SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *MacLean v. MacLean*, 2019 NSSC 322

Date: 20191025
Docket: 207-014418
Registry: Colchester

Between:

Tanya Maclean

Petitioner

v.

Brian MacLean

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	May 14, 15 & 16, 2019 in Truro, Nova Scotia
Key Words:	Property division, exempt asset, inheritance, spousal support, imputed income, retroactive spousal support, child support
Summary:	The parties sought a divorce. Each party requested the court impute income to the other. Income was imputed to the mother who was employed as a substitute teacher. The father had primary care of the three younger children. Child support to be paid by the mother to the father was based on her imputed income. Spousal support was to be paid to the mother on an indefinite basis. The father sought to exclude from the matrimonial property division inheritance monies he received. The inheritance monies were blended with the family funds to the extent that the exempt status was lost. Matrimonial property was divided equally.
Legislation:	*Divorce Act* *Matrimonial Property Act*

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Respondent

Judge:	The Honourable Justice C. LouAnn Chiasson
Heard:	May 14, 15 & 16, 2019, in Truro, Nova Scotia
Counsel:	Lloyd Berliner for the Petitioner Allison Kouzovnikov for the Respondent

By the Court:

[1] The parties were married on July 4, 1998, and separated on January 20, 2017. They have four children ranging in age from 19 years to 15 years of age. Following separation, the parties continued to reside in the matrimonial home together.

[2] Shortly prior to the trial of this matter, Ms. MacLean purchased another residence. Ms. MacLean is a substitute teacher. Mr. MacLean is employed as a regional director for a financial institution.

[3] The parties were offered a settlement conference but chose not to participate. It is unfortunate that the parties did not participate in such a conference. Settlement conferences often narrow the issues if not settle the matter as between the parties. Instead, the parties opted not to negotiate and to have the Court decide these issues.

[4] An oral decision was rendered on the issues of parenting. This decision addresses the divorce as well as the financial issues between the parties: child support, spousal support and property division.

ISSUES:

1) Have the parties satisfied the requirements to be met in order for the court to grant a divorce?

2) What is the appropriate property division?
    a. Should the inheritance of Mr. MacLean be included in the division?
    b. How should the post separation contributions and withdrawals be accounted for in the division?
    c. What is the appropriate value of the matrimonial assets?
    d. Should the matrimonial assets be divided equally?

3) What is the appropriate child support payable based on the parenting arrangement?
    a. Should income be imputed to Ms. MacLean?
    b. What is the income of Mr. MacLean?
    c. How should s 7 expenses be shared?

4) What amount, if any, is the appropriate spousal support payable?
    a. On an ongoing basis
    b. On a retroactive basis
    c. Should there be a termination date?

DIVORCE

[5] I am satisfied that all jurisdictional requirements have been met to grant a divorce.

PROPERTY

[6] There are a number of property issues as between the parties. Although the pre-trial briefs of the parties addressed the issue of matrimonial property division, it was clear that the parties did not have sufficient evidence to canvas the issue fully prior to the trial. The court directed both parties file post trial submissions in relation to the financial issues (inclusive of property division).

INHERITANCE RECEIVED BY MR. MACLEAN

[7] Both parties acknowledge that the High Interest eSavings account ("High Interest Account") is a matrimonial asset subject to division. The issue is that included in the High Interest Account is a sum of money received by Mr. MacLean as an inheritance. The amount received by Mr. MacLean and the dates of deposit are not in issue. Mr. MacLean received a total inheritance of $86,102 and deposited those monies into the High Interest account between 2012-2014. He seeks to have the sum of $86,102 returned to him from this account.

[8] The legislative starting point in matrimonial property division is s. 12 of the *Matrimonial Property Act*, RSNS 1989, c. 275 (as amended). Section 12 permits an equal division of matrimonial assets notwithstanding the ownership of the assets. This is tempered by s. 13 of the *MPA* which states that the court may order an unequal division if "the division of matrimonial assets in equal shares would be unfair or unconscionable."

[9] Section 4(1) of the *Matrimonial Property Act, supra*, states:

> 4 (1) In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of

> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children…

[10] Property division involves the categorization of assets as matrimonial or non-matrimonial (exempt assets, business assets). The categorization of an asset in this way dictates whether the asset is subject to division (or not) as between the spouses. The case law interpreting s. 4(1) has introduced the concept of the categorization of an asset as matrimonial (and presumptively divisible) with the caveat that **a portion of the asset** may not be divisible as it falls within the category of an exception under s 4(1).

[11] In this way, part of an asset may be matrimonial and part of an asset may fall within an exemption. Assets claimed as exemptions under s. 4(1) are much easier to define when the gift or inheritance is kept in a separate asset (bank account, investment, etc). The situation becomes far more problematic when a party requests the court to bifurcate the characterization of one asset- part of it subject to division and part of it exempt from division. Such cases call for a great degree of scrutiny and require significant evidence to show that such a division may be made with some degree of precision based on the evidence before the court.

[12] The cases determining whether an asset (or a portion thereof) is exempt pursuant to s. 4(1) center on whether the asset has been used for the benefit of the family. Counsel for Mr. MacLean relies on *Rafuse v Rafuse*, 2015 NSSC 374 (N.S.S.C.). As stated by MacAdam J. in *Rafuse*, *supra*, at paragraph 20:

> "Although otherwise exempt assets and funds that are withdrawn may lose their exempt character by virtue of being used for family purposes, this does not affect the exemption accorded to the remainder of the fund."

[13] Implicit in these comments is the fact that an asset may have a portion considered matrimonial and the balance of the asset considered exempt. The exemption is limited by the words "except to the extent to which they are used for the benefit of both spouses." This phrase was considered by Cromwell J.A. (as he then was) in *Fisher v Fisher*, 2001 NSCA 18 (N.S. C.A.):

> "51 It is not possible or desirable to set out any hard and fast rules for determining the extent of use of an asset for the benefit of both spouses or the children. The fundamental issue, to use an expression that appears in some of the cases, is the extent to which the asset has gone into "the matrimonial pot" : see Rossiter-Forrest v Forrest (1994), 129 N.S.R. (2d) 130 (N.S.S.C.) and Stoodley v

> Stoodley (1997), 172 N.S.R. (2d) 101 (N.S.S.C.). This determination must be made having regard to the nature of the asset and what use, in the normal course of life, would constitute integration of an asset of that nature into the life of the family. Factors such as the degree to which the asset was kept and treated separately from matrimonial assets, the amount and nature of its use by, or on behalf of, the spouses or the children and the contribution of family resources to maintain or enhance the asset may be factors which will be helpful to consider in making this determination. This, of course, is not an exhaustive list."

[14] The concept of the "use" of the inheritance monies was expanded on by Campbell J. in *Kennedy-Dowell v Dowell*, 2002 NSSF 13, 203 NSR (2d) 130 (N.S.S.C.). At paragraph 52 he stated:

> "Gifts, inheritances and trusts can only be "used" in one of three ways:
>
> 1. Consumed, as for example for living expenses or travel, etc.:
>
> 2. Substituted for other assets, such as purchasing a home or a vehicle; or
>
> 3. Preserved; as for example when inherited investments are preserved to produce income. When an inherited utility such as a cottage is preserved it is capable of being used for its utilitarian purpose."

[15] Further at paragraph 54, Campbell J. states:

> "… The use of some or all of the income from such a fund is an event that can benefit the entire family and one which the drafters of the legislation must have taken into account when attempting to exempt these types of assets from division…"

[16] In the *Rafuse* case, Mr. Rafuse provided the court with detailed calculations related to the inheritance monies invested and was not challenged on the evidence. In the present case, the court has not been provided with a detailed accounting of the High Interest Account. Rather, I note that as of April 30, 2012, prior to the inclusion of inheritance monies, the balance in the account was $95,765.15. Other monies were deposited into the account from undetermined sources.

[17] From the time the inheritance monies were deposited into the High Interest account, these monies were co-mingled with other funds:

(a) From June to December 2012, $18,101.75 was deposited from Mr. MacLean's inheritance monies along with $851.02 of interest and $44,975.13 from another source(s).

(b) In 2013, $57,000 was deposited from inheritance monies, $1,660.80 from interest and a further $29,430.46 from other source(s).

(c) In 2014, $11,000 was deposited from inheritance monies, $2013.32 from interest and a further $34,518.39 from other source(s) .

[18] Large sums of monies were deposited in 2015 and 2016 from other sources- $104,181.56 and $73,922.01 respectively. Mr. MacLean confirmed that some of the deposits into the High Interest Savings came from the parties' joint chequing account. There were times when the funds in the High Interest Savings Account fell below the amount of inheritance monies. For example, in August 2016, the account balance was as low as $66,258.00 (more than $20,000 less than the inheritance monies).

[19] There were also various withdrawals from the High Interest Account over the years without detailed and specific accounting as to what was done with the funds. In 2016 there was one withdrawal for over $100,000. How am I to assume that this disbursement out of the account was done with matrimonial funds, leaving the inheritance monies intact? Would it not be equally plausible that a portion of those monies (if not all) came from the inheritance, depleting the inheritance funds within that account completely?

[20] As noted in *Kennedy-Dowell v Dowell*, *supra*, the inheritance may be converted into another form of holding. Monies from an inheritance may be invested in securities. The court can trace the origin of the funds used to purchase assets to an inheritance and find that the exemption still applies. The issue is the degree to which it can be established that the asset in question is purchased or increased in value by virtue of the inheritance. The tracing of an asset must include clarity of evidence and specific accounting.

[21] Drafters of the *Matrimonial Property Act*, *supra*, intended that certain assets would be exempt from division, which exemption may include inheritances. Whether an asset, or funds within that asset, may remain exempt will depend on the circumstances of the case. Clearly, if the funds are maintained separately, case law is clear that the exemption will likely hold. If the funds are fully utilized by the family, case law is equally clear that there is nothing left to divide. The more difficult and nuanced cases involve the co-mingling of inheritance monies with other matrimonial monies.

[22] Mr. MacLean bears the burden of proof that the High Interest Account balance should exclude monies deposited as a result of his inheritance. As stated in *Chipman v Chipman*, 2017 NSSC 297, at paragraphs 65 and 66:

> "The starting point is that everything is in the pot.
>
> Section 4 does provide for certain exceptions. In Murphy, Justice Jollimore notes that in a 2010 Court of Appeal decision called Cashin v Cashin, 2010 NSCA 51 (N.S. C.A.) ("Cashin"), the court stated that the burden of proving that an asset is not matrimonial by reason of an exception falls on the spouse making the assertion."

[23] Based on the evidence before me, I do not find that Mr. MacLean has discharged the burden of proof. The extent of the co-mingling of funds in the High Interest Account and the lack of detailed accounting with respect to the deposits and withdrawals of the funds mandates that the totality of the High Interest account is to be considered a matrimonial asset subject to division. Although Mr. MacLean provided the bank statements for this account, without details as to the source of the contributions, the specific use made of the withdrawals (other than "to manage the family's cash flow and maximize investment returns"), I do not find that the inheritance monies should be preserved as exempt property.

[24] Having found that the High Interest account is a matrimonial asset subject to division, I may permit an unequal division of that asset pursuant to section 13 of the *Matrimonial Property Act, supra* ("MPA"). The party seeking an unequal division must first demonstrate that an equal division of matrimonial property would be unfair and unconscionable. Section 13(e) of the MPA permits me to consider the date and manner of acquisition of assets. I have also considered the factors noted in sections 13(f), (g) and (i).

[25] I do not find that an equal division would be unfair and unconscionable. The following reasons collectively dictate that the High Interest account should be equally divided:

1) Date of acquisition of account- The asset was in existence prior to the inheritance funds being deposited with a balance of $95,765.15 (prior to the inheritance). At the time of separation, despite the inheritance monies being deposited, the balance in the account had fallen to $83,116.

2) Contributions to asset- Although $86,101.75 was deposited from inheritance monies from 2012- 2014, an additional $292,313.28, was contributed to the

asset from other sources. Mr. MacLean admitted that some of these funds came from the parties' joint bank account.

3) Withdrawals to asset- The evidence disclosed that there were significant deposits (as noted above), but there were also significant withdrawals. As of the date of separation, the account fell below the amount claimed as inheritance ($83,116). Although statements were provided, there was no detailed accounting as to the significant withdrawals over the years. As stated by counsel for Mr. MacLean, he "moved money into and out of this account at various times as a way to manage the family's cash flow and maximize investment returns." It is impossible, therefore, to find that a specific amount of money should be allocated and set aside as exempt monies for Mr. MacLean. The extent of the co-mingling and usage of funds results in the loss of the exempt status of his inheritance monies.

4) Roles during marriage: This was a long term marriage. For the vast majority of the marriage, the parties held traditional roles- Mr. MacLean was the primary breadwinner and Ms. MacLean was primarily responsible for the household. Although these roles changed towards the end of the relationship with Mr. MacLean assuming more of the household responsibility, for the majority of their marriage, she looked after the household and he worked. His work also involved travel for a number of years, resulting in Ms. MacLean caring for the children and the household in his absence.

[26] The equal division of the High Interest account will include a credit to Mr. MacLean for a post separation contribution of $2,986.

POST SEPARATION CONTRIBUTIONS AND WITHDRAWALS

[27] Pursuant to s. 4(1)(g) and 4(3) of the *Matrimonial Property Act, supra*, post separation property is to be excluded from division. Both parties acknowledge that post separation contributions made by Mr. MacLean are not to be included in the matrimonial asset values. There is one post-separation contribution made by Mr. MacLean which will be disallowed.

[28] Four days post separation, Mr. MacLean made a number of contributions from the parties' joint investment account. Exhibit 28 revealed that one such contribution from the parties' joint asset was $5,500 to Mr. MacLean's TFSA.

This post separation contribution will not be credited solely to Mr. MacLean as it came from matrimonial sources and was within four days of separation.

[29] As a result, Mr. MacLean will receive the following credits for post separation contributions:

1) Contribution to High Interest Savings Account- $2,986;
2) Contribution to Mr. MacLean's TFSA- $17,000 less $5,500 (related to a contribution made on January 24, 2017 from the joint investment account) for a total credit of $11,500
3) Contribution to Mr. MacLean's RSP- $19,658

[30] There were also contributions made to the TFSA and RSP in Ms. MacLean's name four days post separation. The financial advisor for the parties, Blair Cameron testified that the contributor to the RSP was Mr. MacLean. Counsel for Mr. MacLean has not calculated any credit to Ms. MacLean for post separation contributions to either the RSP or the TFSA in Ms. MacLean's name. Presumably this is premised upon the assertion that Mr. MacLean was the contributor and, as such, Ms. MacLean should not receive the credit for post separation contributions. The contributions were as follows:

1) Contribution to Ms. MacLean's TFSA- $5,500;
2) Contribution to Ms. MacLean's RSP- $7,971.

[31] The contributions were made within four days of separation. The source of the funds was the joint investment account (reference Exhibit 28). The fact that Mr. MacLean was the contributor is self-evident as he was the party in control of the parties' finances during marriage. As these contributions were made from a matrimonial asset, I am not prepared to attribute the contribution solely to Mr. MacLean. The TFSA and RSP of Ms. MacLean will be valued including the post separation contributions.

[32] In calculating the division of the joint investment account, both parties have considered the balance in the account as of the trial. Exhibit #30 noted the balance in that account to be $272,025.54. By equalizing this amount, the parties have accounted for the post separation contributions to their respective TFSA's and RRSP's within days of separation from the joint investment account.

[33] Counsel for Ms. MacLean does not want the court to consider the post separation withdrawals of Ms. MacLean of $70,700 from her RRSP. Rather the

suggestion is to consider this sum as retroactive spousal support. Post separation withdrawals, as post separation contributions must be taken into account. Although the *Matrimonial Property Act, supra,* does not specify the appropriate date for valuation of matrimonial property, the seminal case of *Simmons v Simmons*, 2001 NSSF 35 (NSSC) provides guidance.

[34] If a party has liquidated an asset (or a portion thereof) and the liquidation did not have a mutually beneficial purpose, the liquidation is to be included in the value of the matrimonial property. Here, the withdrawals from the RRSP by Ms. MacLean were not utilized for family purposes (ie. Paying down matrimonial debt). In relation to the division of property, the withdrawals by Ms. MacLean are to be included in the property division calculation.

OTHER MATRIMONIAL ASSETS

[35] Given the foregoing findings of the court, the appropriate division of matrimonial property is an equal division of matrimonial property as noted in Schedule A attached hereto. The pensions and RESSOP will be divided equally at source from the date of marriage, July 4, 1998 to the date of separation, January 19, 2017. The tax free savings accounts in each of the parties' names shall continue to be owned solely by that party with a credit to Ms. MacLean given the differential between account balances. The chequing account and the visa debt must also be divided equally as between the parties.

[36] The RESP's will continue to be jointly owned but will be managed solely by Mr. MacLean. The RESP monies are held in trust for the children of the marriage. Ms. MacLean is entitled to annual disclosure of the activity in the RESP by June 1st of each year. Although solely managed by Mr. MacLean, Ms. MacLean reserves the right to make a court application, if necessary to seek an accounting and an adjustment to the expenditure of the RESP monies for each of the children. In the event that the RESP funds are not fully expended by the children for their post secondary education, the balance remaining shall be equally divided between the parties.

[37] The motor vehicles owned by the parties were of equal value. As such, each shall retain the motor vehicle in their possession as of separation free and clear of claim by the other party. Each party shall sign any documentation necessary to confirm ownership of the vehicle by the other party. Expenses related to vehicles post separation (repairs, rentals) are the responsibility of the party in possession of the vehicle.

[38] In the equalization of matrimonial property, it is acknowledged that Mr. MacLean has a camper valued at $2,500 and a sea doo which sold for $9,000. Neither party has indicated that the Mazda motor vehicle driven by their oldest child is a matrimonial asset subject to division. As such, it is not included in the matrimonial property division.

[39] Mr. MacLean submits the value of the household contents to be $10,000. After Ms. MacLean receives the household items she has requested, he asserts the household contents will be equally divided. Ms. MacLean asserts that Mr. MacLean has $10,000 in additional furnishings after she is provided with "a modest list of the items she wants from the home." Neither party provided appraisals for the furniture.

[40] Mr. MacLean indicates that the court should accept that the division proposed of household furnishings is an equal division. Ms. MacLean is asserting that she should receive a credit of $7,500 in relation to the furniture kept by Mr. MacLean. Ms. MacLean relies on the principles set out in *Cameron v Cameron* 2014 NSSC 224 (N.S.S.C.). In that case, the trial judge found that Ms. Cameron was only able to remove the contents that could "fit into the parties' vehicle". The trial judge found that Mr. Cameron had $3,000 more in household contents than Ms. Cameron.

[41] Unlike Ms. Cameron, the items requested by Ms. MacLean are more significant in that she has requested: benches and mirrors, china set, dining room set and china cabinet, living room furniture in basement, small appliances from the kitchen, artwork, decorations. It is evident, however, that Mr. MacLean will retain the balance of the furnishing including all major appliances in the matrimonial home. In such matters, the parties should not rely on an arbitrary determination of the value of household contents and, in the absence of agreement, should have obtained appraisals.

[42] Ms. MacLean states that after receiving the list as noted above, the remaining furniture is valued at $10,000. Mr. MacLean asserts (confirmed by the Statement of Property) that the total value of household furnishings is $10,000. I am prepared to allocate a credit to Mr. MacLean of $3,000.

[43] As a tax savings strategy, Mr. MacLean "loaned" Ms. MacLean $300,000 repayable at an interest rate of 1%. Mr. MacLean acknowledges that Ms. MacLean has repaid $6,000 in interest since separation on this "loan". Blair Carter testified

that the repayment of the interest would have no tax implications to Mr. MacLean. He indicated that Mr. MacLean could call the "loan" at any time.

[44] The "spousal loan" was a means to minimize tax. As between Mr. and Ms. MacLean, however, Ms. MacLean was not provided with $300,000 to do with as she pleased. An investment account was collapsed and the money was re-invested in Ms. MacLean's name. It was a paper transaction which is unenforceable as between the parties as a loan. Mr. Carter confirmed that Ms. MacLean had little knowledge of their financial portfolio and Mr. MacLean understood the markets better.

[45] No representations were made by counsel for Mr. MacLean that the loan would be subject to collection. The "spousal loan" is declared null and void as between the parties. I accept the submission of Mr. MacLean's counsel that it is appropriate to credit Ms. MacLean for the $6,000 in interest payments post separation.

[46] The LIRA accounts in Mr. MacLean's name are subject to federal and provincial regulations. As noted by Blair Carter, they can be divided by way of tax free spousal rollover (in the same manner as RRSP's). As such, the LIRA accounts will be divided equally between the parties by way of spousal rollover.

CHILD SUPPORT

[47] The first step in the analysis of child support is to establish the incomes of each of the parties. Ms. MacLean argues that Mr. MacLean should have an income of $210,642 imputed to him. Mr. MacLean is seeking to have minimum wage income imputed to Ms. MacLean ($24,024) as well as interest income earned from investments. Counsel for Ms. MacLean concedes that if Ms. MacLean were successful in obtaining a full time teaching position her annual income would be approximately $53,000. On cross-examination Ms. MacLean conceded that a full time teacher could earn between $50,000 and $75,000 but was uncertain as to whether they would earn this in the first year.

[48] Pursuant to s. 19(1)(a) of the *Federal Child Support Guidelines*, (SOR/97-175) ("Guidelines):

> "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…"

[49] I have considered the appropriate case law including *Smith v Helppi*, 2011 NSCA 65 (N.S. C.A.), and *Drygala v Pauli* 2002 CanLII 41868 (Ont. C.A.). I find that Ms. MacLean is intentionally under-employed. She has worked as a substitute teacher for a number of years. She has accepted work from two schools: South Colchester Academy and Valley Elementary. She has not, however, sought or accepted work from any other schools within a reasonable distance from her residence.

[50] There are a number of schools within a reasonable commute. For example, schools in Pictou and Milford/ Shubenacadie are within approximately 40 minutes drive but Ms. MacLean has opted not to work in those schools. Despite only working an average of 12 days per month, Ms. MacLean has not updated her resume and has made no efforts to increase her income in the last few years. She has not applied for any part time or full time teaching positions, being content to continue to substitute.

[51] Mr. MacLean bears the burden of proving that such an imputation is warranted. He has discharged this burden. Given Ms. MacLean's educational background, her employment history, her age and her health, I find it unreasonable that she is employed an average of 12 days per month during the school year as a substitute teacher. If her employment efforts are not reasonable, the court may impute income (*Gould v Julian*, 2010 NSSC 123 (N.S.S.C.)).

[52] I am prepared to impute an employment income to Ms. MacLean of $35,000. This is below the amount earned by a full time teacher but recognizes that Ms. MacLean could and should be increasing the number of days she is working per month as a substitute teacher. There does not appear to be any impediment to her seeking a full time teaching position and this is what she ought to be doing without further delay.

[53] Additionally, Ms. MacLean will have interest based upon the property division as set out above. The capital redistribution between the parties is not able to be specified as the current balance of the High Interest Account is unknown. The parties have estimated the rate of return on investment to be 6.25%. Once the

property division has been finalized, the parties are to quantify the appropriate annual interest payable to Ms. MacLean.

[54] Ms. MacLean's child support obligation in relation to the three younger children of the marriage is to be calculated in accordance with the *Federal Child Support Guidelines*. The calculation is to be based on imputed income of $35,000 plus interest income to be calculated.

[55] In relation to expenses for their oldest child in post secondary university, there are significant RESP monies which may cover the majority of his expenses. There has been no information provided which relates to the additional means, needs and other circumstances of their adult child. In the absence of this information, the court is unable to specify the appropriate support to be paid by the parents.

[56] Section 7 expenses incurred will be shared proportionally between the parties.

SPOUSAL SUPPORT

[57] Ms. MacLean is seeking spousal support. Counsel on her behalf requested the monies withdrawn from the RRSP in the amount of $70,700 be considered lump sum retroactive spousal support. Ms. MacLean is also seeking ongoing support of $2,500 per month indefinitely.

[58] Mr. MacLean disputes any entitlement to spousal support by Ms. MacLean. He asserts that any claim to spousal support on a compensatory or a non-compensatory basis "should fail, or be extremely limited in both quantum and duration." Mr. MacLean has also requested the court impute income to Ms. MacLean.

[59] Pursuant to section 15.2(4) of the *Divorce Act, supra*, the court shall take into consideration the condition, means, needs and other circumstances of each spouse. The financial means of the parties includes a consideration of the incomes of the parties as well as their assets (ref *Robaczewski v Larson*, 2019 NSSC 78 (N.S.S.C.) and *Leskun v Leskun* 2006 SCC 25 (S.C.C.).

[60] The objectives of an order for spousal support are set out in s. 15.2(6) of the *Divorce Act*:

> "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."

[61] Recognizing that Mr. MacLean will be the primary residential parent for the three younger children, the court must be mindful of the impact of the additional expenses incurred to ensure the children's stability. This factor is incorporated in the "custodial payor formula" in the Spousal Support Advisory Guidelines. As stated by the court in *Papasodero v. Papasodero*, 2014 ONSC 30, at paragraph 69:

> "69 The custodial formula can be a harsh result to recipients. It recognizes the increased costs of raising children to the payor in a manner that is not always reciprocated within the recipient as custodial parent formula (i.e. the with child formula.)"

[62] This was a long term traditional marriage. Ms. MacLean worked but her employment was secondary to that of Mr. MacLean. For example, in 2002, Ms. MacLean was working as a guidance counsellor and was pursuing her Masters of Education program. When Mr. MacLean was offered employment in New Brunswick, Ms. MacLean left her job, discontinued her studies and the family relocated. Three years later, the family again relocated to Nova Scotia for Mr. MacLean's employment. Ms. MacLean is entitled to support on a compensatory basis.

[63] Ms. MacLean is also entitled to support on a non-compensatory basis. Mr. MacLean has significantly more income even after imputation of income to Ms. MacLean. Ms. MacLean was completely financially dependent on Mr. MacLean. He made the financial decisions and was in control of the money. Ms. MacLean's knowledge of the family's financial resources was limited.

[64] What is the appropriate income of Mr. MacLean? Ms. MacLean asserts that his income should be set at $210,642. Mr. MacLean argues that his income is

$140,000. Tony Ragusa testified at the trial. Mr. Ragusa is the Regional Vice President for Atlantic Canada and Quebec. His evidence was forthright and credible.

[65] Mr. Ragusa indicated that Mr. MacLean earned base pay of $117,500. He indicated that this was a higher base salary than other regional directors in Mr. MacLean's position because his base pay was "grandfathered in" after corporate restructuring. In 2017, there was corporate restructuring and Mr. MacLean was demoted two levels. His new position as regional director- field sales entitles him to his base salary and the possibility of bonuses based on performance.

[66] The bonus is structured based on four components: sales effectiveness bonus, team sales goals, risk and retention and short term incentive. Some bonuses are paid quarterly and some annually. Mr. Ragusa testified that Mr. MacLean is not meeting his targets and is rated as a low performer (v mid, outstanding and exceptional performers). To suggest that Mr. MacLean's earning potential is close to his income prior to the corporate restructuring is to ignore the current employment realities for Mr. MacLean.

[67] I accept the evidence of Mr. Ragusa and set the current employment income of Mr. MacLean at $140,500. I acknowledge that Mr. MacLean's income was higher in 2018, due in part to bonus and stock option payments received from his former role as Vice President. The evidence from Mr. Ragusa was abundantly clear- Mr. MacLean will not receive that level of income on an ongoing basis. Mr. Ragusa provided evidence that there were ongoing issues with Mr. MacLean's performance in his current role as regional director.

[68] Both parties provided the court with calculations pursuant to the *Spousal Support Advisory Guidelines* (SSAG). The SSAG calculation done by counsel for Mr. MacLean confirms his primary care of the three youngest children, confirms the employment income of Mr. MacLean of $140,000 and equally distributes to both parties interest and investment income (based upon the property division). Although premised upon a lower level of income for Ms. MacLean ($24,024 versus the imputed income of $35,000), the mid range of spousal support is $1,141.

[69] As indicated in a number of cases, the SSAG do not set mandatory levels of support (*Strecko v Strecko* 2014 NSCA 66 (N.S. C.A.)). In this case, the quantum of spousal support as determined by referencing the SSAG is useful. Mr. MacLean will pay to Ms. MacLean the sum of $1,200 per month commencing the 1st day of June 2019 (following the conclusion of the trial).

[70] Ms. MacLean is seeking retroactive spousal support. The evidence related to the financial needs of Ms. MacLean during the period of separation when they resided in the same house was not clear. Mr. MacLean continued to pay expenses associated with the running of the matrimonial home.

[71] Counsel for Ms. MacLean argued that Mr. MacLean did not provide evidence of his payment of all household expenses. These expenses include taxes, insurance, heat, electricity, cable/ internet and telephone, etc.. She acknowledged on cross examination that the only expenses she was responsible for out of her income were expenses for gas, her cigarettes, eating out, hair cuts, make up and personal products.

[72] Ms. MacLean testified that after separation she needed to access her investment funds to pay for food, other day to day expenses and legal bills (ref Exhibit 4). Legal bills are not to be considered by the court when deciding on quantum of spousal support. Ms. MacLean testified that she had bills related to motor vehicle repair and a car rental. She indicated that she paid for gas, snow tires and some travel and hotels. She also paid $60 for the younger child's piano.

[73] Counsel for Ms. MacLean suggests that the $70,700 withdrawn from RRSPs should be considered as retroactive lump sum spousal support. This would equate to spousal support of over $2,600 per month from the date of separation. This is untenable. During that period of time, Mr. MacLean was paying the vast majority of household expenses. There was evidence that Ms. MacLean continued to have access to the joint account and to credit cards.

[74] The court must first consider the spousal support factors set out in s. 15.2(4) of the *Divorce Act* as well as the objectives contained in s. 15.2(6). As stated by the Supreme Court of Canada in *Bracklow v Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420, paragraph 32:

> "…It is rather a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court."

[75] In striking the appropriate balance, the court must weigh the unique circumstances of each case. This balancing is more complex and intricate in cases of retroactive support. It is particularly complicated in cases involving a request for retroactive support over a significant period of time with conflicting and incomplete evidence.

[76] Ms. MacLean testified to various expenses paid out of her investments as a result of her minimal employment income. Although Mr. MacLean paid the vast majority of expenses, some expenses were paid by Ms. MacLean. I award Ms. MacLean retroactive spousal support of $10,000.

CONCLUSION

[77] Spousal support is to be paid by Mr. MacLean to Ms. MacLean on a compensatory and non-compensatory basis. She will receive a retroactive spousal support payment in the amount of $10,000. Spousal support of $1,200 will be paid every month on a go forward basis with no set termination date.

[78] Child support is to be paid by Ms. MacLean in accordance with the *Federal Child Support Guidelines* based on the Table amount for three children. Section 7 expenses are to be shared proportionally as between the parties.

[79] Matrimonial property is to be divided equally between the parties. The inheritance received by Mr. MacLean is not to be exempt from division. Post separation contributions and withdrawals are to be accounted for in the equal division of matrimonial property as noted herein.

[80] As there has been divided success between the parties related to all issues (including parenting) there will be no order as to costs. Each party shall bear their own costs.

Chiasson, J.

SCHEDULE "A"

ASSET DIVISION CHART		
	Brian MacLean	**Tanya MacLean**
Matrimonial Home (after disposition costs)	$324,162.50	
Household Furnishings and Contents	$3,000.00	
Vehicles		
2011 Dodge Durango	$8,000.00	
2008 Infinity		$8,000.00
Jayco Camper	$2,500.00	
2002 Seadoo	$9,000.00	
Pensions		
Defined Benefit Pension	To be divided equally at source	
Defined Contribution	To be divided equally and updated statements provided	
RESSOP		
RRSPs	To be equalized by way of spousal rollover – see attached	
Savings and Other Accounts		
High Interest eSavings	To be divided equally once updated statements are provided less post-separation contribution of $2986	
TFSA **611		$86,337.00
TFSA **613	$83,469.00	
DS Non Reg **889 CAD		$204,075.55
DS Non Reg **889 USD		$100,161.72 *($74,067.67 USD)*
DS Non Reg **902 CAD	$272,025.54	
DS Non Reg **902 USD	$56,413.10 *($41,716.41 USD)*	
Jt. Checking **7783		$524.00
Total Matrimonial Assets	$758,570.14	$399,098.27
Debts		
Visa Avion	$2,845.50	
Total Debts	$2,845.50	
Net Matrimonial Assets	$755,724.64	
Equalization		
1,154,822.91÷2=$577,411.46	($178,313.18)	178,313.18
Asset Position after Division	$577,411.46	$577,411.45
Interest Payments paid Ms. MacLean post separation	+ $6,000.00	
Total to be paid to Tanya MacLean		
(179,593.68 + 6,000.00)	$184,313.18	

RRSP ROLLOVER

	Brian MacLean	**Tanya MacLean**
*791	$334,772	
less post-separation contributions	($19,658)	
*671		$26,992
*811 (spousal)		$145,948
plus post-separation withdrawals		$70,700
	$315,114	$243,640
Total		
558,754÷2=$279,377		
Rollover	($35,737)	$35,737
	$279,377	$279,377