reasonable, realistic and workable.

[10] Central to the question of whether shared parenting will be ordered is a consideration of the parties' ability to communicate in a timely, meaningful and respectful way, an ingredient which is the backbone of the key characteristics referred to above, and crucial to their operation in a manner that best suits the needs of the child(ren). Courts are not looking for shared parenting arrangements of perfection – as borne out in decisions such as *Gibney v. Conohan* 2011 NSSC 268 and *Clarke-Boudreau* v. *Boudreau* 2013 NSSC 173 – however parents do need to satisfy the Court that it is realistic to expect they can put the child(ren)'s needs first and foremost in their communication and decision-making.

[11] The Petitioner and Respondent each presented as intelligent, determined and strong-willed, attributes that have undoubtedly contributed to their respective successes to date. Each is genuinely convinced, as illustrated numerous times in the precision and detail surrounding their respective voluminous evidence about the specifics of their parenting history, that relative to one another each knows what is best for N., especially in relation to medical/health matters, which are pronounced for their child.

[12] There is no doubt on the evidence put before the Court that the Respondent is equally as capable as the Petitioner in terms of his ability to care for and meet his child's day-to-day needs. However, I am not persuaded the Petitioner has organized or emphasized her approach to parenting N. simply to defeat any prospect of success for a shared parenting regime. For example, she has recently secured a home only minutes from the former matrimonial home, which will assist N. in maintaining the familiarity the child currently enjoys in terms of school, friends, neighborhood, and proximity to family. This demonstrates an ability to put

the child's needs first regardless of her feelings toward and expressed concerns about the Respondent, who will live close by in the former matrimonial home.

[13] The Respondent argues each parent is well positioned to share equally in the parenting of N., including dividing N.'s time equally between them. I agree that many of the factors examined in decisions relied upon by him - *Murphy v. Hancock* 2011 NSSC 197 and *Hammond v. Nelson* 2012 NSSC 27 – including availability of each parent, proximity of homes, opportunities for mid-week contact, stability in the relationship between parent and child – are attributes that do exist in this case. However, the same cannot be said when it comes to these parents sharing of decision-making, willingness to accept professional advice, ability to cooperate and ability to communicate in a productive (rather than critical) manner. Not every factor or attribute discussed in caselaw needs to be present, but the shortfalls absent in this case are very important ones, especially given the child's medical condition and resultant needs.

[14] I am left in no doubt that each parent loves N., enjoys spending "quality time" with N, and is capable of performing the tasks associated with parenting and providing N. with a sound and happy upbringing. However, both parents respective strengths and attributes do not extend to all that a shared parenting regime requires.

[15] I am not persuaded that shared parenting is workable or in N.'s best interests. The level of the parties mistrust of each's intentions and the continuing effort to control that has permeated the Respondent's actions post separation lead me to this conclusion. Little will be accomplished for the parties by recounting in detail all of the examples from the evidence; suffice, it to note the Respondent's approach to communication with the physicians involved in the child's care and his unilateral effort to dominate the parties' finances through his treatment of the line of credit for some sixteen months post-separation, were but two examples of why I am not willing to "gamble" with N.'s best interests in the hope the Respondent's communication style or treatment of the Petitioner as an equal parenting partner might improve going forward.

Issue No. 1 – Parenting – b) what parenting schedule is in the best interest of the child?

[16] N. has been in the primary care of the Petitioner for the majority of the child's life. (The evidence established N. has never been more than a few nights away from the Petitioner's care.) I am persuaded that N.'s best interests are served by having joint custody continue. The parenting plan appropriate for N. will require the Petitioner, as primary caregiver, to assume final responsibility for

decision making, but only in the event of a stalemate as to the appropriate decision, and predicated upon the requirement of full sharing of information and consultation with the Respondent on any major decisions concerning the child's health, education, development or spiritual/religious matters. A separate order will reflect the right of each parent to access at all times, without the consent of the other, all information pertaining to the child as held by third parties, including but not limited to medical, dental and school records.

[17] It is in N.'s best interests to avoid gaps in the frequency of contact with either parent. The level of specificity included in the parenting plan set out below is necessitated by the nature of the problems recounted in the evidence and/or the proposals put forward by each party. The parenting plan is as follows:

A) Regular Schedule

1. Commencing, Sunday, July 1, 2018, N. shall be with the Respondent in week one on Wednesdays from after school (or 3:00 p.m. in the summer months) to Thursday morning when school begins (or 9:00 a.m. in the summer months). In week two, N. shall be with the Respondent on Tuesdays from after school (or 3:00 p.m. in the summer months) to Wednesday mornings when school begins (or 9:00 a.m. in the summer months), and from Friday after school (or 3:00 p.m. in the summer months) to Sunday at 6:00 p.m.
2. The Respondent's employment might prevent him from picking up N. each and every time, but his ability to map out the schedule well in advance should mitigate against that problem. In addition, the Respondent's mother has been regularly involved in assisting him with his parenting tasks, including picking up the child for the Respondent's parenting time and so N. is familiar with adjustments of that type, which will also present additional opportunity for N. to continue the previous pattern of frequent contact with the paternal grandmother and her family.
3. Such other additional times as the parties might agree upon from time to time.

B) Summer 2018 – Each parent shall be entitled to two separate periods of two consecutive days with N. immediately preceding or immediately following their weekend. During that time the regular parenting schedule shall be suspended. The Respondent shall have the first choice of dates and provide the Petitioner with notice of his choices within 10 days of release of this decision. Following that, the Petitioner shall provide the

Respondent with notice of her choices of dates within 15 days of release of this decision. Given the timing of this decision, if N. is already registered in any summer programs or camps, the parent having care of N. at that time will need to ensure N.'s attendance.

C) Summer 2019 and forward – Each parent shall be entitled to two separate periods of one week with N., during which time the regular parenting schedule shall be suspended. The Petitioner shall have the first choice of dates in 2019 and all odd numbered years and provide notice of her selected dates to the Respondent no later than March 1st, and the Respondent shall respond by March 15th. The Respondent shall have the first choice of dates in 2020 and all even numbered years and provide notice of his selected dates to the Petitioner no later than March 1st and the Petitioner shall respond by March 15th.

D) Christmas - Defined as the period from December 24th at 10:00 a.m. to Christmas Day at 4:00 p.m., during which the regular parenting schedule is suspended. The Respondent shall have N. in his care for Christmas 2018 and every even numbered year thereafter. The Petitioner shall have N. in her care for Christmas 2019 and every odd numbered year thereafter.

E) March Break – Defined as the period from Sunday evening to Friday after school, shall alternate each year, during which the regular parenting schedule is suspended. The Respondent shall have N. in his care for March Break 2019 and every odd numbered year thereafter and the Petitioner shall have N. in her care for March Break 2020 and every even numbered year thereafter. The effect of this will be that one of the parents will have N. in their care for a week, depending on whether their regularly scheduled weekend falls at the beginning or end of March break.

F) Easter – During Easter, which is defined as the period from Thursday after school to Saturday at 4:00 p.m. and Saturday at 4:00 p.m. to Monday at 6:00 p.m., the regular parenting schedule is suspended. The Respondent shall have N. in his care for the first portion of Easter in 2020 and all even numbered years thereafter and for the second portion of Easter in 2019 and all odd numbered years thereafter.

G) The parent commencing parenting time shall be responsible for pick up of N. (as advocated by each parent).

H) The parents shall communicate by email or text in relation to matters concerning N., and communication will be respectful. Each is required to

notify the other by telephone as soon as practicable in the event of an emergency concerning or involving N.

I) Neither parent shall make any negative or disparaging comments about the other parent, nor permit anyone else to do so, in the presence of the child.

J) In the event either parent is unable to be present with N. for a period of 6 consecutive hours or more during their parenting time, they shall first offer the other parent the opportunity to assume that parenting time prior to securing third party child care.

K) Each parent is responsible to ensure opportunities for N. to communicate with the other parent during their parenting time, and shall not unreasonably withhold any reasonable request by the other parent to speak with N. by phone. I decline to impose a specific schedule, recognizing such contact can be subject to what the situation is "on the ground" at any given time, although I trust the parents will see the merit in employing a reasonable approach to making or complying with requests - each should treat the other's requests as they seek to be treated in return. Given N.'s age the child should not be out of contact with the other parent for more than two days at a time. At any time when N. seeks to initiate contact with the other parent it should be permitted.

L) In the event of travel by either parent with N. outside of Halifax Regional Municipality, the following shall apply:

1. for overnight travel within Nova Scotia, the other parent shall be advised twenty-four (24) hours before it occurs, with notice to include the location(s) and appropriate duration of the travel;
2. for overnight travel within Canada, the other parent shall be advised a minimum of seven (7) days before it occurs, with notice to include the location(s) and duration of the travel;
3. For international travel, the other parent shall be advised a minimum of three (3) months before the intended travel. The other parent shall not unreasonably withhold their consent to travel nor any travel permission documentation requested by the travelling parent to facilitate N.'s travel. It is recognized that international travel could be for a duration that would require the need to plan/schedule make-up time if the other parent's parenting time was affected by such travel. A minimum of 30 days prior, the

location(s) and a full itinerary of the travel shall be provided to the other parent.

M) Each party must provide the other with a minimum of sixty (60) days notice of any intention to relocate outside of Halifax Regional Municipality, to allow ample opportunity to formulate a revised parenting schedule or, if needed, to permit the filing of an application with the court.

N) The parties will mutually agree on a maximum of two extra curricular (non-school) activities for N. to be enrolled in at any given time. Absent agreement, the Petitioner shall decide on the activities. The parent having the child in their care at any given time will be responsible to ensure N. attends the activity.

Issue No. 2 – Child Support – a) what is the appropriate quantum of prospective support (table and section7's)?

[18] The evidence established the Respondent's 2017 annual income of $76,624 as shown in Exhibit 4, Tab 11. The application of s.3(1)(a) of the *Federal Child Support Guidelines* attracts an obligation of $656.00 per month, which shall be payable by the Respondent to the Petitioner on a prospective basis. Payments are due on the first day of each month commencing July 1, 2018. Each party shall provide to the other a complete copy of their annual income tax return (including all supporting slips and Notice(s) of Assessment) no later than June 1st of each year, to allow for any table amount adjustment or proportionate adjustment to payment of s.7 expenses that might be needed, to become effective July 1st of that year.

[19] Effective July 1, 2018, section 7 expenses shall be paid by each party on a proportionate basis, net of any tax deductions and/or insurance benefits. The Petitioner's 2017 annual income was $46,465 as shown in Exhibit 3, Tab 18. Reimbursement is due to the paying parent within thirty days (30) days following confirmation of the expense having been communicated by the parent incurring the expense. Each parent shall fund health or medical insurance for the child pursuant to any benefits available to them through their employment, and each shall provide the other with any documentation required from time to time to maximize the child's coverage/benefits.

Issue No. 2 – Child Support – b) what, if any, retroactive/arrears of child support is due?

[20] The Respondent's calculations regarding support monies paid to the Petitioner, or on her behalf, were contained in the balance sheet found at Exhibit 4, Tab 14. The Respondent calculates an overpayment of combined child and spousal support totaling $4,560.95 during the period from November 1, 2016 to April 11, 2018. In contrast, the Petitioner claims she is owed combined retroactive support, including s.7 expenses, of $6,285.50 for the period November 1, 2016 to and including November 1, 2017, on the basis that while the Respondent may have paid her equal share of the parties mortgage obligation (against the matrimonial home), he nonetheless underpaid the total amount of support due in a number of those months.

[21] I heard no reason to reject the numbers found in the Respondent's balance sheet. I am satisfied those are the amounts he has paid. I hasten to add that in doing so, the Respondent did not have any authorization under the Interim Order to make third-party payments. While the Respondent's payment of the mortgage could theoretically replace part of his child support obligation (the Petitioner was occupying the home), cross-examination of the Respondent established that in some months his mortgage payments totalled less than his child support obligation, resulting in an underpayment. However, the Respondent's balance sheet also showed, for example, months when three mortgage payments were made or property taxes or insurance were paid, in amounts that would have exceeded the child support obligation.

[22] Considering all of the amounts involved as claimed by both parties and the factors discussed in *D.B.S. v. S.R.G.*, 2006 SCC 37 (reasonableness, blameworthy conduct, circumstances of the child, hardship), I am satisfied it is appropriate to exercise my discretion to determine no further amounts are owed by or due to either party by way of retroactive or arrears of child support.

Issue No. 3 – Property – a) is the Agreement binding?

[23] The parties take very different positions concerning their property. They do not dispute values, but rather distribution. The Petitioner argues for an equal division pursuant to the *Matrimonial Property Act*, R.S. 1989, c.275, exclusive of the arrangement set out in the provisions of the parties' Agreement. This would result in an equalization payment from the Respondent to the Petitioner of $138,582.00. The Petitioner seeks to vary the terms of the Agreement pursuant to s.29 of the *Act*.

[24] The Respondent relies on the terms of the Agreement, which directs sole ownership of any assets held in each party's name, exclusive of the application of the *Act*, leaving as the only divisible matrimonial property the jointly held matrimonial home, the equity in which can be equally divided, net of credit to each party for the amount(s) each contributed to its acquisition. This would result in an equalization payment from the Respondent to the Petitioner of $20,659.

[25] The appropriate division of assets requires determination as to whether the Agreement, which the Petitioner asserts is unfair and unconscionable and upon which the Respondent relies, is binding. The Petitioner challenges that the Agreement cannot stand as the circumstances surrounding its execution establish she was disadvantaged at the time she signed it. The burden of establishing such was the case rests with her, and requires examination of those circumstances.

[26] The parties agreed theirs was a brief courtship. They met in the summer of 2007; in late October of that year they began living together upon the Petitioner's arrival in Canada, and were engaged at Christmas. The Petitioner's visa was due to expire in March 2008. The Respondent prepared the Agreement and four days prior to their marriage the parties executed it at a lawyer's office, both in the presence of the Husband's friend as the witness. The lawyer signed the Affidavit of Execution as to the friend's signature. While it was not her first language, the Petitioner spoke English and had previously worked for a United Kingdom-based company in her home country.

[27] In *Campbell v. Campbell*, 2012 NSCA 86, Farrar, J. set out the relevant two-stage analysis on the question of whether to uphold a domestic contract as found in *Miglin v. Miglin*, 2003 SCC 24:

> [36] Although *Miglin* was focused on child support, it speaks broadly to prenuptial, cohabitation and separation agreements between spouses. It sets out a two-stage process that governs a judicial departure from a separation agreement. At stage one the court examines circumstances to see if there is

> evidence to warrant a finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. At this point in the analysis the court is looking to see whether there are any circumstances of oppression, pressure or other vulnerabilities taking into account the circumstances and the conditions under which the negotiations were held including whether there was professional assistance (**Miglin**, ¶80-81).
>
> [37] If there are no vulnerabilities present, or they are compensated for by the assistance of legal counsel, the court then considers the agreement to determine whether it substantially complies with the objectives of the **Divorce Act**, R.S.C. 1985, c. 3 (2nd Supp.) (**Baker, supra**, ¶25).

[28] The Petitioner's evidence was that although the Agreement stated the parties had exchanged financial information they had in fact not done so, and although it stated they had each had time to get independent legal advice, she did not have that opportunity. The Petitioner was not contradicted on her evidence as to the circumstances surrounding execution of the Agreement. Her direct evidence, which I accept, was that she did not receive any financial disclosure prior to signing the Agreement, she had "little notice" of the request by the Respondent that she sign the document, and she did not have ample time to seek independent legal advice prior to its execution (in the presence of the Respondent's friend). The Agreement was presented to her four days before the marriage, the date of which was dictated in part by the timeline associated with her soon-to-expire visa. Her evidence was that being new to the country she had "basic business/legal English".

[29] The Respondent's direct evidence was that the Petitioner's language capacity was more than sufficient to permit her to understand the document she executed. He stated the parties provided each other with full disclosure of their assets and liabilities although "no sworn statements were exchanged", and they each had a month to seek independent legal advice before they signed the Agreement. The Respondent's friend, Mr. S., who was not present when the parties executed the Agreement, gave evidence he socialized with the couple before and after their wedding and the Petitioner presented as capable of communicating in the English language and "fluent" in English. Mr. S. was not cross-examined, and did not give any evidence regarding the Agreement or its execution. Mr. S.'s evidence was, with respect, of little assistance.

[30] The Respondent testified under cross-examination that he had prepared the Agreement using an on-line precedent, and that neither party received any independent legal advice before signing. While the parties may have signed the Agreement in front of a lawyer, I am satisfied that its contents were overseen solely by the Respondent.

[31] The Respondent also testified under cross-examination that when the Agreement was signed he did "not entirely" understand his rights, entitlements and obligations under the *Matrimonial Property Act* as referenced in the document, and he either "didn't know" or "maybe" expected the Petitioner to understand hers. In the same vein, he did "not entirely" understand his rights, entitlements and obligations under the *Divorce Act (supra)* as referenced in the Agreement. The Respondent was asked if he expected the Petitioner would have understood the term "fiduciary relationship" as used in the Agreement, to which he replied "possibly". That answer could be taken one of two ways – he thought it only possible the Petitioner would have known the meaning of the term when she signed, or it was possible that at the time of execution of the Agreement he had expected her to know the meaning. Either interpretation begs the issue of what the Petitioner could reasonably have understood about what she signed and highlights the problem of the Petitioner's vulnerability at the time the Agreement was signed.

[32] While I can be satisfied the Petitioner could communicate in English at the relevant time, the matter goes beyond her facility in the language. I am not persuaded the Petitioner, a new-comer to this country at the time, was given the proper opportunity to fully understand the legal implications in this country and province of the Agreement prepared by the Respondent, who had lived all his life in this jurisdiction. (To be fair, perhaps the Respondent too was not entirely informed as to all of the legal implications for him of his hand-crafted, internet-sourced document.) The circumstances were further exacerbated by the lack of disclosure available to the Petitioner before signing the Agreement. (While the Respondent relied on *Harrington v. Coombs*, 2011 NSSC 34 in support of his position, unlike that case, there was no evidence before me that the Petitioner was experiencing any "self-imposed" pressure to execute the Agreement.)

[33] Having reached the conclusion that the Petitioner was disadvantaged by the circumstances surrounding the execution of the Agreement, I am mindful of the Supreme Court of Canada's caution in *Miglin, supra* that:

> 82 … There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. Next, the court should not presume an imbalance of power in the relationship or a vulnerability on the part of one party, nor should it presume that the apparently stronger party took advantage of any vulnerability on the part of the other. Rather, there must be evidence to warrant the court's finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement. If separating or divorcing parties were generally incapable of making agreements it would be fair to enforce, it would be difficult to see why Parliament included "agreement or arrangement" in s. 15.2(4)(*c*). Finally, we stress that the mere presence of vulnerabilities will not, in and of itself, justify the court's intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties. (emphasis added)

[34] I am satisfied that the evidence established that the vulnerabilities of the Petitioner and the imbalance in the parties respective positions that existed when the Agreement was executed were not effectively compensated against, given the lack of disclosure and absence of professional advice and assistance available to the Petitioner under the circumstances. The fundamental flaw(s) in the process as they existed were not and cannot now be overcome, hence the terms of the Agreement cannot be enforced.

Issue No. 3 – Matrimonial Property – b) What is the appropriate division of property?

[35] Division of matrimonial property is governed by s.12 of the *Act (supra)*. Section 12(1) presumes an equal division. There was nothing in the evidence which could support anything other than an equal division. The equalization chart prepared by the Petitioner is, I am satisfied, accurate and reliable. Applying the values therein as reflecting possession of certain assets by each party, an equal division of matrimonial property (less equal apportioning of debts) requires an equalization payment of $138,582.01 owed by the Respondent to the Petitioner.

[36] I did not receive any submissions on a potential payment schedule. Therefore, I exercise my discretion to direct that the equalization payment be effected within 180 days of the date of this decision. If the parties wish to effect partial or full payment through the transfer of certain assets from the Respondent to the Petitioner, as opposed to a cash payment, I leave that for them to elect.

Issue No. 4 Spousal Support – a) what if any, is the appropriate quantum of support?

[37] The Petitioner claimed relief by way of spousal support. The Petitioner's alternate position on spousal support was that in the event the Court determined a custodial arrangement and parenting schedule that resulted in the payment of child support to her by the Respondent, she would waive her claim to spousal support.

[38] Given the matters in issue, the Court began, as it always should, with determination of the question of the parenting arrangement in the child's best interests, from which flowed the assessment of child support. After matters pertaining to the child were determined, the Court turned to consideration of the property issues as discussed earlier herein.

[39] Spousal support could not be determined until the issues enumerated above were resolved, given the Court's obligation under section 15.2 (4) of the *Divorce Act*, *supra*, to consider the "conditions, means, need, and other circumstances of the parties". Given the way in which the Court's determination on the parenting matters informs the Petitioner's alternative argument, there is no need to make any determination on the issue of spousal support in light of the Petitioner's waiver of the claim to such relief.

Issue No. 4 Spousal Support – b) what if any, retroactive/arrears of support is due?

[40] None of the "third party" payments the Respondent made to the mortgage, insurance or taxes on the matrimonial home were contemplated in the Interim Order. (Again, this may be reasonably perceived as another effort by the Respondent to exercise financial control over the Petitioner). Therefore the Respondent has deprived himself of the usual tax relief associated with payment of spousal support, and the Petitioner has had no additional income to claim, and has now benefited from division of greater equity in the home by using the February 2018 mortgage balance, not the date of separation balance.

[41] I repeat also the comments and conclusions contained earlier in paragraphs 20 and 21 (but here in the context of spousal support) as also contributing to my determination that no payment of retroactive spousal support is due.

Conclusion

[42] Counsel for the Petitioner shall prepare a Divorce Order and Corollary Relief Order giving effect to this decision, to be consented to as to form only by counsel for the Respondent. The latter will include provisions for:

1. The parenting plan set out herein;
2. The payment of child support by the Respondent in the amount of $656 per month effective **July 1, 2018**;
3. The payment of section 7 expenses by the parties proportionate to their incomes, effective **July 1, 2018;**
4. The payment of the property equalization amount to the Petitioner.

[43] The Petitioner asked to be heard on the question of costs. I urge the parties to make every effort to reach a resolution on the matter; continued litigation is hardly in the interest of either party at this point. While the Petitioner would be properly characterized as the more successful of the two parties, quantification of costs cannot be fully undertaken or assessed as I would need to know the nature of any offers to settle exchanged. Barring a resolution of the costs matter by **August 1, 2018**, counsel may then write the Scheduling Office to request one hour on my docket on the issue. In preparation for the appearance the Petitioner would then be required to file brief submissions on the matter no later than seven (7) days prior to the date and the Respondent to do the same two (2) days prior.

Beaton, J.

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *A.N. v. J.Z.*, 2018 NSSC 146

Date: 20180626
Docket: *Halifax* No. 1201-070017
SFHD-103542
Registry: Halifax

Between:

A.N.

Petitioner

v.

J.Z.

Respondent

ERRATUM DATED FEBRUARY 20, 2019

Judge:	The Honourable Justice Carole A. Beaton
Heard:	April 17, 18, and 19, 2018, in Halifax, Nova Scotia
Written Release:	June 26, 2018
Counsel:	Jessica D. Chapman for the Petitioner Judith Schoen for the Respondent

ERRATUM:

The initials of the Respondent have been changed from J.S. to J.Z. on the title page.