No. 1201-56223 (S.F.H. No. D-012803)

IN THE SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)
Citation: *Gossen v. Gossen*, 2003 NSSF 7

BETWEEN:

ANTHONY GOSSEN

- PETITIONER

- and -

RITA GOSSEN

- RESPONDENT

DECISION

HEARD: at Halifax, Nova Scotia, before The .Honourable Justice Deborah K. Smith

DECISION: March 31, 2003

WRITTEN RELEASE: March 31, 2003

COUNSEL: G. Douglas Sealy, Esq. for the Petitioner
Paul Thomas, Esq. for the Respondent

This case involves a divorce action between the Petitioner, 42 year old Anthony Gossen, and the Respondent, 30 year old Rita Gossen.

The parties met in the summer of 1998 and married a short time later on September 12, 1998. There are two children of the marriage: Elias Anthony Gossen who was born on […], 1999(presently three years of age) and Angela Christina Gossen who was born on […], 2001(presently two years of age). The

parties separated on May 11, 2001 and have been living separate and apart since that time.

At issue is the valuation of and division of property (matrimonial and non-matrimonial), quantum of child support(including a determination of the Petitioner's income for support purposes), quantum of spousal support (both periodic and lump sum), whether there should be a termination or review date in relation to spousal support, whether the Petitioner's agreement to sponsor .the Respondent when she came to Canada effects the Petitioner's spousal support obligations, life insurance to secure the spousal support payments that will be made by the Petitioner and medical/dental insurance for the Respondent. Custody and access are also in issue although the parties have agreed to sever these issues. Custody and access will be dealt with in a separate trial which is scheduled to be heard in May of this year.

FACTS

The Petitioner is a life insurance sales representative with Clarica. In addition, he is the sole shareholder of two companies that own a variety of rental properties in the city of Halifax. At the time that the parties met, the Petitioner was living in Halifax with his parents.

The Respondent is not presently employed outside of the home. At the time that the parties met, the Respondent was living in Lebanon with her parents.

In the summer of 1998, the Petitioner traveled to Lebanon. There, he met and began dating the Respondent. The Petitioner testified that the parties knew each other for approximately five weeks before they were married. The Respondent suggests that the parties knew each other for approximately three months before the wedding took place.

In October of 1998 (the month after the parties' wedding) the Petitioner returned to Canada. The Respondent's immigration documentation was not yet finalized and accordingly, she remained in Lebanon. By this time, the Respondent was pregnant with the couple's first child.

The Petitioner returned to Lebanon in December of 1998. He stayed in Lebanon for Christmas that year and both the Petitioner and the Respondent returned to Canada in late January of 1999. When they returned to this country they moved in with the Petitioner's parents.

Unfortunately, there was a strained relationship between the Respondent and the Petitioner's mother. This seems to have caused difficulty throughout the parties' marriage. Eventually, the Petitioner and the Respondent moved into an

apartment so that they could be on their own. Shortly thereafter, the Respondent became pregnant with the couple's second child.

Despite this move, the parties' marriage deteriorated. The Petitioner suggests that the Respondent and her family were looking for money and had the expectation that the Petitioner would provide a much greater lifestyle than he could afford. The Respondent suggests that she was trying to make the marriage work but the Petitioner resented the fact that the Respondent took him from his parents' home.

In December of 2000, construction began on what would, for a very brief time, be the parties' matrimonial home. The parties moved into the property on May 4, 2001 and separated one week later on May 11, 2001.

The parties have very different views about the circumstances surrounding their marriage as well as its breakdown. The Petitioner suggests that he first suspected that there may be trouble in the marriage when the parties were on their honeymoon. He testified that shortly into the marriage he realized that the Respondent was looking for money -- much more money than he could provide. The Respondent, on the other hand, gave evidence that the Petitioner came to Lebanon talking about his "many assets and properties" and the building of a "dream home" (the Respondent's affidavit sworn to on November 29, 2001).

According to the Respondent, the Petitioner promised she and her family that she would have a very good life in Canada but once she got to this country, the Petitioner changed and the lifestyle that she had been promised did not materialize.

It is unnecessary for the Court to review in detail the allegations that each party raises against the other concerning the breakdown of the marriage. Suffice it to say that from early on in this relationship troubles began to develop with the result that the marriage itself and the period of the parties cohabitation was of short duration.

DIVORCE

I am satisfied that all procedural and jurisdictional requirements have been met and that the grounds for divorce have been established based on a breakdown of the marriage as evidenced by the fact that the parties have lived separate and apart for at least one year immediately preceding the determination of the divorce and were living separate and apart at the commencement of the proceeding. In addition, I am satisfied that there is no possibility of reconciliation. Accordingly, a divorce judgment shall be granted reserving to the Court the right to deal with all issues relating to custody and access.

VALUATION OF AND DIVISION OF PROPERTY

Matrimonial Assets

Matrimonial Home

In October of 2000, the Petitioner purchased the land where the parties' matrimonial home was eventually built. Construction of the home began in December of 2000. The Petitioner acted as the general contractor while continuing to work at his regular job. The home was completed in the spring of 2001 and the parties moved into the property on May 4, 2001 (one week prior to their separation).

The Petitioner testified that he surrendered approximately $25,000.00 worth of GICs and Canada Savings Bonds to help finance the cost of constructing the matrimonial home. These savings were accumulated prior to the parties' marriage. The remainder of the construction costs were financed.

On October 4, 2001 the Petitioner applied to the Court for an Interim Order for the sale of the matrimonial home. The Petitioner indicated that he was unable to afford the expenses relating to this property and could not obtain the Respondent's consent to list and sell the property. The Honourable Justice Deborah Gass granted an Interim Order for the sale of the matrimonial home and the property was sold at the end of April 2002 for $355,000.00. A number of matrimonial debts were paid from the sale proceeds and the net sum of $39,470.00 was placed in trust.

The Petitioner proposes that the net sale proceeds be divided equally between the parties. He is not requesting that the savings that he contributed to

the acquisition of this asset (in the approximate amount of $25,000.00) be returned to him, however, he asks the Court to take into account that a concession has been made by him in this regard.

At trial, the Respondent proposed that she receive the entire net proceeds from the sale of the matrimonial home.

1997 Toyota Automobile

The Petitioner has possession of a 1997 Toyota automobile. The parties have agreed that this is a matrimonial asset which should be valued at $13,000.00.

Household Furnishings/Effects and Miscellaneous Items

In May of 2000, the parties purchased a number of household furnishings and effects for which they paid $6,630.90. These furnishings were purchased from relatives of the Petitioner at a figure slightly above cost. The Petitioner testified that the actual retail value of these furnishings was approximately $10,000.00 if purchased on sale and $12,000.00 if purchased at regular retail price. The Respondent has retained possession of all of these furnishings.

Approximately one week prior to separation, the parties purchased a number of new appliances for the matrimonial home for which they paid $5,800.00. The Respondent has also retained possession of these appliances with the exception of a dishwasher which remained in the matrimonial home at the time the property was sold. The Petitioner testified that the parties paid between $500.00-$550.00 for the dishwasher.

In addition to the above, the Respondent has retained possession of a number of additional household furnishings and effects the particulars of which were given at trial.

Finally, the Respondent had possession of jewelry which she valued at $10,000.00 in her Statement of Property sworn to on November 5, 2001. Included in this figure was a diamond ring that the parties value at $5,000.00. Neither party claims to have been able to locate this ring after separation and accordingly, the parties have agreed to value the Respondent's jewelry at $5,000.00. . The Petitioner suggests that the .Respondent's jewelry forms part .of the matrimonial assets that are subject to division. The Respondent takes the position that her jewelry is personal property and accordingly, is not subject to division (s.4(1)(d) of the *Matrimonial Property Act*).

As indicated above, the Toyota automobile is in the possession of the Petitioner, while the household furnishings/effects and miscellaneous items are in the possession of the Respondent. The Petitioner suggests that the values of these items basically offset each other (regardless of whether the Respondent's jewelry is taken into account) and proposes that the household furnishings/effects and miscellaneous items in the Respondent's possession be valued at $13,000.00 (the same value given to the 1997 Toyota).

The Respondent values the household furnishings/effects and miscellaneous items at $8,000.00. She suggests that five thousand dollars of this amount represents jewelry which she submits is not a matrimonial asset. This leaves a figure of $3,000.00 for the household furnishings and effects in the Respondent's possession.

I should note that the Court was not provided with any formal valuations or appraisals of the parties' household furnishings/effects and miscellaneous items. Accordingly, it must make its findings based on the evidence presented.

Ordinarily, one would consider jewelry to fall within the exception set out in s.4(1)(d) of the *Matrimonial Property Act* (reasonable personal effects of one spouse) and would not include them in the division of matrimonial assets. In this case, I was not provided with any evidence concerning the Respondent's jewelry and so it is difficult to make a determination in this regard.

I accept that the furniture purchased by the parties in May of 2000 depreciated in value by the time the parties separated one year later. Nevertheless, I find that its value would still be fairly close to the original purchase price of $6,630.90 since this furniture was bought at slightly above cost and had a retail value of approximately $10,000.00-12,000.00 at the time that it was purchased. In addition, the appliances that were bought one week prior to separation and which remained in the Respondent's possession (with the exception of the dishwasher which I value at $525.00) would have depreciated only minimally by the time the separation occurred.

Taking all of the above into account, including the additional household furnishings and effects which have remained in the Respondent's possession, I am satisfied that the household furnishings/effects and miscellaneous items left with the Respondent have the same approximate value as the 1997 Toyota automobile regardless of whether the Respondent's jewelry is taken into account. Accordingly, I value these items at $13,000.00.

RRSPs

The Petitioner testified that at the time of marriage he had RRSP's valued at $86,854.00. At the time of separation, these RRSP's were valued at $129,601.00. At the time of trial, these RRSP's had a value of $120,050.66.

Both parties agree that the later figure ($120,050.66) is the appropriate figure for the Court to consider. Using this figure, it appears that 72.34% of the Petitioner's RRSP's were acquired prior to the parties marriage. The Petitioner has indicated that for the purpose of simplicity, he is prepared to agree that two-thirds of his RRSP's were acquired prior to marriage and the remaining one-third was acquired during the marriage.

The Petitioner submits that the RRSP's that he acquired prior to marriage should not be subject to division. He proposes that the remaining one-third (which he has valued at $40,049.00) should be divided equally. The Petitioner proposes that this division should take place by way of a spousal roll-over.

The Respondent takes the position that all of the RRSP's (in the amount of $120,050.66) are matrimonial assets subject to division. The Respondent proposes that all of the RRSP's be divided equally and agrees that the division should be performed by way of a spousal roll-over.

I should indicate that at the time of trial both counsel agreed to a discount rate of 33% in relation to the tax consequences associated with the RRSP's. It is unnecessary for the Court to apply this discount rate since both parties have agreed that the division of the RRSP's shall be effected by way of a tax free

spousal roll-over.

Bank Accounts

It appears from the Statements of Property that have been filed that both parties had a personal bank account at the time of separation. The parties have agreed that both of these accounts contained relatively small savings and that the values of each account at separation were similar. Accordingly, it has been agreed that each party will keep the value of his/her personal bank account in existence at the time of separation without the need to account for such in the division of the parties matrimonial assets/liabilities.

Cash Surrender Value - Life Insurance

The parties have agreed that the cash surrender value of the Petitioner's life insurance policy in existence at the time of separation shall be valued at $2,815.00 (after tax). This figure shall be accounted for in the division of the parties' matrimonial assets/liabilities.

Petitioner's Share Purchase Plan

The parties agree that the Petitioner's share purchase plan should be valued at $723.00 and that this figure should be taken into account in the division of the parties matrimonial assets/liabilities.

Matrimonial Liabilities

As indicated previously, a number of matrimonial debts were paid at the time the matrimonial home was sold. The parties agree that the Petitioner assumed responsibility for an additional $7,448.00 in matrimonial debts

following separation. This figure should be taken into account in the division of the parties matrimonial assets/liabilities.

Business Assets

The Petitioner is the sole shareholder of two companies known as Oxford Developments Limited and Stanford Street Properties Limited. Oxford Developments Limited owns three rental properties and Stanford Street Properties Limited owns two rental properties all of which are located in the city of Halifax.

The evidence established that the five properties owned by these two companies were purchased and /or developed between 1988 and 1995 (prior to the parties' having met one another). The Petitioner's parents provided the Petitioner with the down payments necessary to purchase and develop these properties. The Petitioner testified that some of this money was provided to him as an early inheritance.

The Petitioner estimates that these five rental properties have equity valued at $512,774.00 less the disposition costs and tax consequences that will inevitably be incurred upon sale.

In the Respondent's post-trial submissions, she suggests that the Petitioner has equity in these rental properties (via his two companies) in the amount of $684,400.00 (the Respondent estimates the market value of the rental properties to be $945,000.00 and suggests that the mortgages registered against these properties are in the amount of $260,600.00. $945,000.00 - $260,600.00 = $684,400.00). In arriving at this figure the Respondent appears to have failed to

take into account the two lines of credit associated with the Petitioner's two companies. The evidence indicated that at the commencement of the trial, these lines of credit had balances of $57,888.00 and $10,915.00 respectively.

The Respondent acknowledges that the Petitioner's interest in Oxford Developments Limited is a business asset. There does not appear to be any dispute that the Petitioner's interest in Stanford Street Properties Limited is also a business asset. I would have found this to be the case in any event (see: **Gray .v. Gray** (1994), 133 N.S.R. (2d) 237 (S.C.) affirmed on appeal at (1995), 137 N.S.R. (2d) 292 (C.A.)).

The Petitioner testified that the Respondent did not contribute any work, money or moneys worth to the acquisition or maintenance of the rental properties. The Respondent does not appear to dispute this suggestion and did not provide any evidence to the contrary. Understandably, the Respondent has not made a s.18 claim in relation to the Petitioner's business assets.

MATRIMONIAL PROPERTY ACT

There is a presumption in the *Matrimonial Property Act* of an equal division of matrimonial assets. The Court has the jurisdiction to award an unequal division of matrimonial assets or to make a division of property that is not matrimonial if it is satisfied that a division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the various factors set out in .s.13 of the *Act*. These factors are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

The Petitioner submits that it would be unfair or unconscionable to divide that portion of his RRSP's which was acquired prior to marriage based on the

length of time that the spouses cohabited during their marriage (s.13(d)) and the date and manner of acquisition of this asset (s.13(e)). In all other regards, the Petitioner proposes an equal division of the parties' matrimonial assets.

The Respondent seeks an unequal division of the matrimonial assets as well as a division of non-matrimonial assets. In the Respondent's Pre-trial Brief she suggests either of the following alternatives as an equitable property division:

(a) (i) The Petitioner, by way of a tax-free spousal roll-over, transfers 50% of his RRSP's to the Respondent;

(ii) The Respondent receives the whole of the net proceeds of the sale of the matrimonial home;

(iii) The Petitioner transfers to the Respondent one of his [companies] mortgaged rental properties; or

(b) (i) The parties share the proceeds of the sale of the matrimonial home equally;

(ii) The Petitioner, by way of a tax-free spousal roll-over, transfers to the Respondent $50,000.00 worth of his RRSP's;

(iii) The Petitioner transfers to the Respondent one of his [companies] mortgage free rental properties.

The Respondent submits that an equal division of matrimonial assets and a failure to divide non-matrimonial assets would be unfair or unconscionable having regard to sections13(f)(h)(i)(j) and (l) of the *Matrimonial Property Act.*

The Respondent points out that the Petitioner has significant equity in his

two companies and that if the Court were to divide only the parties' matrimonial assets there would be a tremendous imbalance between the assets held by the Petitioner and those held by the Respondent. The Respondent referred the Court to the case of **Ryan v. Ryan** (1980), 43 N.S.R. (2d) 423 (S.C.) in support of the suggestion that the Court should consider the entire net worth of the parties when dealing with an application under s.13, not simply the parties' matrimonial assets. The Respondent has also referred the Court to the case of **Archibald v. Archibald** (1981), 48 N.S.R. (2d) 361 (S.C.) in support of the position that in appropriate circumstances the Court will unequally divide the matrimonial assets and may also order a division of non-matrimonial assets taking into account the factors listed in s.13 and the disparity in the amount of assets held by each spouse at the conclusion of the proceeding.

THE COURT'S FINDINGS RE: VALUATION OF AND DIVISION OF PROPERTY

The Petitioner's RRSP's

I accept the Petitioner's suggestion that two-thirds of his RRSP's were acquired prior to the parties' marriage. The issue is whether all of the Petitioner's RRSP's should be divided by the Court or only that portion which was acquired after the parties' marriage.

Section 4(1) of the *Matrimonial Property Act* .defines "matrimonial assets" to mean the matrimonial home or homes and all other real and personal property acquired by either or both spouses *before or during their marriage* with certain exceptions as set out in s.4(1). Accordingly, the total value of the Petitioner's RRSP's would, *prima facie,* be considered to be matrimonial assets subject to division. There is a presumption that all of the Petitioner's RRSP's

will be divided equally subject to a consideration of the factors set out in s.13 of the *Act*.

I consider this to be a marriage of short duration. Our Court .of .Appeal .discussed the division of property in a marriage of short duration in the case of **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47 (CA). Bateman, J.A. stated at pp.53:

> Over the last twenty years, across Canada, provincial matrimonial property legislation was enacted. It .was .required to compensate for the inability of the equitable and the common law remedies to adequately recognize the contribution of the homemaker to the acquisition, maintenance and improvement of family assets. The broad intent of the legislation is to provide a fair distribution of assets upon dissolution of the marriage. The **Matrimonial Property Act** S.N.S. 1980, c.9, s.1 is no exception.

The recitals to the **Matrimonial Property Act** set out its purpose;

> WHEREAS it is desirable to encourage and strengthen the role of the family in society;
>
> AND WHEREAS for that purpose it is necessary to recognize the contribution made to a marriage by each spouse;
>
> AND WHEREAS in support of such recognition it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses upon the termination of a marriage relationship;
>
> AND WHEREAS it is necessary to provide for mutual obligations in family relationships including the responsibility of parents for their children;
>
> AND WHEREAS it is desirable to .recognize that childcare, household management and financial support are the joint responsibilities of the spouses and that there is a joint contribution by the spouses, financial and otherwise; that entitles each spouse

> equally to the matrimonial assets.
>
> The **Act** was not, however, implemented as a tool to arbitrarily redistribute or equalize wealth between married persons. I agree with the comment of Davison, J. in **Zimmer v. Zimmer** (1989), 90 N.S.R. (2d) 243; 230 A.P.R. 243 (T.D.), at p.253:
>
> > The legislature did not intend for the **Matrimonial Property Act** to be used as a vehicle for one party to profit by entering into a short marital relationship and departing with a profit by reason of the contribution made to the marriage by his or her spouse...
>
> And that of Baker, J. in **Jensen v. Jensen**, [1994] B.C.J. No. 2603 (S.C.) at p.29:
>
> > In my view, the authorities establish that the division of assets, following the breakdown of a marriage of very short duration between two mature adults, should not result in a considerable financial windfall to one of the parties. Marriage is not a legal institution created for the redistribution of wealth.

While the parties in **Roberts v. Shotton**, *supra*, only lived together for one year and did not have children, the principles enunciated therein are applicable to the case at bar.

I find that it would be unfair and unconscionable to divide the full amount of the Petitioner's RRSP's equally in light of ss.13(d) and (e) of the *Matrimonial Property Act.* Only that portion of the Petitioner's RRSP's acquired after marriage (valued at $40,049.00) shall be divided equally between the parties.

<u>Remaining Assets/Liabilities</u>

As indicated previously, the Petitioner submits that the remaining matrimonial assets should be divided equally between the parties.

The Respondent seeks an unequal division of the remaining matrimonial assets as well as an interest in one of the rental properties owned by Oxford Developments Limited or Stanford Street Properties Limited (while not specifically stated by the Respondent's solicitor, presumably the Respondent is seeking an interest in one of the Petitioner's companies as it is the companies that own the rental properties -- not the Petitioner).

I have carefully reviewed s.13 of the *Matrimonial Property Act* and in particular sections 13(f)(h)(i)(j) and (l) (these sections having been relied on by the Respondent) and have concluded that there is nothing in the facts of this case which warrants an unequal division of the remaining matrimonial assets or a division of non-matrimonial assets.

The Respondent's submissions concerning the division of property seem to ignore the reality that this is a marriage of short duration. While the Petitioner will be leaving this marriage with significantly more assets than the Respondent (when one takes into account the Petitioner's business assets and that portion of his RRSP's which was acquired prior to marriage) the reality is that all of the

Petitioner's business assets and the majority of his RRSP's were accumulated by the Petitioner prior to the marriage without any contribution whatsoever by the Respondent. In the Court's view, a division of assets as proposed by the Petitioner (an equal division of the remaining matrimonial assets) is both fair and reasonable in the circumstances of this case.

The Respondent has made note of the fact that the Petitioner brought her to Canada from her native country of Lebanon. I am satisfied that the Respondent was content to come to Canada and that overall her situation has not been negatively affected by this move. It appears from the evidence presented that the Respondent's parents and siblings all have an interest in living in Canada. I am satisfied that the fact that the Respondent brought the Petitioner to this country should not affect the division of the parties' assets.

CONCLUSION RE: MATRIMONIAL ASSETS/LIABILITIES

In light of the findings that have been made, the division of the parties matrimonial assets and liabilities shall be as follows:

Matrimonial Assets	Value	Petitioner (Mr. Gossen)	Respondent (Ms. Gossen)
Net proceeds of the sale of the matrimonial home	$39,470.00	$19,735.00	$19,735.00

1997 Toyota automobile	$13,000.00	$13,000.00	
Household furnishings/effects miscellaneous items	$13,000.00		$13,000.00
RRSP's accumulated after marriage	$40,049.00	$20,024.50	$20,024.50
Cash surrender value-life insurance	$2,815.00	$2,815.00	
Share purchase plan	$723.00	$723.00	

TOTAL MATRIMONIAL ASSETS	$109,057.00	$56,297.50	$52,759.95
Matrimonial Debts			
Various matrimonial debts as agreed by the parties	($7,448.00)	($7,448.00)	
NET MATRIMONIAL ASSETS	**$101,609.00**	**$48,849.50**	**$52,759.95**

As indicated by the above figures, the Respondent should be paying the Petitioner an equalization payment in the amount of $1,955.45. The Petitioner has advised the Court that he is not seeking an equalization payment from the Respondent and accordingly, the Court will not order such.

CHILD SUPPORT

Both parties agree that the Petitioner shall pay child support to the Respondent pursuant to the Federal Child Support Guidelines (hereinafter referred to as “the Guidelines”) in accordance with the Nova Scotia table. At issue is the amount of the Petitioner’s annual income for the purpose of calculating his child support payments.

A spouse’s income for child support purposes is determined in accordance with sections 15-20 of the Guidelines which read as follows:

> **Determination of annual income**
>
> **15.** (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.
>
> **Agreement**
>
> (2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.
>
> **Calculation of annual income**
>
> **16.** Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.
>
> **Pattern of income**
>
> **17.** (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the

spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

Non-recurring losses

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Shareholder, director or officer

18. (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

Imputing income

19. (1) The court may impute such amount of income to a spouse as

it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

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

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

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

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

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

(g) the spouse unreasonably deducts expenses from income;

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

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

Reasonableness of expenses

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

Non-resident

20. Where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a

resident of Canada.

Justice Deborah Gass dealt with the issue of child support on an interim basis in December of 2001. At that time, she imputed income to the Petitioner and found that he had an income of $70,000.00 per annum for child support purposes. Justice Gass ordered the Petitioner to pay child support in the amount of $945.00 per month.

An interim hearing is designed to deal with matters on a temporary basis until a full hearing can be held. An Interim Order is not binding on the trial judge. The trial judge has the benefit of hearing all relevant evidence as well as the full argument of counsel.

In this case, at the time of trial, I was provided with additional evidence that was not before Justice Gass. In addition, in the hearing before me both parties had a full opportunity to give their evidence and be cross-examined on the materials before the Court.

THE COURT'S FINDINGS CONCERNING THE PETITIONER'S INCOME

As indicated previously, the Petitioner is a self-employed life insurance sales representative with Clarica and is the sole shareholder of two corporations.

The Court has been provided with copies of the Petitioner's Income Tax Returns for the years 1998-2001 inclusive. These returns disclose the following:

1998
Interest and other investment income
$3,191.05 Rental Income Gross .$72,883.00 Net . $7,978.98
Taxable capital gains $82.72
Self-employment income Gross $54,875.00 Net . $48,710.99
Total Income (Line 150) $59,963.74

1999
Taxable amount of dividends from taxable Canadian corporations $63.54 Interest and other investment income $1,832.77

Rental income Gross $70,385.00			$347.88
Self-employment income	Gross $53,056.00	Net	$45,040.87
Total Income (Line 150)			**$67,501.63**

2000
Taxable amount of dividends from taxable Canadian corporations $5,815.35
Interest and other investment income $2,725.21
Rental income Gross $70,060.00 Net $20,91 .
Self-employment income Gross $69,153.00 Net $61,206.25
Total Income (Line 150) $90,659.26

2001
Taxable amount of dividends from taxable Canadian corporations $123.93
Interest and other investment income $1,942.87
Rental income Gross $11,092.50 Net $1,458
Self-employment income Gross $55,461.22 Net $47,12
Total Income (Line 150) $50,652.63

The Petitioner testified that some of the interest and other investment income reflected on his Income Tax Returns represents interest that he earned on the GICs and Canada Savings Bonds that were cashed-in in order to help finance the building of the matrimonial home. In addition, the Petitioner explained that he holds certain investments and shares in his name which are funded by way of

security deposits that he receives from tenants. These investments and shares also earn interest and dividends. These security deposits (with interest) have to be returned to the tenants after they move out. Accordingly, while the investments are held in the Petitioner's name, they are not his.

The Petitioner further testified that the taxable dividends that he declared in the year 2000 in the amount of $5,815.35 represented a life insurance de-mutualization payment that occurred only once and would not be received again.

The Petitioner testified that he does not have any other interest bearing or dividend declaring investments and accordingly, he does not anticipate receiving any interest income or dividends at the present time.

In relation to rental income, the Petitioner testified that until March of 2001, a rental property located at 3700 Joseph Howe Drive in Halifax, Nova Scotia was registered in his name and he declared the rental income from this property. The Petitioner further testified that while he paid tax on the net rental income received from this property, he did not have the benefit of the majority of the rental income declared on his tax return. For example, in the year 2000, the Petitioner declared a gross rental income from this property in the amount of $70,060.00 and a net rental income of $20,912.45. While personal income tax was paid by the Petitioner on this latter figure ($20,912.45), according to the Petitioner's testimony, $18,874.18 of this amount was paid to the bank by way of principal mortgage and line of credit payments which were not tax-deductible. Accordingly, while the Petitioner was paying tax on $20,912.45 his cash flow from rental income was $2,038.27 after taking into account the principal mortgage and line of credit payments that he made to the bank ($20,912.45 .-

$18,874.18 = $2,038.27). In light of this situation, in 2001 the Petitioner transferred title to 3700 Joseph Howe Drive to Stanford Street Properties Limited. As a result, the Petitioner will not have any rental income reflected on his 2002 personal Income Tax Return.

I do not draw a negative inference as a result of the Petitioner's decision to transfer 3700 Joseph Howe Drive into Stanford Street Properties Limited thereby reducing his personal income. I am satisfied that this transfer took place as a result of sound tax and financial planning and for no improper purpose.

Sections 18 and 19 of the Guidelines/Section 11 of Schedule III

The Respondent has asked the Court to take into account sections 18 and 19 of the Guidelines, as well as s.11 of Schedule III, when determining the Petitioner's income for child support purposes.

Section 18 of the Guidelines

Section 18 of the Guidelines allows the Court to include in a spouse's annual income all or part of the pre-tax income of a corporation (and of any corporation that is related to that corporation) for the most recent taxation year or an amount commensurate with the services that the spouse provides to the corporation (provided that the amount does not exceed the corporation's pre-tax income) in circumstances where a spouse is a shareholder, director or officer of a corporation and the Court is of the opinion that the amount of the spouse's annual income as determined under s.16 does not fairly reflect all of the money available to the spouse for the payment of child support.

The ability of the Court to impute income pursuant to s.18 is discretionary.

The fact that an individual may not draw an income from a corporation or may draw a lesser amount of income than could possibly be taken is not necessarily determinative of the matter (if it were, s.18 would be mandatory in nature rather than discretionary). The question that the Court has to consider is whether it is reasonable for a corporation to retain part of its earnings rather than pay them out to the spouse in question (see for example: **Lyttle v. Bourget** (1999), 178 N.S.R. (2d) 1 (S.C.) where the Court declined to include in a spouse's income the pre-tax income of a professional corporation despite the fact that the company held retained earnings of $218,119.00).

What then should the Court take into account in determining what is reasonable in this regard?

As a preliminary matter, the Court should review the tax returns of the individual in question as well as the financial statements and tax returns of the companies involved. Of interest would be whether, prior to separation, the paying spouse took income or benefits from the company which he/she is no longer taking now that the parties have separated without some justifiable business reason. In other words, is the spouse intentionally leaving money in the company in order to reduce his/her income for child support purposes?

Intentional under-drawing of income, however, is not the only matter for the Court to consider. An individual may have no intention whatsoever of reducing his/her income for child support purposes but, nevertheless, may be unreasonably leaving income in a company which should be available for child support purposes. In order to determine this, the Court must consider the pre-tax income of the corporation, the services that the individual provides to the

corporation (is this an individual who works full-time for the company but without reasonable justification draws out a non-commensurate income?) as well as the needs of the business itself in order to function properly. The goal is not to strip the company of capital reasonably required in order to function. Nor is the goal to deny the company the ability to grow and to become more competitive and to be able to fund capital needs as they arise. The goal is to balance reasonable child support objectives with reasonable company objectives.

In a situation where the Court is satisfied that a corporation should and can pay out additional income to a spouse without undermining the financial health of the company, the Court may include in the spouse's annual income all or part of the pre-tax income of that corporation (see for example: **Jess v. Strong** (1998), 169 N.S.R. (2d) 271 (S.C.)).

I have not been provided with any expert testimony concerning the financial standing of the Petitioner's two companies. However, I have been provided with copies of the 1998, 1999 and year 2000 Financial Statements and Income Tax Returns for Oxford Developments Limited as well as the 1999 and year 2000 Financial Statements and Income Tax Returns for Stanford Street Properties Limited. These documents establish the following:

Oxford Developments Limited

1998	Income before income taxes	$8,563.00*
1999	Income before income taxes	$10,918.00*
2000	Income before income taxes	$12,502.00*

** Figures taken from the Financial Statements*

Stanford Street Properties Limited

1999 Income before income taxes	$2,366.00
2000 Income before income taxes	$798.00

In addition to the companies' pre-tax income, the Respondent has asked the Court to take into consideration the capital cost allowance (CCA) that each company is permitted to claim each year. While permitted as an operating expense, CCA involves no cash outlay. It is money that is available to a company if not specifically set aside for replacement of the asset being depreciated. The Respondent has submitted that the CCA being claimed each year by Oxford Developments Limited and Stanford Street Properties Limited should be added to the companies' pre-tax income and then the total amount should be added to the Petitioner's income for child support purposes.

It must be noted that the CCA in question is being claimed by the Petitioner's companies rather than by the Petitioner himself. While s.11 of Schedule III of the Guidelines directs the Court to adjust a spouse's annual income to include *the spouse's* deduction for an allowable capital cost allowance with respect to real property, no provision for such is made in relation to a corporation. The only specific adjustment that the Court is directed to make to a corporation's pre-tax income is for amounts paid to persons with whom the corporation does not deal at arm's length (see: s.18(2) of the Guidelines). Accordingly, if the Court has the ability to adjust the corporation's income for capital cost allowance, it must be derived from the Court's entitlement to include in a spouse's income all or part of the pre-tax income of a corporation as set out in s.18(1)(a).

The annual pre-tax incomes of each of these companies is very small relative to the total assets of each. These incomes are reduced even further after making provision for the income taxes that each company will pay.

In addition, it is notable that the companies' in question have very little by way of liquid assets. For example, the companies' financial statements indicate that for the year ending December 31, 2000 Oxford Developments Limited had cash of $1,386.00 and Stanford Street Properties Limited had cash of $397.00. The balance of the companies' assets were made up of buildings, land and appliances all of which are essential for the companies' objectives.

Both of the Petitioner's companies are able to claim CCA each year. However, recognition must be given to the fact that this benefit would, at least in part, be offset by the principle payments that the companies make on their outstanding mortgages and/or lines of credit. As can be seen from the Statements of Income and Retained Earnings for each of these companies, the companies' operating expenses do not include the principle payments that each company makes to the bank in relation to its outstanding mortgages and/or lines of credit. These principle payments are in addition to the expenses referred to in the companies' financial statements. This must be taken into account when considering the capital cost allowance that each company is permitted to claim each year.

According to the Petitioner's testimony he does not draw (nor has he drawn) an income from either of his two companies as there is no "disposable money" in the companies to take out. After reviewing the companies' financial statements, I am satisfied that short of the companies re-financing (which I am

not prepared to require in these circumstances) the Petitioner's practice not to draw out an income from his companies is reasonable and I am not prepared to impute income to the Petitioner pursuant to s.18 of the Guidelines. I should note that the corporate income of Stanford Street Properties Limited will likely increase by virtue of the fact that title to 3700 Joseph Howe Drive was transferred to this company in March of 2001. That is not sufficient, in my view, to alter my conclusion in this regard.

I recognize that the Petitioner's two companies contain significant equity. The equity that exists is not readily accessible to the Petitioner without requiring the companies to borrow funds or sell the properties in question. Rarely does the Court require a spouse to borrow money or sell assets in order to pay child support, particularly in a situation such as this where the paying spouse has a full-time job and will be paying reasonable child support in any event.

Many spouses upon divorce have equity in various assets such as real property, RRSP's and the like. In this case the Petitioner has equity in a variety of assets including the value of the shares of his two companies. It would be unusual for the Court to make an Order the effect of which is to require a spouse to access equity in order to pay additional child support and I am not prepared to order such in the circumstances of this case.

Section 19 of the Guidelines

The Petitioner has testified that he is content to remain a sales representative for Clarica and is not seeking to be promoted to a managerial position. The Respondent suggests that in light of this, the Petitioner is intentionally under-employed and, accordingly, income should be imputed to

him pursuant to s. 19(1)(a) of the Guidelines.

The Court was not provided with any evidence which would suggest that the Petitioner would earn a greater income in a managerial position with Clarica than he does as a salesperson. Based on the evidence presented, I am not satisfied that the Petitioner is under-employed whether intentional or otherwise.

Further, the Respondent suggests that income should be imputed to the Petitioner pursuant to s. 19(1)(g) of the Guidelines on the basis that the Petitioner is unreasonably deducting expenses from income.

Counsel for the Respondent has referred the Court to the Nova Scotia Court of Appeal decision in **Wilcox v. Snow** (1999), 181 N.S.R. (2d) 92 (C.A.). That case dealt with an application to vary child support by a self-employed business person. Flinn,J.A. stated at pp. 96-97:

> In the case of a self-employed businessman, like the Respondent, there is very good reason why the court must look beyond the bare tax return to determine the self-employed businessman's income for the purposes of the **Guidelines**. The net business income, for income tax purposes, of a self employed businessman, is not necessarily a true reflection of his income, for the purpose of determining his ability to pay child support. The tax department may permit the self employed businessman to make certain deductions from the gross income of the business in the calculation of his net business income for income tax purposes. However, in the determination of the income of that same self-employed businessman, for the purpose of assessing his ability to pay child support, those same deductions may not be reasonable."

While the Court in **Wilcox v. Snow**, *supra*, was dealing with an application to vary child support, there is no reason why these principles would not be applicable at any stage of a proceeding where the Court is determining

income for the purpose of the payment of child support.

As a self-employed salesperson, the Petitioner is able to deduct certain expenses from his gross business income and pay tax only on his net business income. I have carefully reviewed the various business expenses deducted by the Petitioner on his Income Tax Returns and referred to in his testimony and am satisfied that these expenses are reasonable and that income should not be imputed to the Petitioner pursuant to s. 19(1)(g) of the Guidelines

Section 11 of Schedule III

Finally, the Respondent refers to s.11 of Schedule III of the Guidelines. Schedule III deals with adjustments to income and includes the following:

> **Capital cost allowance for property**
>
> **11.** Include the spouse's deduction for an allowable capital cost allowance with respect to real property.

Section 11 must be read in conjunction with s. 12 of Schedule III which indicates that where the spouse earns income through a partnership or sole proprietorship the Court shall deduct from any amount included in income that which is properly required by the partnership or sole proprietorship for the purposes of capitalization.

As indicated previously, s. 11 of Schedule III refers to a *spouse's* deduction for an allowable capital cost allowance with respect to real property. While in previous years, the Petitioner was allowed deductions for capital cost allowance (when the rental property located at 3700 Joseph Howe Drive was still registered in his name) the evidence establishes that all five properties are now

registered in the names of the Petitioner's two companies. Accordingly, the Petitioner will no longer be permitted a capital cost allowance deduction with respect to real property. I find that this section of Schedule III no longer applies to the Petitioner's income.

What then is the Petitioner's income for child support purposes? Both parties agree that s. 17(1) of the Guidelines applies to the case at bar. Accordingly, when determining the Petitioner's income I shall have regard to his income tax returns for the last three years for which they have been provided (1999, 2000 and 2001).

In light of the fact that the Petitioner no longer has any rental income, I find that it is not appropriate to include in his income calculation any rental income that he received in previous years. I also find that the dividends and interest income relating to the tenants' security deposits should not be attributed to the Petitioner in light of his testimony that these deposits must eventually be returned to the tenants with interest. Finally, I find that the interest income that was earned on the GICs and Canada Savings Bonds that were cashed in to build the matrimonial home and the one-time dividend payment received in 2000 as a result of the life insurance de-mutualization payment should not be included in the determination of the Petitioner's income for child support purposes as these sums are no longer being received by the Petitioner.

Based on the evidence presented, I am satisfied that in calculating the Petitioner's income for child support purposes, the Court should take an average of any taxable capital gains and net self-employment income received by the Petitioner during the years 1999,2000 and 2001. According to the Petitioner's

Income Tax Returns, the following calculations apply:

1999

Taxable Capital Gains ($347.88)
(adjusted to $463.84 as per s.6 of Schedule III) $463.84

Self-employment Income	Gross - $53,056.00	Net - $45,040.87
Total		**$45,504.71**

2000

Self-employment Income	Gross- $69,153.00	Net - $61,206.25
Total		**$61,206.25**

2001

Self-employment	Gross - $55,461.22	Net - $47,127.64
Total		**$47,127.64**

Averaging these amounts over three years provides an annual figure of $51,279.53. I find that this is the Petitioner's annual income for support purposes. Based on this figure ($51,279.53) the Petitioner shall pay to the Respondent child support for the two children of the marriage in the amount of $696.00 per month (table amount only). These payments shall commence on April 1, 2003 and shall continue on the 1st day of each and every month thereafter until further Order of the Court.

The Petitioner has agreed to maintain his present medical/dental plan for the benefit of the children for as long as this plan is available to him and the

children are eligible as dependants under the plan. This shall form part of the child support provisions of the Corollary Relief Judgment.

In addition, the Petitioner has agreed to maintain his two life insurance policies held with Clarica (policy # […]-4 in the face amount of $350,000.00 and policy # […]-8 in the face amount of $250,000.00) with both children being named as beneficiaries and David Gossen being named as Trustee for as long as the Petitioner has an obligation to pay child support in relation to the children of the marriage. This, too, shall form part of the child support provisions of the Corollary Relief Judgment.

SPOUSAL SUPPORT

Both parties agree that the Petitioner shall pay spousal support to the Respondent. At issue is:

(1) quantum of spousal support,

(2) whether lump sum support should be paid in addition to periodic support,

(3) whether there should be a termination or review date in relation to the periodic payments,

(4) whether the Petitioner's agreement to sponsor the .Respondent when she came to Canada effects the Petitioner's spousal support obligations,

(5) whether the Petitioner should maintain an additional amount of life insurance to secure the spousal support payments, and

(6) whether the Petitioner should be ordered to pay for a medical/dental plan for the Respondent in addition to his spousal support payments.

Spousal support is governed by s. 15.2 of the *Divorce Act* which provides as follows:

> **Spousal support order**
>
> **15.2** (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
>
> **Interim order**
>
> (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).
>
> **Terms and conditions**
>
> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
>
> **Factors**
>
> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.
>
> **Spousal misconduct**
>
> (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
>
> **Objectives of spousal support order**

> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time."

The Supreme Court of Canada has set out the method to be followed when determining a spousal support dispute. The starting point is to review the objectives set out in s. 15.2(6) of the *Divorce Act* and then consider the factors set out in s. 15.2(4) of the said *Act* (see: *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420).

All of the objectives referred to s. 15.2(6) must be taken into account. No single objective is paramount (see: *Moge v. Moge*, supra).

Quantum of Spousal Support

The Petitioner's Statement of Financial Information

Both parties have filed sworn Statements of Financial Information. In the Petitioner's Statement of Financial Information sworn to on August 22, 2001 he indicated an income of $4,532.47 per month or $54,389.64 per year. It is reasonable to assume that in arriving at this figure, he took into account the fact that his net self-employment income for the year 2000 was $61,206.25. The Income Tax Return that was subsequently prepared for the Petitioner for the year 2001 indicates a net self-employment income of $47,127.64. For the purposes of

these proceedings, I have found that the Petitioner has an annual income for support purposes of $51,279.53.

The Petitioner has indicated a proposed budget of $4,202.75 per month (including his child support payments). A number of the expenses listed in the Petitioner's budget require comment.

At the time of trial, the Petitioner was residing with his parents. He testified that he plans on moving out of his parents' home and obtaining a two bedroom apartment once his financial obligations to the Respondent have been determined. In the Petitioner's budget he proposes a figure of $750.00 per month for the cost of a two bedroom apartment.

The Respondent points out that for the most part, the Petitioner has lived with his parents throughout his life (except for the period of time when the parties moved into their own accommodations) and suggests that the Petitioner will continue to live with his parents after the divorce is concluded. In response, the Petitioner notes that prior to marrying the Respondent he was a single man without children. The situation is much different now that the Petitioner is the father of two children.

While I accept the Petitioner's evidence that he does not intend to continue to live with his parents once these proceedings are concluded, I do not accept that he requires the sum of $750.00 per month for an apartment. The Petitioner, through his sole ownership of two companies, owns five rental properties. I am satisfied that in the circumstances of this case, it is reasonable to expect the Petitioner to live in one of his companies' rental properties rent free. While .this arrangement will affect the rental income of one of the companies and may result

in certain tax consequences (the suggestion was made that the use of one of the apartments may be considered to be a taxable benefit to the Petitioner), I am satisfied that this is a reasonable expectation in the circumstances.

The Petitioner lists a number of vehicle expenses in his Statement of Financial Information including gas ($225.00 per month); maintenance/repairs ($25.00 per month) and insurance, license, registration and inspection ($80.00 per month). The Petitioner is able to claim a large portion of these expenses as business expenses on his Income Tax Return. This must be taken into account when determining the Petitioner's ability to pay spousal support.

In addition to the above, the Petitioner has listed a number of expenses in his budget which do not seem realistic in light of the parties financial circumstances. I refer in particular to the Petitioner's proposed figures of $100.00 per month for house repairs, maintenance, appliance and furniture repairs/ replacement; $150.00 per month for Christmas, birthdays, events and gifts; $43.33 per month for charitable donations and $200.00 per month for holidays. While it is reasonable to assume that the Petitioner will incur some expenses in this regard, his proposed figures are too high in light of the family's financial circumstances.

In addition to the above, the Petitioner has proposed a figure of $200.00 per month for savings .- RRSP's. . According .to .the .Petitioner's .testimony .his RRSP contribution is optional. While in many cases such a figure would be considered reasonable, I am satisfied .that in this case, the Petitioner's business interests will provide him with sufficient financial security for the future and it is neither necessary nor reasonable at this time for the Petitioner to accumulate

additional savings by way of RRSP's.

The Respondent's Statement of Financial Information

The Respondent's Statement of Financial Information indicates that her only source of income is her child support payments (at the present time the Respondent is not working). On cross examination the Respondent acknowledged that in addition to these payments, she receives $506.31 per month by way of child tax benefit. During summation, the Respondent's solicitor advised the Court that this figure is incorrect and that at the present time the Respondent is actually receiving $450.00 per month by way of child tax benefit.

The Respondent will now be receiving the sum of $696.00 per month in child support. The Respondent will therefore be receiving $1,146.00 per month ($696.00 child support + $450.00 child tax benefit = $1,146.00 per month) before taking into account her spousal support payments.

In .the .Respondent's most recent Statement of Financial Information she lists expenses of $4,150.00 per month without taking into account income tax. A number of the expenses listed in the Respondent's budget also require comment.

As indicated previously, in April of 2002 the parties matrimonial home was sold. It was necessary at that time for the Respondent to find alternative accommodations for she and the children. The Respondent determined that she wanted to rent a home located at 3509 Joseph Howe Drive in Halifax. This property was advertised by the landlord as a five bedroom home and was offered to the Respondent for a rental figure of $1,300.00 per month.

Around this time, there was talk of a possible reconciliation between the

parties. On April 12, 2002 the .Petitioner's solicitor wrote to the .Respondent's solicitor the following:

> You have indicated to me your client intends to rent a five bedroom house at a cost of $1,300.00 per month and with a one year lease when she moves from the matrimonial home at the end of this month. I have confirmed with you that the family, all living together, could not afford this accommodation nor is there any need for a five bedroom home for Ms. Gossen, the two children, and Mr. Gossen. Should the family remain separated, Mr. Gossen is in no way able to support the costs associated with such a home for Ms. Gossen and the children. Should your client choose to take on this housing responsibility, we must be clear that it is her choice alone and that Mr. Gossen does not agree with such a choice."

Around this time, the Petitioner suggested to the Respondent that they consider purchasing a replacement home which was listed for sale for $169,900.00. This home had three bedrooms and was located near two schools. The Petitioner thought that this would be a suitable home for the Respondent and the two children regardless of whether the parties reconciled. The Petitioner testified that this property had a backyard where the children could play and was close to a number of shopping centres. The Petitioner had calculated that the monthly mortgage payment on this property would be $767.77 assuming that the net proceeds from the sale of the matrimonial home were used as a down payment. The Petitioner was prepared to assist the Respondent in the purchase of this home regardless of whether the parties reconciled. The Respondent would not agree to view this property and on April 26, 2002 she signed a lease for 3509 Joseph Howe Drive.

It is hard to understand why the Respondent chose to rent such a large and expensive home in light of the parties financial circumstances. At the time of trial the Respondent suggested that she considers this property to be a three

bedroom home rather than a five bedroom home. It is difficult to accept this evidence in light of the fact that four rooms in the home are presently being used as bedrooms.

The .Respondent's decision to rent this property was unreasonable in the circumstances and she cannot now look to the Petitioner to finance a rental payment of $1,300.00 per month. I am satisfied that reasonable accommodations could have been obtained by the Respondent at a much lower figure than $1,300.00 per month.

At the time of trial, the Respondent's brother and parents were residing with the Respondent and the children at 3509 Joseph Howe Drive. The Respondent testified that her parents are living with her temporarily. The Petitioner questions the veracity of this noting that the Respondent's parents brought their bed and other furniture with them when they came to Canada to "visit".

According to the Respondent's testimony, at the present time her brother is paying the electric and water bill relating to 3509 Joseph Howe Drive and shares in the cost of groceries. The Respondent testified that her parents assist her brother with these payments but otherwise, they do not assist with any of the expenses relating to this property. While the Petitioner has an obligation to help support the Respondent and their two children, he has no obligation to support the Respondent's brother and parents. This must be kept in mind when considering the budgeted expenses relating to 3509 Joseph Howe Drive.

There are also a number of expenses listed in the Respondent's budget which do not seem realistic when one considers the parties' financial

circumstances. I refer in particular to the budgeted figure of $80.00 per month for telephone and postage; $800.00 per month for food (for herself and two young children); $300.00 per month for clothing; $200.00 per month for holidays and $150.00 per month for furniture.

The Petitioner's solicitor has suggested a spousal support figure in the amount of $950.00 per month based on the .Petitioner having a gross income of approximately $51,000.00 per annum. He suggests that even with such a payment it is questionable whether the Petitioner will be able to live independently in a modest two-bedroom apartment. This concern should be alleviated somewhat by my finding that it is appropriate for the Petitioner to live rent free in one of his companies' rental properties.

The Respondent's solicitor has suggested a spousal support figure of $3,144.20 per month based on the Petitioner having an imputed income of approximately $70,000.00 per annum.

My determination in relation to spousal support is necessarily guided by the Petitioner's ability to pay. Spousal support shall be paid by the Petitioner to the Respondent in the amount of $1300.00 per month. This figure, along with the child tax benefit that the Respondent receives in the amount of $450.00 per month and the child support that she will be receiving in the amount of $696.00 per month leaves the Respondent with a total monthly income of $2446.00($29,352.00 per year). While the Respondent may have difficulty adjusting her budget to this income, it must be recognized that the child and spousal support payments that have been ordered will leave the Petitioner with limited disposable income after the payment of support and other non-

discretionary expenses such as income tax, CPP and the cost of the medical/dental plan and life insurance that the Petitioner will be maintaining. Were it not for the fact that the Petitioner is able to obtain reasonable accommodations rent-free, the spousal support figure that would have been awarded would have been lower.

At the conclusion of the trial counsel for both parties agreed that I should set periodic spousal support for the period May 1st, 2002 onward. Accordingly, the Petitioner's obligation to pay periodic spousal support in the amount of $1300.00 per month shall commence on May1st, 2002 and shall continue on the 1st day of each and every month thereafter until further Order of the Court.

Lump Sum Support

In the Respondent's post-hearing brief, she requests lump sum support for:

> 1) Provision of a safe, reliable car for [the Respondent] of sufficient size to house two car seats;
>
> 2) .Provision of annual lump sums sufficient to meet the costs of a degree in psychology and professional accreditation, together with a book allowance." The Respondent noted that the current fees at St. Mary's University for a part-time student are $2,500.00 per annum and in addition, the Respondent proposed a book allowance of $1,000.00 per annum noting the possibility of increased costs in the future.

In subsequent materials filed with the Court, the Respondent repeated her request for the transfer of one of the rental properties and suggested that in lieu thereof, lump sum spousal support could be awarded to her for the purchase of a house.

Lump Sum Support for a Vehicle

The Respondent does not have a vehicle. She transports the children by bus. I am satisfied that the Respondent has an immediate need for a vehicle and that the Petitioner has the ability to contribute towards this expense.

The Respondent suggests that she requires $25,000.00 for the purchase of a small family car. She acknowledges that there are vehicles available in the $12,000.00 - $13,000.00 range but questions how safe these vehicles are.

The .Petitioner suggests that a reasonable vehicle can be obtained for $12,000.00 - $13,000.00 but submits in his post-hearing brief that a lump sum award should not be granted taking into account the fact that the savings that he contributed to the acquisition of the matrimonial home (in the approximate amount of $25,000.00) were not accounted for prior to dividing the net proceeds of the sale of the home. Presumably, the Petitioner is arguing that he has in fact already provided the Respondent with a lump sum payment as a result of this concession.

I find that in the circumstances of this case, it is reasonable for the Petitioner to pay the lesser of $10,000.00 or the actual cost of a vehicle for the Respondent provided that the Respondent actually purchases a vehicle. The Respondent shall advise the Petitioner which vehicle she intends to purchase. The Petitioner shall then have ten days to provide the Respondent or the individual/dealership that is selling the car with his portion of the purchase price. The Respondent shall, within thirty days of the Petitioner paying his portion of the vehicle's cost, provide the Petitioner with proof that she has ownership of the vehicle.

Should the Respondent elect to purchase a car which costs more than $10,000.00, she shall be responsible for any additional costs relating thereto. I note that the Respondent will have funds from the sale of the matrimonial home from which she can contribute towards the cost of a vehicle.

Lump Sum Support for Advanced Education

At the time of trial, the Respondent testified that she wishes to go to university and study to become a psychologist. She anticipated taking up to three courses per year and estimated that it will take her nine to ten years to complete her education and any training that is necessary in order to be qualified as a psychologist.

The Respondent graduated from high school in Lebanon when she was 17 years of age. The following year she attended Holy Spirit University in Lebanon where she studied psychology. After three-four months of study, the Respondent was forced to return home due to war. The remainder of that school year was lost as a result.

The following year the Respondent returned to Holy Spirit University but by this time had decided to study languages. The Respondent had studied Italian while in high school and decided to study Italian and English while at University. Eventually, the Respondent obtained a diploma in English language from Holy Spirit University as well as a second diploma in Italian language and translation from the Italian Cultural Centre. The Respondent was 20 years of age when she completed school.

After finishing school, the Respondent started work as a translator. At the

same time she was teaching Italian to high school students. After two years, the Respondent began teaching Italian and French. When the Respondent met the Petitioner, she was teaching high school Italian and was working in the library in the school where she taught. While the evidence was somewhat unclear on this point, it appears that most of the Respondent's work was done on a part-time basis.

The Respondent continued teaching Italian and working in the school library for approximately 3 months after the parties married. She then gave up this employment to move to Canada.

From April 24 to September 4, 2000 the Respondent worked on a part-time basis as a telephone sales associate for Sears Canada, Inc. She worked on the bilingual telephone. During this time she earned .$3,763.28. According .to the Respondent's Record of Employment she earned $7.74 per hour while working for Sears. The Respondent gave up this job in September of 2000 in order to travel to Lebanon for a 3 month visit. She has not worked since that time.

The Petitioner submits that the Respondent's present plan to go to University does not make any economic sense and suggests that the Respondent should be focusing on finding employment rather than upgrading her education. In the Petitioner's post-hearing brief, he suggests that in the absence of any reasonable retraining/re-education plan, he should pay by way of lump sum, up to $5,000.00 to assist in the Respondent's re-education/retraining upon the Respondent presenting the Petitioner with "verifiable expenses" in this regard.

An individual claiming support to upgrade his/her education or to retrain, should provide the Court with a clear plan including complete particulars of the educational program they wish to embark on (including all costs associated therewith), the reason why upgrading or retraining is being suggested and the benefits that he/she expects to obtain as a result of this upgrading or retraining. The Court can then assess the reasonableness of the plan.

In this case, the Respondent testified that she would like to take a university degree in psychology and has provided the Court with the costs that would be associated therewith. However, the Court was not provided with sufficient evidence as to why this plan of study is reasonable or necessary in the circumstances, nor has evidence been presented concerning the benefits that the Respondent would anticipate receiving as a result of obtaining this additional education. Obviously, there are inherent benefits to advanced education, but in these circumstances, where an individual is asking another individual to finance post-secondary education by way of spousal support, the Court must be satisfied that there are tangible benefits that will accrue as a result of this education being pursued.

The Respondent's plan to attend university would, according to her evidence, take nine to ten years to complete. No evidence has been given as to the employability or income of individuals that hold a psychology degree. I am not satisfied that the Respondent's plan to attend university is reasonable in the circumstances and accordingly, her request for lump sum spousal support to finance a university education is dismissed.

No other retraining or education plan was proposed by the Respondent. Accordingly, I decline to make any award in relation to upgrading or retraining

for the Respondent. Nothing in this decision shall preclude the Respondent from applying for alternate retraining or upgrading expenses in the future, provided that she can satisfy s.17(4.1) of the *Divorce Act*.

Lump Sum Support for the Purchase of a Home

Finally, the Respondent suggests that in lieu of the transfer of one of the rental properties, the Court should award the Respondent lump sum spousal support for the purchase of a house.

A lump sum spousal support award may not be used to redistribute assets (see: **Johnson v. Johnson** (1974), 10 N.S.R. (2d) 624 .(N.S.S.C.A.D.) .and **Vermeulen v. Vermeulen** (1999), 2 R.F.L. (5th) 140 (N.S.C.A.)). .I am not satisfied that the Respondent has an immediate need for a house, nor am I satisfied that the Petitioner has the ability to pay for such, short of disposing of his business assets (which I am not prepared to order). Accordingly, the Respondent's application in this regard is dismissed.

Termination/Review Date in Relation to Spousal Support

The Petitioner notes that this is a marriage of short duration and submits that this is an appropriate case for a termination date in relation to spousal support or alternatively, a review date. The Petitioner suggests that in light of the Respondent's age, education and qualifications (she is multi-lingual), she should be taking immediate steps towards self-sufficiency.

One of the objectives of a spousal support Order under the *Divorce Act* is, insofar as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time. This, however, is only one of the four

objectives set out in 15.2 (6) of the said *Act*. The Court must also recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage and relieve any economic hardship of the spouses arising from the breakdown of the marriage. As indicated previously, no single objective is paramount (see: **Moge v. Moge**, *supra*).

While the Court must not focus unduly on self-sufficiency, it is one of the four objectives of a spousal support Order. In this case, there is a legitimate concern as to whether, insofar as practicable, the Respondent is attempting to achieve self-sufficiency within a reasonable period of time.

As indicated previously, the Respondent worked for Sears Canada, Inc. as a bilingual or multi-lingual telephone sales associate between April 24th and September 4th, 2000. The Respondent gave up this job in the fall of 2000 to visit Lebanon and has not returned to work since that time. The Respondent acknowledged that she has not looked for or considered other employment since leaving Sears two and a half years ago.

During the course of the Respondent's cross-examination, the following excerpt of her discovery evidence was read into the record:

> Q. What type of accommodations are you looking for?
> A house.
>
> Q. In what location?
>
> A. I'm looking in my area. Clayton Park west.
>
> Q. And can you give me a general price range that you've been looking at?

A. . Actually, until now I'm not looking at a specific but I'm looking for a house similar to the house I live now - - I live in now because I think this is what I was promised to live in.

Q. What's the sale price of the house you live in now? What's it being sold for?

A. Three fifty-five, I guess.

Q. So, you would like another house worth three hundred and fifty-five thousand ($355,000)?

A. Well, of course.

Q. Sorry?

A. Of course.

Q. Of .course. *But you don't see yourself making any financial contribution for, at least, 10 years?*

A. *When I'm ready to do it, I will do it.*

Q. *Yes. When will you be ready?*

A. *Well, this is what I said, like, when Angela will be at least 10 or 12.*"

[emphasis added]

Angela is presently two years of age.

Self-sufficiency may be difficult for the Respondent to attain in the near future in light of her limited work experience in Canada, the fact that English is not her first language and the fact that the two young children of the marriage reside primarily with her. Nevertheless, the Respondent must, insofar as practicable, work towards becoming self-sufficient within a reasonable period of time.

In addition, it must be recognized that both the Petitioner and the Respondent have a joint financial obligation to support the children of the

marriage in accordance with their relative abilities to contribute to the performance of that obligation (see s. 26.1(2) of the *Divorce Act*).

In this case, it is certainly reasonable to expect the Respondent to make efforts to obtain employment. The family simply cannot afford to have her remain at home.

While I am not satisfied that it is appropriate at this time to set a termination date in relation to the Respondent's spousal support payments, I am satisfied that a date should be set to review the issue of spousal support and the efforts that the Respondent has made to obtain self-sufficiency. A review shall be heard any time after May of 2004 (three years after the date of the parties' separation) upon application of either spouse. It will not be necessary for the Applicant to establish a material change in circumstances in light of the fact that I have ordered a review (see: **Bergeron v. Bergeron** (1999), 2 R.F.L. (5th) 57 (Ont. S.C.J.) and **Hill v. Hill**, 2003 NSCA 33 (& 26). Nothing in this decision prevents either of the parties from applying to vary the spousal support Order at any other time upon establishing a change in circumstances as provided for in the *Divorce Act*.

The .Petitioner's Agreement to Sponsor the Respondent when she came to Canada

During the course of trial, the Petitioner acknowledged that he sponsored the Respondent when she came to Canada in 1999. As part of this sponsorship he agreed to be financially responsible for the Respondent for ten years. I have not been provided with any of the documentation which would have been generated in relation to this sponsorship.

In my view, any obligations that the Petitioner may have as a result of sponsoring the Respondent are separate and apart from any obligations that he has under the *Divorce Act* and are not relevant for the purposes of this proceeding.

Life Insurance to Secure Spousal Support

As indicated previously, the Petitioner is maintaining $600,000.00 in life insurance for the benefit of the children of the marriage. In addition, he has a group policy through Clarica in a minimum amount of $100,000.00. The Petitioner is prepared to name the Respondent as beneficiary of this latter policy for as long as spousal support is payable. The Respondent requests that the Petitioner take out further life insurance in an additional amount of $100,000.00 (total insurance $200,000.00) to further secure her spousal support payments.

The Petitioner has agreed to maintain a total of $700,000.00 in life insurance to secure his child and spousal support payments. No evidence was given as to whether the Petitioner qualifies for further life insurance and if so, the cost thereof. In any event, I am not satisfied that the Petitioner can afford the cost of further life insurance in light of the child and spousal support payments ordered herein. Accordingly, the Respondent's request for this additional relief is dismissed.

Medical/Dental Plan for the Respondent

In addition to the above, the Respondent has requested that the Petitioner be ordered to pay for a medical/dental plan for the Respondent in addition to the spousal support payments that have been awarded. No evidence was led

concerning the cost of such a plan. Again, I am not satisfied that the Petitioner has the ability to make any further support payments other than those already awarded. Accordingly, the Respondent's request for additional medical/dental coverage is dismissed.

Costs

Counsel have asked to make representations on the issue of costs. In the event that the parties are unable to reach agreement concerning costs, any representations that the Petitioner may wish to make in this regard shall be filed with the Court within 14 days from the date of this decision. Any representations that the Respondent's solicitor wishes to make in this regard shall be filed with the Court within 7 days thereafter.

J.