

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation :** *MacDonnell v. MacDonnell*, 2021 NSSC 265

**Date:** September 9, 2021

**Docket:** 1217-001106

**Registry:** Port Hawkesbury

Between:

Jerome MacDonnell

Petitioner

v.

Camille Denys MacDonnell

Respondent

**Judge:** The Honourable Justice Moira C. Legere Sers

**Heard:** June 14, 2021

**Counsel:** Kerri-Ann Robson, Counsel for Jerome MacDonnell

Jeanne Sumbu, Counsel for Camille MacDonnell

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[1] This is the second part of the decision relating to the matter between Jerome MacDonnell and Camille MacDonnell No. 1217-001106 SFPAD # 119449.

[2] The parenting portion was released on August 24<sup>th</sup>, 2021, to confirm the parenting plan authorized by the court . This portion of the decision was held pending the filing of a Statement of Expenses and other information to better quantify the child support issues.

[3] The running file itemizes the number of requests made for full financial disclosure including income tax returns and confirmation of net of tax and subsidies child care expenses to support the request for section 7 expenses.

[4] Two post-trial virtual appearances were required to address interrogatories arising from the filing of the Statement of Expenses.

[5] The Petitioners 2020 income tax return summary was filed. I have worked with the 2020 assessment and the Answer to Interrogatories to estimate compulsory and health related deductions.

[6] No child care expense information was provided for the September 2021 academic year except for a statement of “child care subsidy approval notice” filed September 7<sup>th</sup>, 2021, that allows me to recognize a subsidy . Before and after school actual and necessary child care expenses have not been filed. All children are in school this year.

[7] This has been a high conflict divorce throughout. The fallout from the parenting dispute has created its own tsunami and absorbed the parents and their counsel.

[8] There are times when, try as one might, court directions cannot motivate parties to do what is required to attend to the financial details. Adding penalty to pain at this point achieves nothing.

[9] In the absence of this information, I release this decision based on the evidence provided to bring to conclusion this divorce proceeding. Where necessary, I have provided a formula and draw conclusions to permit the parties and their counsel to finalize their calculations.

### ***Divorce***

[10] I am satisfied that all jurisdictional elements have been proven and grant the divorce on the grounds of a one-year separation as set out in the *Divorce Act* S.8(1)(2)(a).

[11] The Respondent, Camille Denys MacDonnell, was born in Fort

Saskatchewan, Alberta, on November [..], 1981. Her name before marriage was Camille Denys Arsenault and is now changed back to Camille Denys Arsenault.

[12] For reasons described in the body of the decision, I decline to make a finding on the grounds of mental cruelty.

### ***Child Support***

#### ***Interim***

[13] The children have resided with the mother since separation. The parties reached an interim agreement between counsel that the father would pay \$1,299.15 per month starting July 2020.

#### ***Prospective***

[14] In 2019, the Petitioner earned \$57,609.00; in 2020 he earned \$59,435.00. His annual income is stable.

[15] The table amount of child support for 4 children is \$1,337.79

[16] The child support payments shall be adjusted commencing June 1<sup>st</sup> 2021 forward and be adjusted each year after the mandatory exchange of full and complete financial disclosure including income tax returns, whether filed with Revenue Canada or not, on or before June 1<sup>st</sup> each year commencing June 1, 2021.

#### ***Retroactive Support***

[17] The Respondent seeks retroactive child support from February 2020 forward.

[18] The father worked and deposited his cheque in the family joint account. He relinquished all knowledge and authority over this financial function and put his trust in the mother to complete this function.

[19] The Respondent controlled and managed the family finances and continued to access the joint account up until December 2020 when she closed the account.

***Reimbursement of household expenses and child tax credit paid after February 2020***

[20] I decline to adjust or divide responsibility for payments made to household expenses out of the joint account or as a result of re-deposited monies from the Respondent's account.

[21] From February to June 2020, the Respondent was first in a transition home, then she vacationed in Arizona with her parents. Thereafter, she was in Alberta and Saskatchewan with her mother until she returned in June 2020 to Nova Scotia where she stayed in a cottage owned by her parents.

[22] The Respondent has asked that the court direct the Petitioner to reimburse her for deposits into the family joint account for payment of household and family bills after the separation and particularly from August 2020 forward.

[23] The Respondent historically operated out of this account to manage the household debts. She continued in this role. The Petitioner may or may not have known that she paid the debts out of this account but he continued to do what he historically had done; deposit his cheque.

[24] In September 2020, the Respondent diverted the Child Tax Credit to herself solely. This meant the only money being deposited into the joint account to pay the pre-authorized family bills was the Petitioner's .

[25] The joint family account shows the Child Tax Credit to have been \$1,379.41 in March and April 2020 whereas it increased to \$2,374.85, as noted in her statement of expenses dated January 2021.

[26] In September 2020, the Petitioner's cheque appears to have been deposited and the pre-authorized cheques paying the ordinary expenses continued to be cashed.

[27] Following her move, *it appears*, in subsequent months his cheque was no longer deposited to this account.

[28] The Respondent continued, during this period, to have access to the joint account. The bills appear to have been paid by way of pre-authorized cheques out

of this account. This included the RBS Visa (including her own) the insurance premiums, Bell and Nova Scotia Power.

[29] With only the Petitioner's money going into the account which traditionally paid all bills, the diversion of the Child Tax Benefit, the Respondent's income and no further access to monies traditionally donated to the family by the grandparents, the inevitable happened. There were insufficient funds to pay the bills.

[30] The Respondent apparently redeposited some of the monies she had diverted back to the account to pay the bills. I don't know what the Petitioner may have paid from another account.

[31] No doubt, when the Respondent moved to Dartmouth, however ill advised the move, she then required child support to re-establish herself.

[32] The diversion of the income from the Respondent, the improved level of child tax credit and the benefits traditionally provided by the Respondent's parents went directly to the new household.

[33] There was a dispute about who actually paid the bills. It is my conclusion the pre-authorized cheques continued to demand payment from the joint account and the Respondent continued to manage the money until she closed the account in December 2020.

[34] Thereafter, there are a series of transfers into the account to cover pre-authorized debts, including premiums on life insurance and power.

[35] Payment of expenses associated with maintaining the home in proper condition prior to division including property insurance, power, the Visa bills etc. will benefit both parties.

[36] The Petitioner gave evidence that he maintained the taxes and backhoe payments and the Respondent maintained he did not. The Respondent transferred into the joint account and paid some of the household expenses to December 2020. They do not agree on whether the payments were made and where the funds came from.

[37] The funds were mingled and used by both parties. There was little to no effective communication between the parents at this point, as is evidenced in the

decision. The Respondent arbitrarily terminated all contact between the Petitioner and herself . The only contact that could solicit a response was through lawyers.

[38] The Respondent argues that the Petitioner did not contribute the child support they agreed upon on a timely and consistent basis.

[39] Any retroactive child support (table amount) will be calculated from July 2020 forward based on their agreement, and on my direction, to adjust the payment in June 2021 for the current year.

[40] The effect of this decision will be to make it possible to establish the arrears of child support retroactive to July 2020, as adjusted, and the Respondent will receive reimbursement for unpaid child support through Maintenance Enforcement.

[41] To return to the division of household accounts and accurately account for their joint and individual contributions by way of their joint account, I would have to conduct an audit not only of what the Respondent transferred into the joint account; I would have to itemize and apportion all household debts and expenses as well as income in order to adjust the Respondent's reimbursement with credit to the Petitioner for his contributions through his income. That is not the function of the Court.

[42] There is insufficient evidence to permit fair and equitable division or adjustment as to who paid what out of the joint funds . I am unable to account for family expenditures and discrepancies not covered by the joint account and the reasonableness of her request for reimbursement.

[43] In addition, the refusal to address, in a timely fashion, the parenting issues and arrange the separation of the parties, their finances and develop a parenting plan that would effectively and peacefully resolve all matters in dispute, plays a significant role in the financial decline.

### ***Section 7 Childcare and Uninsured Health Care Expenses***

[44] The Child Support Guidelines state as follows:



Special or extraordinary expenses

- **7 (1) In a child support order the court may, on either spouse’s request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child’s best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family’s spending pattern prior to the separation:**
  - *(a) child care expenses incurred as a result of the employment, illness, disability or education or training for employment of the spouse who has the majority of parenting time;*
  - (b) that portion of the medical and dental insurance premiums attributable to the child;
  - (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
  - (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child’s particular needs;
  - (e) expenses for post-secondary education; and
  - (f) extraordinary expenses for extracurricular activities.
  
- Definition of “extraordinary expenses”

(1.1) For the purposes of paragraphs (1)(d) and (f), the term *extraordinary expenses* means

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse’s income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
  - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

- (ii) the nature and number of the educational programs and extracurricular activities,
  - (iii) any special needs and talents of the child or children,
  - (iv) the overall cost of the programs and activities, and
  - (v) any other similar factor that the court considers relevant.
- Sharing of expense

**(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.**

- Subsidies, tax deductions, etc.

(3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account **any subsidies**, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

- Universal child care benefit

***(4) In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit.(emphasis added)***

[45] The Respondent's projected income for 2021 is \$41,808. However \$28,498.2 of this comes from the Canada Child Benefit.

[46] The Guidelines do not permit inclusion of the Child Tax Benefit in arriving at a proportionate sharing of Section 7 expenses.

[47] Using a proportionate sharing based solely on incomes would result in a 81-82 % share of the expenses for the Petitioner for the 2021 year.

[48] For reasons set out below, that would be unsustainable for the Petitioner.

### ***The Petitioner's Net Disposable Income***

[49] The Petitioner's 2018 tax assessment showing his family's net annual income while living together in Cape Breton, Nova Scotia, was \$65,594.00. This equates to a monthly family net income before deductions of \$5,466.00.

[50] His 2020 gross income was \$59,435.00. His 2020 compulsory deductions inclusive of health care premiums reduce his income to \$38,814.71 (I have included his annual tax bill of \$12,347.09; CPP deductions of \$2,898.00; EI premiums of \$856.36 and R.P.P. contributions of \$2,724.00. (*figures from tax assessment*))

[51] His health benefits premiums that cover the four children are \$1,794.84 annually or (\$149.57 monthly). (*figures from interrogatories*)

[52] The father must now contribute a table amount for four children of \$1,337.79 or \$16,053.48 annually as adjusted according to the Child Support Guidelines.

[53] This leaves him a monthly gross of \$1,896.76 or \$22,761.23 annually.

[54] Childcare expenses made necessary to permit a parent to work are a priority.

[55] I do not have a current statement of before and after school child care for four children if the mother is working full time and child care is a necessity for the full period claimed.

[56] Eighty one percent of child care expenses for two children would likely reduce his estimated net disposable to a figure that would make supporting himself, transporting himself to work and the children back and forth for his parenting time difficult if not unsustainable .

### ***Uninsured Health Care Costs***

[57] Uninsured health care costs come next for this family. Counsel agree to continuing the children on the Petitioner's health care plan.

[58] The Respondent submitted two pieces of conflicting evidence regarding her medical benefits.

[59] The first is the letter she tendered from her employer which indicated that she has assumed a full time position with benefits and profit sharing.

[60] However, upon further questioning her lawyer clarified at a post trial virtual appearance that the Respondent's hours have not yet reached a level where she has access to medical benefits.

[61] In fact her projected income is \$1,109.15 a month which at minimum wage rates would be equivalent to 19.78 hours a week.

[62] It is therefore critical the children remain on the Petitioner's medical and dental plan. They would then share the uninsured costs.

[63] After those essentials, extracurricular activities can be considered if there is an ability to contribute.

[64] He will have to remortgage or sell his home to pay the mother her equalization payment. A re-mortgage will result in a monthly payment.

[65] If he sells his home, he will have to:

- rent a suitable place to live and to exercise his parenting time with his two children.
- have transportation to access the children and work in rural Nova Scotia.
- maintain his health insurance as requested to mitigate the costs for the children's needs.

[66] The day care and rent costs, as well as the increased transportation costs between Cape Breton and Dartmouth will be significant.

### ***Respondent's Historic Income***

[67] The Respondent filed a letter which explained the income allocation to the Respondent for her and her family from the Richard and Evelyn Family Trust, a discretionary trust established on December 15, 2010.

[68] In 2015, the Respondent declared income of \$31,499.14 and in 2016, \$16,184.03.

[69] In 2017, the Respondent declared income from her parents' family trust, in the amount of \$234,143.00 producing capital gains tax of \$65,603.93 which her father paid. This money was used to purchase the Port Hood property discussed in the division of property section of this decision.

[70] The Respondent's 2018 T4 income was \$22,911.00. For this base year, the family entitlement to the Canada Child Benefit was raised to \$17,752.98.

[71] In 2019, the Respondent's declared income was \$21,591.00.

[72] On September 14<sup>th</sup>, 2020, the Respondent began working for Calissieco Enterprise in the Dartmouth area. She accepted the position of Manager, Retail Standards and Employee Safety. It was said to be a full-time position with benefits and profit sharing.

[73] However her hours are not yet full time.

[74] The president of the company has written that the Respondent will also be participating in a leadership training /mentoring program with a view of possible ownership of her own business or an executive /senior management role in future.

[75] Her T4 for 2020 year starting in September and ending in December employment with her Dartmouth employer shows income of \$3,422.02.

[76] Her Statement of Income prepared in January 2021 projects an income of \$1,109.15 monthly. She received \$2,374.85 in the Canada Child Benefit for a total monthly income of \$3,484.00. (Annual \$41,808.00) She shows monthly expenses of \$5,854.70.

### ***Retroactive childcare costs***

[77] The Respondent seeks retroactive child care expenses from September 2020 forward. Covid has made this calculation more complicated, requiring extra information from the Respondent.

[78] Section 7 (1) indicates the Court can order "an amount to cover all or any portion of the expenses identified therein". While proportionate sharing is in the discretion of the Court, the Court is also permitted to deviate from that in the right circumstances.

[79] There were no recoverable childcare expenses incurred until September 2020 when the Respondent moved to Dartmouth and commenced employment.

[80] The Respondent's historic employment, when completing work for her father's business (20-30 hours per week according to her testimony), started in Alberta then in Moosejaw and later in Port Hawkesbury. Nova Scotia.

[81] While working in Nova Scotia, the child care provider function and her accounting work did not require attendance out of the home. Both functions were performed at home without day care while the four children were at home with the mother .

[82] All four children will be enrolled in school this academic year.

[83] The Respondent described these historic functions as work related to battery warranties and claims adjustment.

[84] While the employment letter provided in evidence indicated her employment in Dartmouth from September to December 2020 was full time, 5 days a week; she testified on cross examination that from September to December 2020 she worked an estimated three hours a day and some of that was from home. I cannot determine how much of the work during this period took place at home or on site.

[85] Ackerley Child Care Centre confirmed by letter that *the younger two* children were registered full time during September to December with the costs at \$689.01 per month per child for September and \$891.66 per child per month thereafter. This cost almost equals her 2019 income.

[86] There is no claim for the eldest two children for childcare for the four months in 2020.

[87] The Respondent's 2020 **T4** shows income of \$3,422.02 representing her part time employment income in Dartmouth for the last four months of the year. This roughly equals a gross of \$855.00 a month.

[88] Her income for the period of September to December 2020 is minimal. Her hours of work were not provided, nor any information that would allow me to conclude when she was required to be at work on location. At minimum wage, the T4 hours would be equivalent to 15 hours a week.

[89] The evidence does not indicate whether the expenses were actual or necessary given also that some schools and daycares were closed due to Covid.

[90] I have insufficient information to complete a retroactive review **to determine** what, if any, of the claim for retroactive child care expenses related to necessary on site employment arising from her employment was necessary or is recoverable. Certainly it does not appear that full time child care was a requirement if the historic evidence is to be the guide.

Section 7(1) of the Guidelines does however give the court a discretion. It requires the court to consider **the means of the parties**, not just their income. The word "means" should be interpreted broadly to include not just the income of the spouse, but other sources of revenue available to that spouse. **The court can look at the economic wellbeing of the spouses and this includes a consideration of family income** ( *Baum v. Baum 2000 BCSC 1835*)

[91] This discretion is also recognized in *Doyle v Doyle [2006]B.C.J. No.3015;2006 BCSC1727* at para38 and in *Gordinier-Regan v. Regan 2011 Carswell NS 530 (N.S.C.A.)* wherein Justice Elizabeth Jollimore of the Supreme Court of Nova Scotia (Family Division) reviewed Section 7(1) of the Federal Child Support Guidelines and confirmed the discretion afforded to courts under this section.

[92] For reason I have articulated throughout, I have concluded that when the child care costs are known, the Petitioner shall pay 55% of the **after tax and subsidy costs**. These costs *must be necessary for day care, made necessary because the Respondent works outside the home* .

[93] The evidence before me indicates the Respondent is not working full time hours and all children are in school. The burden is on the Respondent to prove the necessity of the costs and provide evidence of net costs. If her work continues to be at home, there does not seem to be the same necessity for child care .

[94] Her January 2021 Statement of Expense does not itemize child care costs and her Statement for Extraordinary Expenses relates to registration when the younger children were not in school

[95] The 55% share of childcare and health related expenses shall be adjusted at the same time as the annual child support table amount is recalculated after annual tax disclosure and necessary child cares expenses net of tax and subsidy have been provided to the Petitioner as mandated by the Child Support Guidelines.

[96] The Petitioner shall maintain the children on his health and medical benefits plan as long as possible. As noted in the spousal support section he has also agreed and shall maintain his wife on these benefits as long as possible.

[97] The Respondent should provide by September 30th, 2021, a detailed statement for childcare, proof of subsidies, commencement date and after-tax costs as well as before and after school childcare for any retroactive childcare expenses she wants reimbursed. This shall include:

a statement from this childcare facility as to the total amount of childcare provided in 2020, 2021 to reflect commencement of their services, actual attendance, and evidence of any shutdowns due to Covid.

Information as to what arrangements were made for the older two children from September 2020 on ward.

Information as to what, if any, assistance her family provided for childcare.

Her actual out-of-home work hours for any period she is seeking retroactive childcare expenses.

She shall respond to reasonable requests for information on a regular basis in a timely manner.

[98] The Respondent shall provide the Petitioner with confirmation as to her first day of work and her attendance on site verified by source.

[99] Any child table amount of arrears determined by the Court as payable, made necessary by the requirement that she work outside the home, shall be brought up to date on sale of the home, re-mortgaging of the home or within 12 months of this decision.



[100] The issue of retroactive is deferred until such proof is provide with proof of hours and location of employment, taking into consideration the Covid shutdown.

[101] If the Respondent intends to pursue the retroactive claim, she will have until September 30<sup>th</sup>, 2021, to provide the information to the Petitioner and the Court, together with her application for retroactive childcare expenses for those four months.

[102] Failing the provision of proof on the issue of her location of work and hours of employment and the necessity for childcare, this retroactive claim shall be dismissed.

***Prospective childcare***

[103] It is my understanding that all children will be in school commencing September 2021.

[104] I have not been provided the cost of before and after school care and have on September 7<sup>th</sup>, been provided a notice of approved subsidy. I am therefore unable to make the necessary calculations .

[105] The Respondent shall provide the Petitioner and the Court proof of after-tax and subsidy costs of the before and after school childcare.

[106] The Respondent shall provide the Petitioner proof of her employment and her hours requiring she attend work outside the home that would require childcare, from January 2021 forward.

[107] The Respondent shall provide the Petitioner with confirmation as to her first day of work and her attendance on site verified by source.

[108] She shall keep him advised and verify her hours and any change in her schedule or hours of work.

[109] Upon receipt of the information and verification of the requirement for childcare, the Respondent shall add his 55% portion of before and after school costs net of taxes to his monthly payment of base amount of child support on a monthly basis.

### ***Boots and Crutch***

[110] The Respondent withdrew this request as she has been reimbursed by the Petitioner's medical plan.

### ***Orthodontic Expenses***

[111] The Respondent contracted for braces for the two older children without advance meaningful consultation or sharing of this information with the Petitioner.

[112] She asks for a contribution to this total actual cost for two girls in the amount of \$9,730.00.

[113] The orthodontic work is being provided by a Sydney Cape Breton orthodontist involving trips to Sydney from Dartmouth.

[114] She shall provide the Petitioner proof of actual expenditures, proof the work was undertaken, proof of the accounting from the Orthodontic office and proof of payment to establish this is an expense that is current and ongoing.

[115] He shall pay 55% of the uninsured cost for 2021.

### ***Arrears and Retrospective Expenditures***

[116] The unpaid childcare expenses starting in September 2020 shall be proven as directed in this decision.

[117] The Petitioner shall pay outstanding childcare table amount from July 2020 to date, plus retroactive childcare expenses for September 2020 forward as proved by direction in this decision and his contribution toward the orthodontic costs in the following manner.

[118] He shall reimburse the Respondent immediately in the event he re-mortgages the home in addition to any obligation to pay an equalization to the Respondent.

[119] In the event the Petitioner does not re-mortgage his home and must place the home for sale, the proceeds shall be paid in trust until the total of the outstanding arrears in table amounts plus proven childcare expenses made necessary by the

mother's on-site employment and his share of the then current orthodontic expenses are known and they shall be deducted from his share of the equity in the home before releasing his net share of the proceeds of sale.

[120] In the event he does not re-mortgage or sell he shall pay his share of the above-mentioned expenses in 12 equal installments commencing on the issuance of the Corollary Relief Judgement.

### ***Extra Curricular Expenses Dance / Aerobics***

### **Pre-separation Household Expenses and Lifestyle**

[121] As noted above, the family net household income in 2018 was **\$65,594.00**. This equated to a monthly net income of **\$5,466.00**.

[122] The Respondent's current projected expenses in Dartmouth N.S. before Section 7 and extracurricular is **\$5,854.70**.

[123] Pre-separation, the family lived in rural Nova Scotia in a home inherited by the Petitioner when his father died. There was not then and there is not now a mortgage against the home.

[124] There were no childcare expenses as the mother provided childcare, while the father the bulk of the household income.

[125] The children's extracurricular activities were various and affordable.

[126] In Cape Breton, the children were involved in 4H, fiddle, piano lessons, softball, Gaelic and dance classes and a local children's choir.

[127] They had a family income slightly above his income.

[128] The Respondent's lifestyle choices were also augmented considerably by her parents' contribution to her and the children's travel with them on March break and other vacation trips.

[129] The move to Dartmouth has not left this family better off financially.

[130] Their family income is *projected* to increase because of her employment. Her child tax benefits for four children are paid to her for her exclusive use.

[131] However, their costs of child related expenses are significantly higher with two households to support after the move. This will have an adverse effect on their lifestyle choices.

[132] Any contribution from her family, which historically occurred throughout the marriage, will support her household and benefit the children exclusively.

[133] These parental contributions are not a factor in my calculations.

[134] While the Petitioner is obligated to pay 55% of before and after school childcare for four children, in addition to his table amount, he does not have the ability to contribute to any other than essential expenses.

[135] The Petitioner must first address the regular table amount of child support, his share of childcare costs and uninsured health care needs as well as his own basic needs and travel expenses associated with the distance between Mabou and Dartmouth.

[136] The Respondent has submitted receipts for aerobics and various musical and yoga products she has ordered and paid for.

[137] The cost of aerobics, dance and music, although life enhancing and beneficial for children, were undertaken by the Respondent without consultation and without notice to the Petitioner.

[138] There is insufficient income to consider adding extra curricular activities at this time.

[139] The Respondent must consult in advance on any extracurricular activities to which she wishes the Petitioner to contribute.

[140] In the event he is not able to contribute, she may enroll the children if it does not interfere with the father's parenting time.

***Spousal support - The Respondent's financial picture***

[141] The Respondent has filed four out of her historic years of income tax assessments; 2017, 2018 , 2019 and 2020.

[142] The evidence confirms there were money transfers into their account throughout the relationship.

### **2017**

[143] In 2017, her parents' family trust allocated **\$181,874.00** dividend income to Camille MacDonnell. The grossed-up amount would be \$212,792.27.

[144] In this year, there were nine payments made by the trust on behalf of Camille and her family.

[145] The accountant's explanation regarding this transfer may can be found at Exhibit 6, Tab 4.

[146] The largest (\$177,159.30) was a wire transfer to purchase the Port Hood property (Lot 1AB PID # 50163955) close to the matrimonial home. The purchase price was said to be (\$177,159.30). This was not a cash transfer.

[147] The remaining transfers up to the \$181,874.00 were for personal items for Camille and her family.

[148] The Respondent's tax return shows income of \$234,143.00 from her father's Family Trust. This generated a tax bill of \$65,362.00 paid by the father.

[149] There is a Warranty Deed dated January 3<sup>rd</sup>, 2017, from the owners of this lot in Port Hood to both the Petitioner and Respondent and the Respondent's parents.

[150] There is no current valuation of this land before the Court.

[151] The Respondent indicates throughout she worked at home for her father's business for the previous 25 years. Her work related to bookkeeping activities. She also worked as a child care provider.

[152] Her work for her father has enabled her to obtain employment. Her employer has indicated she has long term prospects with the company.

[153] Her employment income is said to be full time, although as noted above, it has not yet reached the level where she has full time hours or entitlement to benefits despite the employment letter provided.

[154] It is the children's expenses that are the priority and will affect the parents' lifestyle choices.

[155] The Respondent testified that her role as a home maker and childcare provider entitles her to spousal support.

[156] Her pre-marital education and training information is not in evidence.

[157] The parties recognize that while the Respondent is entitled at least to interim spousal support she recognizes that the Petitioners ability to contribute, given his income and the level of child support for four children, is minimal.

[158] She is seeking recognition of her entitlement to spousal support.

[159] She requests her spousal support be recognized such that she be kept on her husband's medical in recognition of her entitlement to spousal support.

[160] He does not object to that request if he is able. ( Post hearing the Respondent's counsel has advised that post divorce this coverage will not be available)

[161] There is a recognition that child support is the priority and given the parties financial circumstances and the father's child support obligations, currently there are not sufficient funds to cover extracurricular activities for the children, let alone to allocate spousal support other than medical coverage if it exists.

[162] Given the move and consequent transportation costs to maintain a connection between the children and their father I decline to require him to pay extracurricular activities which might result in affecting his ability to travel for his parenting time.

[163] A healthy connections with parents is the children's right; it is an invaluable right that ought to be considered a priority for healthy development.

### ***Property***

[164] On July 13<sup>th</sup>, 2020 ( after separation) the Petitioner decided to Quit Claim his interest in the Port Hood property to his parents-in- law and the Respondent, thereby divesting himself on any interest in this property purchased in January 2017.

[165] He now seeks an unequal division of the matrimonial property in his favour.

[166] He refused compensation from the Respondent's father for the transfer.

### ***Matrimonial Home***

[167] The home has been assessed significantly higher than the municipal assessment. (\$435,000.00 v. \$166,900.00)

[1] The municipal assessment, for tax purposes, is \$166,900.00.

[2] The Respondent commissioned an appraisal of the home in July of 2020.

[3] The appraised value is said to be \$435,000.00 as of July 2020.

[168] It is an inherited property without mortgage.

[169] While a discrepancy between these property value assessments is not uncommon; in this case I am concerned about the extent of the discrepancy between the tax assessment and the market appraisal.

[170] The Petitioner was deeded the property in 2004, the Respondent placed on the deed in 2007. The Respondent's parents have provided funds to renovate a bedroom and ensuite bathroom upstairs to make the home more comfortable during their visits.

[171] This is a long-term cohabitation of 18 years. The Respondent has contributed to the wellbeing of the family as a stay-at-home parent.

[172] There was an unspecified amount of money from the Respondent's car accident invested in the basement.

[173] Both have contributed significantly to the property.

### *The Port Hood Property*

[174] The Petitioner argues that his actions to quit claim the Port Hood property should result in an unequal division of the matrimonial property to create a fair result overall.

[175] In 2017, the maternal grandparents purchased a piece of land in Port Hood in their names and the names of the Petitioner and Respondent.

[176] It was purchased on the 3<sup>rd</sup> of January 2017 for \$177,159.00 solely with funds funnelled through the Family Trust to the Respondent and declared in her income tax return.

[177] The parents added the Petitioner and Respondent as joint tenants; the Petitioner in 2004 and the Respondent one year later.

[178] The capital gains tax on this income were paid by the Grandparents.

[179] The Petitioner believed they were going to build a home on this land for the family.

[180] At that time, the parties were together approximately 15 years.

[181] It is a reasonable assumption that the maternal grandparents put the property in the Petitioner's name first as well as their daughter's later, cautiously believing the relationship between the Petitioner and Respondent would last.

[182] As of the date of separation, the Petitioner held a quarter interest jointly with the other owners.

[183] The Petitioner assigned a value of \$88,579.65 to be divided between the Petitioner and the Respondent.

[184] After separation, the Petitioner testified that the Respondent told him her parents were going to build her a home for the children on this lot but would not do so unless he quit claimed his interest in the property.

[185] He was informed that they needed his signature to begin construction.

[186] This discussion was not reduced to writing.



[187] The Respondent disagrees with the Petitioner's evidence. She said the purpose of the purchase was for her parents even though the Petitioner was on the deed.

[188] Against the advice of counsel, he unconditionally quit claimed his interest in the property believing that the Respondent and the children would return to Cape Breton and live not 10 – 15 minutes from him to facilitate his ability to parent his children.

[189] He wanted the construction to go forward and the children to remain in the area. He signed off on the property.

[190] The Respondent's parents also own a cottage property close to the matrimonial home in Mabou as well as the Port Hood property.

[191] There was some basis for his belief.

[192] She denies any oral agreement with the Petitioner that she would not seek a division of equity on the matrimonial home if he did not seek compensation on the Port Hood Property. (i.e., he keeps the home he inherited, and she /her parents keep the Port Hood property.)

[193] There was no matrimonial money invested in this Port Hood property.

[194] The Respondent's father offered the Petitioner \$40,000.00 to sign off on the property. The Petitioner refused to take any money from his father-in-law.

[195] He testified he wanted his wife and children to have the benefit of any money and he was content to have the home built, keeping his children close to his home.

[196] Whether or not the Respondent's parents represented this to him is unknown to me as neither of the parents in law testified.

[197] Given the totality of the evidence, his explanation is entirely believable. I prefer his testimony over the Respondent's on this point.

[198] There is no construction on going.

[199] The only value offered is the municipal assessment of \$156,000.00 capped currently at \$67,000.00. It is listed as resource property in Inverness.

[200] If one were to divide the purchase price by four (the original purchase price of the property, one quarter would equal \$44,289.00)

[201] Considering the division of both properties, and the fact that he had legal entitlement, the Petitioner would have had an interesting and reasonable argument for a division of a portion of this property as valued in today's real estate market, on dissolution of the marriage.

[202] If not, he would have had some leverage to obtain an unequal division of the matrimonial home.

[203] However, the Petitioner surrendered the Port Hood property willingly after obtaining legal advice not to sign off.

[204] While he had time to reconsider this decision after signing the Quit Claim Deed in July 2020; in his in-court testimony in June 2021 he confirmed he did not want money from the Respondent's parents for his interest in this property. He wanted any money/compensation to go to his children.

[205] He also wanted his family home eventually deeded to his children as well.

[206] While he may have believed the benefit of the property would go to the children because that is what the Respondent told him would happen; he willingly signed off his interest.

[207] There is no evidence the maternal grandparents placed undue pressure on him or that he was unable to consent due to some impairment.

[208] The maternal grandparents were the sole contributors to the purchase of the Port Hood property.

[209] I do not have sufficient evidence to conclude he was under duress by the grandparents; although it was clear the Respondent may have misled him or put pressure on him to quit claim his interest so they could begin to build.

[210] Obtaining legal advice was an intervening factor that causes me to conclude that the Petitioner had an opportunity to reflect and decided otherwise.

[211] While this was not in his self interest, he has convinced me that his priority is and was his connection to his children and he did not intend to be distracted by monetary issues.

[212] Absent lack of competency there is little the Court can do at this point. The Port Hood property is not subject to division as a matrimonial asset.

[213] Section 12 of *the Matrimonial Property Act* sets out those circumstances in which an unequal division can be considered;

**Factors considered on division**

**13** Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:

- (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. R.S., c. 275, s. 13; revision corrected.

I refer to case law on unequal division starting with the discussion in *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414; [1981] N.S.J. No. 6 (Q.L.) (A.D.), one of the first cases in which the Matrimonial Property Act was considered

**Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the Act and prescribed by s. 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors.** That initial decision is whether, broadly speaking, equality would be clearly unfair - not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be made. (Emphasis added)

The judge must look at all of the circumstances, not simply weigh the respective material contributions of the parties. In *S.B.M. v. N.M.*, [2003] B.C.J. No. 1142 (Q.L.)(C.A.), a recent decision of the British Columbia Court of Appeal, the court was asked to review the trial judge's unequal division of family assets. The Family Relations Act, R.S.B.C. 1996, c. 128, s. 65(1) permits a deviation from the prima facie unequal division of family assets, where an equal division would be "unfair". I would endorse the approach to the

question of unfairness outlined by Donald, J.A., for the court. It is consistent with the direction in Harwood, supra and the cases in this province which have followed: para 23 ... The question is not whether an unequal division would be fair; that is not the obverse of the test in s. 65(1). **The Legislature created a presumption of equality - a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of s. 65(1), that an equal division would be unfair before he considers apportionment.** Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends.

[214] Having regard to the Section 12 considerations, taken alone on the face of the Section 12 factors as it relates to the matrimonial home, an equal division would be the most equitable result.

[215] Considering the division of property as a whole and the Section 12 factors set out in *the Matrimonial Property Act* and in light of the case law on the subject of defining “unjust and unconscionable”, there is no basis for an unequal division of the matrimonial home.

[216] I cannot conclude an equal division of matrimonial assets is unjust or unconscionable. The unfairness, if any, is the fact that his assets will be depleted after division and the Respondent has a safety net given the ongoing contributions from her parents.

[217] The existence of parental support is not something that is obviously factored into the section 12 requirements.

### ***Disposition Costs***

[218] There is a dispute between counsel as to disposition costs. The costs are calculated based on what would be the actual disposition costs if the house were sold. The tax on the real estate fee must reflect what would have to be paid if the property were to be sold. The value will be reduced by the appropriate and full estimated disposition costs on sale.

### ***Valuation***

[219] I am reluctant to place the market value as the assessed value as of July 2020.

[220] If the Petitioner is required to sell the home to pay the Respondent her equalization payment, the actual sale price shall be used in determining the division.

[221] If he can purchase her interest, the parties may consider the bank assessment for mortgage purposes as a guide to whether they wish to undertake another assessment.

[222] In any event, I suggest another appraisal take place by an independent party other than the current assessment to confirm the price at today's value post Covid.

[223] The Petitioner shall, **by October 1<sup>st</sup>**, 2020, provide proof of his ability to re-mortgage the matrimonial home to pay the Respondent her interest in the matrimonial property together with any outstanding arrears of child support.

[224] Failing his ability to re-mortgage, the home shall be placed for sale with an agreed upon relator and both parties shall do and sign any documentation necessary to effect this sale.

[225] I refer the parties to the remaining assets to ensure that there is a current calculation of all investments to assist the Petitioner in deciding whether there will be a transfer of his interest in those investments or there will be a set off such that any mortgage necessary to complete this transaction will be facilitated.

[226] I reserve for the parties the right to seek relief from the Court in the event the execution of this decision is impaired by either party.

### ***Investments***

[227] The parties have agreed to an equal division of all investments and pensions in both names as of the date of separation.

[228] The Petitioner has a pension with Manulife and the Respondent a spousal RRSP and RRSPs with East Coast Credit union.

[229] All investments and pension that existed at or before the date of separation shall be divided equally at source.

[230] Under **savings and accounts** in the Statement of Property provided by the Respondent under the category of savings and other accounts, there are four showing a value of \$0. (All are with East Coast Credit Union and are identified in the statement.)

[231] I do not appear to have attached exhibits to these, as I do the other investments listed in her statement.

[232] The Respondent shall provide to the Court and to the Petitioner's counsel the balance as of the date she closed out these accounts within one month of the date of this decision.

[233] I reserve the right for both parties to appear before the Court to seek an equal division of these investments if they existed before separation and were unilaterally cashed in by one of the parties without sharing them equally.

### ***Pension***

[234] The division of pension shall reflect the separation date whereas *the investments should reflect the date of realization or transfer as close as possible to the order for division.* (*Simmons v Simmons, 2001 NSSF 35*)

### ***Debt***

[235] The Petitioner has agreed to assume the \$30,000.00 debt associated with his legal costs.

### ***Backhoe***

[236] The backhoe is to be sold, the proceeds to pay down any debt outstanding on the purchase of the backhoe.

[237] As of January 28<sup>th</sup>, 2020, this debt equalled \$22,092.14. After sale of the backhoe and the debt reduction resulting therefrom, the net proceeds are first to be

put towards the remaining joint line of credit. If there are any proceeds thereafter the net proceeds or the deficiency, if any, are to be divided equally.

***Joint Line of credit***

[238] The responsibility for repayment shall be divided equally as of the date of separation. This shall be paid out before any equity is disbursed by any party or their representative.

***RESP***

[239] There are multiple RESP's as shown on the Respondent's Statement of Property. The balance totalled equals \$82,465.11.

[240] The Respondent asks that the ownership be transferred to her absolutely.

[241] I decline that request given her historic behavior evidencing an intent to cut the Petitioner out of all matters concerning the children.

[242] I do not have confidence that the Respondent will advise or share with the Petitioner any information regarding these funds.

[243] His name will remain on these RESP's and unless both agree in writing, they shall only be withdrawn as intended to finance post secondary education.

[244] All other accounts shall be divided equally in accordance with an equal division of matrimonial assets.

***Life Insurance***

[245] Each party shall be entitled to maintain their current life insurance policy providing the beneficiary is named as the guardian in trust for the children for as long as there are child support obligations.

[246] In the event an insurance policy is cashed out for some reason, the value as of the date of cashing out is to be divided equally.

[247] Otherwise, it is to be held as security for maintenance for as long as the children are dependant children.



### *The Family Van*

[248] The van was first taken post separation in March 2020 by the Respondent and parked at a friend's home until she returned from Alberta in June 2020.

[249] During this period the Petitioner had the children at home. He carpooled to work in the morning or drove his ATV to work.

[250] When she returned in June, the Petitioner said the side door locks were no longer working.

[251] She again picked up the van on July 26<sup>th</sup>, 2020, and returned it August 19<sup>th</sup>. She advised him she would have the van repaired.

[252] Her parents had given her a car for her use.

[253] The Respondent seeks to be reimbursed the entire costs of repair in the amount of \$2,286.58. She reasons that the vehicle is now in the Petitioner's possession and he should be responsible.

[254] Alternately, she also asks to have the van delivered to her .

[255] In Exhibit 6, Tab "A", paragraph 33, the Respondent values the van at \$25,344.25. In the Petitioner's Exhibit 1, Tab 8, the Motor Vehicle Appraisal record indicates a value of \$4,800.00 as of April 14<sup>th</sup> 2021. The latter value was provided by an independent source.

[256] The Respondent's use after separation does not allow me to determine value at the date the Petitioner regained possession, nor does it allow me to determine its condition at separation or to set off any depreciation or damage that may have occurred while in the Respondent's exclusive possession post separation.

[257] Both have used it post-separation. For these reasons, I depart from the usual direction that the vehicles be valued as of the date of separation. (*Simmons v Simmons*, 2001 NSSF 35)

[258] The parties may either accept the value set by Mr. MacLean (\$4,800.00) and in the equalization chart provided by the Petitioner's counsel or take the van in for

another appraisal if they wish. The Petitioner is to pay over half the current value of the van.

[259] The parties shall share equally the costs of repair.

[260] If not, the Petitioner shall sell the van and divide the net proceeds after paying out the loan.

[261] If there is a deficiency that shall be shared and accounted for before any net equity is divided from the remaining assets.

### ***Household possessions***

[262] The totality of the evidence in the decision confirms that there were a number of visits by the Respondent to the matrimonial home to retrieve her personal belongings and during the September visit, the older children removed a number of their possessions.

[263] The valuations provided in the Statement of Property are unverified estimates. There is no agreement on valuation. There is little evidence on point.

[264] I decline to divide any items said to be the maternal grandparents as I have no evidence from them or the Petitioner on point. If they have vehicles registered in their name at the matrimonial site they have avenues of relief or can work directly with the Petitioner for their recovery . They are not parties to this case.

[265] As between the Petitioner and Respondent, the Petitioner is to return any remaining personal items belonging to the Respondent that she has not already removed. Her list of non matrimonial household possessions contains items used during the marriage and as such may well be considered matrimonial property, not necessarily personal items.

[266] Her musical instruments, and those of the children, are to be returned

[267] He shall divide the toys and send half of the children's toys to their current residence for their use.

### ***The Painting***

[268] The painting is to be appraised . If the Petitioner wishes to keep the painting he is to transfer half the value to the Respondent. If he does not want to keep it the Respondent is to pay him half the value for its return to her .

[269] If neither want the painting, it is to be sold and the proceeds divided equally.

***Documentation***

[270] Both parties shall facilitate this equal division by the signing of any documentation necessary to ensure the equal division is complete.

[271] I reserve the right of the parties to return to Court should they have difficulties effecting the division of property as ordered.

[272] Should the parties wish to argue costs, I direct the Petitioner's submissions on or before September 30<sup>th</sup> and the Respondent's on or before October 15<sup>th</sup> .

[273] The Petitioner shall prepare the Corollary Relief Order and the Pension Division Order and incorporate the Parenting Order into the Corollary Relief Judgement.

Moira C. Legere Sers, J.