**SUPREME COURT OF NOVA SCOTIA**
**FAMILY DIVISION**
**Citation:** *Davis v. Davis*, 2022 NSSC 212

**Date:** 20220726
**Docket:** *SKD-120735* No. 1204-007203
**Registry:** Kentville

**Between:**

Joanne Davis

Petitioner

v.

Donald Davis

Respondent

| | |
|---|---|
| Judge: | The Honourable Justice Lloyd I. Berliner |
| Heard: | December 9, 2021, December 16, 2021, in Kentville, Nova Scotia |
| Final Oral Submissions: | February 24, 2022 |
| Written Release: | July 26, 2022 |
| Counsel: | Kay L. Rhodenizer for the Petitioner<br>Meaghan C. Johnston for the Respondent |

**By the Court:**

**INTRODUCTION**

[1] The parties were married on May 19, 2001.

[2] The parties differed on their date of separation (May 28, 2020 or June 3, 2020).

[3] The parties have two children; B.D. who is 19, and E.D. who is 17.

[4] Ms. Davis filed a Petition for Divorce on January 11, 2021. Mr. Davis filed an Answer on February 10, 2021. Ms. Davis filed a Notice of Motion February 25, 2021, which was subsequently amended following a conference before Justice Keith. An interim hearing was scheduled for May 2021. That hearing never took place. The matter was before the Court for a case conference on July 27, 2021. At that time, both Counsel confirmed that the documents previously filed had been stale-dated and a number of disclosure issues remained. Both parties wanted an interim hearing on the issue of child support and spousal support. Instead of setting an interim hearing, the court provided dates for the divorce trial.

[5] A three-day divorce trial took place in person in Kentville on December 9, 16, and 21, 2021.

[6] There were thirty-two Exhibits entered into evidence which include the following:

(a) Ms. Davis' case:

i. Five Affidavits of Ms. Davis

ii. Three Statements or Updated Statements of Income

iii. Three Statements or Updated Statements of Expenses

iv. Three Statements or Updated Statements of Property

v. Two Statements of Special or Extraordinary Expenses

vi. Two Trial Exhibit Books

(b) Mr. Davis' case:

vii. Three Affidavits of Mr. Davis

viii. Two Statements or Updated Statements of Income

ix. Two Statements or Updated Statements of Expenses

x. Two Statements or Updated Statements of Property

xi. Two Statements of Special or Extraordinary Expenses

xii. Affidavit of Ms. Acton

xiii. Various other documents and records

[7] Post-trial written submissions were received by the Court; from Ms. Davis on January 27, 2022 and a reply submission on February 23, 2022. Mr. Davis'

submissions were received on February 16, 2022. Counsel also appeared for final oral submissions on February 24, 2022.

**ISSUES**

(a) Divorce

(b) Date of Separation

(c) Parenting/Decision-Making

(d) Classification and Value/Division of Assets and Debts:

i. Matrimonial Home

ii. Mr. Davis' Canadian Forces Pension

iii. RRSPs

iv. RESPs

v. Inherited Items Received by Mr. Davis

vi. Expenses Incurred Post Separation

vii. Inherited Cottage

viii. Household Contents and Items

ix. Vehicles

x. 2020 Tax Returns

xi. Bank Accounts

xii. Cash Balance in Mr. Davis' Possession

xiii. Interest on Cash Balance

(e) Treatment of Mr. Davis' Section 45 Disability Award

(f) Child Support:

xiv. Mr. Davis' Income

xv. Ms. Davis' Income

xvi. Prospective Child Support

xvii. Retroactive Child Support

xviii. Section 7 Expenses

(g) Spousal Support:

xix. Prospective spousal support

xx. Retroactive spousal support

(h) Insurance (Medical and Life)

[8] I have reviewed and considered all of the evidence presented. I have followed the guidance and wisdom of the Ontario Court of Appeal in *K.K. v. M.M., 2022 ONCA 72* and have not referenced every piece of evidence in this Decision. At paragraph 23 of the *K.K. v. M.M.* (supra.) Decision, the Court states:

> …One of the purposes behind the requirement to give reasons is to identify the issues to be resolved and to distill the evidence down to the facts that are relevant

> to those issues: see generally, R. v. Sheppard, 2002 SCC 26, [2002] 1 S.C.R. 869. The wholescale repetition of all the evidence heard does not fulfill that purpose. It does not help the parties who may be unable to understand the central basis for the decision reached. It does not help counsel in terms of their ability to understand and identify possible grounds of appeal. Finally, it does not help this court which must, among other things, then determine if extraneous facts influenced the trial judge's analysis.

**DIVORCE**

[9] I am satisfied there is no possibility of reconciliation between the parties. I am satisfied that all jurisdictional requirements have been met based on the breakdown of the marriage caused by a separation in excess of one year as set out in the *Divorce Act* section 8(1)(2)(a). Accordingly, I grant the Divorce.

**DATE OF SEPARATION**

[10] Throughout the proceedings, the parties differed on the date of separation. Mr. Davis was consistent in his position that the parties separated on May 28, 2020 (the day that Mr. Davis informed Ms. Davis about his relationship with his new partner). Ms. Davis was consistent in her position that the parties' date of separation was June 3, 2020 (the date when Mr. Davis physically left the home). Ms. Davis is now prepared to use May 28, 2020 as the separation date. I am satisfied that the date of separation was May 28, 2020.

**PARENTING/DECISION-MAKING**

[11] B.D. graduated from high school in June 2021 and is taking a “gap year” working part-time before going to university. Since the date of separation, B.D. has resided with Ms. Davis in the matrimonial home. Should B.D. attend post-secondary education, both parties believe he would likely rent an apartment or live in residence for the school year commencing September 2022.

[12] E.D. plans to attend post-secondary education, however, the details surrounding this were unknown at the time of the trial. There were a number of possibilities described which included her attending; Kingstec College (Kentville), The University of Prince Edward Island (UPEI), or joining the Canadian Armed Forces (CAF) for training in Quebec. Since the date of separation, E.D. has resided with Ms. Davis in the matrimonial home.

[13] Both parties agree that the children are of an age where they can determine where they are going to reside, and any order with respect to parenting time with E.D. should be made in consultation with her. I agree. Therefore, the order will provide that any decision in respect to E.D. shall be made with and in consultation of E.D. This would include, but is not limited to, consulting her about where she wishes to live and the time she wishes to spend with each parent.

[14] The parties also agree to joint decision-making for both children in consultation with each child. This is consistent with the Interim Consent Order of November 2, 2021. In that Order, a comprehensive parenting plan was put in place. The parties agree that the terms of the Interim Consent Order should be incorporated into the Corollary Relief Order. The Corollary Relief Order will contain the following parenting provisions:

**Decision-Making**

(a) Pursuant to section 16(1)(2) of the *Divorce Act*, the parties shall make joint decisions about any item of significance that would affect either of the children, in consult with one another, and agree in advance of those decisions. The exception to this is if there is a time sensitive medical emergency. In case of such an emergency, the parent supervising the child at the time may make emergency medical decisions if the other parent can not be contacted.

(b) Both parties shall have access to the children's health and school records by requesting them directly from the third parties who create these records, except for information about either child's mental health counselling. This will not be released to either parent unless

the counsellors confirm that releasing it would not be detrimental to the children's counselling progress/privacy concerns.

(c) The Petitioner shall have primary care of the children and the children will have parenting time with the Respondent including overnights in accordance with the children's wishes. The children shall decide the dates and times of these visits, and both parents will encourage E.D. to have her parenting time with a parent when they are working less and for example but not limited to this, during the alternate weeks when the Petitioner's regular work schedule involves less shifts.

(d) In 2022, the parties will equally share parenting time during the Thanksgiving long weekend and the time between Christmas Eve and Boxing Day. As both parents are on vacation during the Christmas school break, they will encourage E.D. to spend equal amounts of time with each parent.

(e) Neither parent shall speak negatively about the other parent in front of the children and shall exert their best efforts to encourage a positive relationship including feelings of love and affection between the children and the other parent.

## CLASSIFICATION AND VALUE/DIVISION OF ASSETS AND DEBTS:

### Matrimonial Home

#### *Appraisal*

[15] The matrimonial home is located in Greenwood, Kings County, Nova Scotia. Since separation, Ms. Davis has lived in the home with the children.

[16] Ms. Davis wishes to remain in the home until E.D. graduates high school. Ms. Davis then wants the house sold on the open market. Between the date of separation and mid-September 2021, Mr. Davis wanted the house listed for sale and sold.

[17] Mr. Davis changed his position after the September 13, 2021 pre-hearing conference. Mr. Davis indicated that he wanted to purchase Ms. Davis' interest in the matrimonial home. Ms. Davis' Counsel responded by email dated October 17, 2021 (Exhibit 18):

> Regarding Mr. Davis buying Ms. Davis out of the house, she does not agree with this. She believes given the current COVID seller's market that it is in the parties' mutual best interests to list the home for sale with the hope of attracting multiple offers and obtaining the best possible price. If Mr. Davis wants to buy her out, then he will need to produce a market appraisal (not a realtor opinion) of the house value and present this option to the Court at trial. I reserve the right to produce this email on the issue of costs.

[18] On November 18, 2021, Ms. Davis received a comparative market evaluation done by a local realtor, Tiffany Balcolm of Royal LePage.

[19] Mr. Davis' change in position was addressed at a pre-trial conference on November 22, 2021, approximately two and a half weeks prior to the start of the trial. Mr. Davis advised that he arranged for an appraiser to conduct an appraisal on the matrimonial home and was seeking leave of the Court to allow the report to be admitted into evidence. Ms. Davis consented to the report being admitted into evidence on two conditions:

(a) Mr. Davis would facilitate any appraiser attending the home; and

(b) Ms. Davis would have an opportunity to introduce a comparative opinion and/or formal appraisal of the matrimonial home if she did not agree to the appraised amount.

[20] I granted leave to Mr. Davis to file an appraisal primarily based on Ms. Davis' consent, and subject to the conditions outlined above.

[21] On December 7, 2021 (two days before the trial was to start) a further pre-trial conference was held. At that time, I was informed that the appraisal had still not been received. Ms. Davis was no longer consenting to the filing of the

report since she no longer had an opportunity to obtain a comparative opinion and/or formal appraisal.

[22] Mr. Davis' Counsel confirmed that the appraisal was done but could not confirm when it would be ready for release, filed with the Court, and a copy provided to Ms. Davis' Counsel. I determined that there would be no additional appraisals admitted into evidence for the trial. The Court extended the time to permit Mr. Davis to file the report; he had not met that deadline. To allow the report at this stage would prejudice Ms. Davis.

***Ms. Davis' Position***

[23] Ms. Davis wants the matrimonial home listed for sale and sold on the open market after E.D. graduated high school in June 2022. She asks that any closing date on the sale of the property be no earlier than July 4, 2022.

***Mr. Davis' Position***

[24] In his post-trial written submissions and oral submissions, Mr. Davis, once again, requests the Court Order the matrimonial home be appraised. He wants to purchase Ms. Davis' interest. He says remaining in the home will provide the children with consistency and stability.

[25] I am not prepared to grant Mr. Davis' request to obtain an appraisal on the matrimonial home so that he can purchase Ms. Davis' interest. I decline this for the following reasons:

(a) Ms. Davis does not agree to the proposal. She wants the property listed for sale on the open market with a Real Estate Agent to maximize the sale price;

(b) It is recognized that a sale through a Real Estate Agent is likely to maximize the sale price (see *Roach v. McNeil, 2014 NSSC 112* at para. 64);

(c) It is not appropriate to now order an appraisal on the subject property to determine its value. The evidence in this trial was concluded on December 21, 2021. To now admit (fresh) evidence could result in the necessity to hear further evidence in the form of a rebuttal report from Ms. Davis. Mr. Davis had the opportunity to file a report prior to the commencement of the trial. He did not do so. To allow him to do that after the fact is not appropriate;

(d) There is no current appraisal of the property and therefore insufficient evidence for which to calculate the value of the property and Ms. Davis' interest;

(e) By Mr. Davis retaining the matrimonial home, it may provide consistency and stability for the children as they embark on their post-secondary studies (although it is not known where they may be studying), there is no certainty to that; and

(f) The children are 19 and 17 respectively; the consistency being proposed is not the same as if the children were significantly younger.

[26] I order that the matrimonial home located in Greenwood, Kings County, Nova Scotia, shall be listed for sale on the following conditions:

(a) The parties shall cooperate completely with each other with respect to the listing and sale of the parties' matrimonial home located in Greenwood, Kings County, Nova Scotia (hereinafter "the property") to provide for its orderly and early sale at fair market value.

(b) The parties shall have seven days from the time this Decision is released to agree on the following:

i. Their choice of Listing Agent for the property;

ii. The listing price of the property;

iii. The rate of sales commission that will apply to the sale; and

iv. The closing date shall be no earlier than July 31, 2022.

(c) In the absence of agreement within the time limit referred to above as to any of those matters identified in paragraph (b), either Party has the right to apply to the Court for direction regarding disputed issues. The application to the Court can be by telephone conference that either party can request.

(d) The Court reserves jurisdiction pursuant to section 15 of the *Matrimonial Property Act* and otherwise to decide those issues and any other matters arising from the administration of the sale of the property that was at any time within that Court's jurisdiction and the Court's decision shall bind the parties.

(e) Both parties shall execute whatever documents are needed to give effect to the ruling contemplated by paragraph (d) above or any other ruling made by the Court.

(f) It shall be a term of the Listing Agreement that all offers or counteroffers to purchase the Property must be open for acceptance for a minimum of 48 hours commencing at an hour of a business day.

(g) Any reasonable offer or counteroffer to purchase must be accepted by both parties by executing the offer or counteroffer within the time during which it is open for acceptance.

(h) Any reasonable counteroffer proposed by one party must be endorsed in writing by the other party within the time frame that allows for that counter offer to be presented in a reasonable time for its possible acceptance.

(i) In the event of a dispute as to the acceptance of an offer or counteroffer or the making of a counteroffer by the parties, either party may apply to the Court for a ruling and the Court's jurisdiction to so rule is hereby reserved, and its ruling shall bind the parties.

(j) For the Closing of the Sale pursuant to an Agreement of Sale that results from the process referred to herein, each party shall execute all documents that are reasonably necessary to close the transaction. The net proceeds, being the sale price less all encumbrances necessary to remove valid objections to title, all reasonable closing costs, legal fees and selling costs plus or minus any recognized closing adjustments (plus HST or other taxes that may be applicable) shall be divided equally.

(k) Both parties are entitled to copies of all documents and an accounting of this transaction and neither party shall have any greater entitlement than the other to copies of documents or to an accounting.

**Mr. Davis' Canadian Forces Pension**

[27] Mr. Davis was in the Canadian Armed Forces from September 25, 1989 until August 14, 2011 (he served for a total of 263 months).

[28] Following his retirement from the regular service, he became a non-commissioned member of the Canadian Forces. Mr. Davis receives a gross annual pension income of $23,416.20.

[29] Mr. Davis was in a common-law relationship for nine years prior to marrying Ms. Davis. Mr. Davis stated that he separated in 2000 and at the time, transferred approximately $29,0000.00 of his RRSPs to his common-law partner to prevent his pension from being divided. Specifically, at paragraph 49 of Mr. Davis' Affidavit dated November 10, 2021 (Exhibit 22), he states as follows:

> I separated from my previous common-law partner in 2000. I transferred approximately $29,000.00 in an RRSP so my pension would not have to be divided when we separated. I am trying to obtain a copy of our agreement, but I do not have a copy in my possession. My ex-partner has indicated she will send

> me a copy if she can find hers. I have also contacted the court in Manitoba to try and obtain a copy.

[30] At trial, a copy of the Separation Agreement was entered into evidence (Exhibit 25). A review of the Separation Agreement shows that Mr. Davis did not transfer RRSPs to his former partner. Instead, he waived any claim to RRSPs that were in her name. In particular, paragraph 11 reads as follows:

> The parties agree that upon the signing of this Agreement, the 1996 Plymouth Van, all RRSPs in Wendy's name which are in client #3853967 with the Toronto Dominion Asset Management Inc. in the approximate amount of $28,000.00 and all furniture, furnishing and appliances in her possession, shall become her sole and exclusive property, and Don waives all claims he has thereto. In addition, immediately upon the signing of this Agreement, Don shall pay Wendy the sum of $500.00, being one-half of the present day value of his bond (acquired by payroll deduction) that will mature at the end of October, 2000.

[31] Paragraph 15 of the Separation Agreement provides:

> The parties acknowledge that Don has accumulated pension credits through his employment with the Department of National Defence for the period of the common law relationship of the parties hereto. The parties agree that Wendy hereby waives all rights she has to the division of those pension credits and will sign all documents necessary for that purpose.

[32] Mr. Davis believes that to divide his premarital contributions to his pension, would be inherently unfair and relies upon section 13 of the *Matrimonial Property Act* to seek an unequal division of his pension.

***The Law re: Unequal Division***

[33] A party seeking an unequal division of assets must first demonstrate that an equal division of matrimonial property would be unfair and unconscionable. Paragraph 13 of the *Matrimonial Property Act* reads:

> **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.

[34] In *Wolfson v Wolfson, 2021 NSSC 260*, Forgeron, J. provides a detailed analysis of the Court's limited jurisdiction for unequal division of matrimonial assets at paragraphs 261 and 262 as follows:

> [261] Section 13 of the *MPA* provides the court with the limited jurisdiction to award an unequal division if an equal division of the matrimonial assets would be unfair or unconscionable. The Law Reform Commission of Nova Scotia, in its 2017 Final Report on *Division of Family Property*, summarized the high threshold that must be met to support a successful s. 13 claim, at pages 200 to 201:
>
> > Among Canadian jurisdictions, the standard of unfairness is at the lower end of the spectrum for an unequal division. The standard of unconscionability tends toward the higher end. For instance, in Ontario the unconscionability standard significantly limits judicial discretion in ordering an unequal division.
> >
> > Nova Scotia courts have taken a fairly constrained view of their discretion under section 13. In *Morash v. Morash*, Bateman J.A. warned that when deciding an unequal division claim: "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."
> >
> > ….
> >
> > Despite the fact that the plain wording of section 13 provides for an unequal division of matrimonial assets where an equal division would be "unfair or unconscionable,", the cases have tended to favour the higher standard of unconscionability, rather than mere unfairness.
>
> [262] In Cunningham v Cunningham, 2017 NSSC 244, as aff'd at 2018 NSCA 63, this court reviewed general principles that apply to a claim for unequal division at para 27. The legal principles identified are as follows:
>
> > • The *Matrimonial Property Act* must be given a liberal interpretation in keeping with its remedial purpose: *Clarke v. Clarke*, 1990 CanLII 86 (SCC), [1990] S.C.J. No. 97 (S.C.C.).
> >
> > • The *Matrimonial Property Act* affords significant rights to spouses. Asset division is not based on a strict economic analysis as often occurs in unjust enrichment claims. To the contrary, the *Matrimonial Property Act* recognizes the intrinsic value of noneconomic contributions and views marriage as a partnership. In Young v. Young, supra, at para 15, Bateman, J.A. confirmed that the "predominant concept under the Act is the recognition of marriage as a partnership with each party contributing in different ways". Marriage is neither a business nor an economic enterprise.

- All real and personal property acquired by either spouse is presumed to be a matrimonial asset, unless falling within certain narrow exceptions, and is subject to a presumptive equal division: Morash v. Morash, 2004 NSCA 20, para 16, per Bateman, J.A.

- Section 4(1) of the *Matrimonial Property Act* confirms that pre-marriage assets are captured within the definition of matrimonial assets; "… the mere fact of prior acquisition does not remove the asset from *prima facie* equal division:" Young v. Young, supra, para 20, per Bateman J.A.

- The burden of establishing entitlement rests upon the spouse who seeks an unequal division.

- An unequal division is only permitted where "there is convincing evidence that an equal division would be unfair or unconscionable": Young v. Young, supra, para 15, per Bateman, J.A.; or where there is "strong evidence showing that in all the circumstances an equal division would be unfair or unconscionable on a broad view of all relevant factors:" Harwood v. Thomas (1981), 1981 CanLII 4167 (NS CA), 45 N.S.R. (2d) 414 (A.D.) at para 7, per MacKeigan, C.J.N.S.

- Although the word "unfair" and "unconscionable" do not have "a precise meaning", they nonetheless evoke "ethical considerations and not merely legal ones:" Young v. Young, supra, para 18, per Bateman, J.A.

- Unconscionable has been held to mean "unreasonable", "unscrupulous", "excessive" and "extortionate" and when "coupled with the requirement that "strong evidence" must be produced to support an unequal division, the burden upon the party requesting an unequal division of matrimonial assets is somewhat onerous:" Jenkins v. Jenkins (1991), 1991 CanLII 4342 (NS SC), 107 N.S.R. (2d) 18 (T.D.), at para 10, per Richard, J.

- The question to be asked is "whether 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:" Harwood v. Thomas, supra, para 7, per MacKeigan, C.J.N.S.

- Courts are instructed to examine all the circumstances, and not to simply weigh the respective material contributions of the parties, except in unusual circumstances: Young v. Young, supra, paras 15 and 19, per Bateman, J.A.

- When focusing on a claim grounded in s.13 (e) of the Matrimonial Property Act, the court must examine relevant factors including "the timing of the contribution", "the parties' use of the asset", "the length of the marriage", "the significance of the asset relative to the entire pool of matrimonial assets"; and "the age and stage of the parties at separation:" Young v. Young, supra, para 20, per Bateman J.A.

> • When focusing on claims grounded in s. 13 (d) of the Matrimonial Property Act, the length of cohabitation is a reference to short term, not long term unions: Briggs v. Briggs (1984), 64 N.S.R. (2d) 40 (N.S. T.D.) as affirmed at (1984), 65 N.S.R. (2d) 126 (N.S. C.A.) and Donald v. Donald (1991), 1991 CanLII 2563 (NS CA), 103 N.S.R. (2d) 322 (N.S. C.A.) per Chipman, J.A.
>
> • The determination of whether an equal division will produce an unfair or unconscionable result is a fact-based decision, as shown in the divergent results reported in the various cases relied upon by counsel, which I reviewed.

***Mr. Davis' Position***

[35] Mr. Davis argues that after 22 years of service in the Canadian Armed Forces, it is significant that he contributed to his pension for 12 years prior to his marriage and cohabitation with Ms. Davis. He was married to Ms. Davis for 46.77% of his active service and with his previous partner for 39.55% of his active service.

[36] Mr. Davis relies on the decisions of *Bishop v. Bishop*, *2005 NSSC 220* and *MacLean v. Cox, 2017 NSSC 309* as examples of where an unequal division of a parties' pension was ordered.

[37] In *Bishop v. Bishop* (supra.), Leblanc, J. divided Mr. Bishop's premarital pension contributions unequally, awarding Ms. Bishop 35% of the total value of the pension. In arriving at his decision, Leblanc, J. found that Mr. Bishop had previously made a $20,000.00 cash payment to his first wife in order to

avoid a division of that pension. Mr. Bishop argued that the premarital contributions of service ought to be excluded from the division of assets in his second marriage. In his decision, Leblanc, J. applied the section 13 argument and ordered an unequal division of the husband's pension.

[38] In *MacLean v. Cox* (supra.), Jollimore, J. states:

> 47 Regardless of these deficiencies in the evidence, it is clear that Ms. MacLean contributed to her pension for almost 17 years before the parties began to cohabit. She contributed to her pension for almost twice as long as the parties cohabited and there was no diversion of family income to finance these contributions. These facts are relevant to an unequal division of a pension: Connolly v. Connolly, 1999 Canlii 172 NSCA; and HRB v. PLB 2005 NSSC 220.
>
> 48 The date and manner of the acquisition of Ms. MacLean's pension is the basis for an unequal division of assets.

***Ms. Davis' Position***

[39] Ms. Davis seeks a division of Mr. Davis' entire pension earned before and during the marriage and says that the pension is presumptively equally divisible.

[40] Ms. Davis cites as an authority, the decision in *S.S. v. D. S., 2013 NSSC 384*, paragraph 112:

> A central aspect of Ms. S.'s claim for an unequal division relates to her teacher's pension. Her starting point is that her pension should not be divided, or should be divided unequally. These alternatives both amount to an unequal division of the matrimonial assets. Pension entitlements earned before and during the marriage are presumptively divisible. Mr. S. initially requested an equal division of Ms. S.'s pension from the beginning of cohabitation (2000) until June 2007. He did not

> initially request a division of the entire pension, including amounts earned prior to marriage. The court referred the parties to Morash v. Morash, 2004 NSCA 20, which confirms that pension entitlements earned before and during the marriage are matrimonial assets, even if division of the pre-marriage portion is not contemplated by the relevant pension legislation, in this case the Teachers Pension Act, S.N.S. 1998, c. 26. On the basis of Morash, Mr. S. now seeks an equal division encompassing the amounts accumulated before and during the marriage.

[41] In support of including the pre-marriage contributions in the division, Ms. Davis relies on the decisions of *Verdun v. Dorrance, 2006 NSSC 305*, and *Pilotte v. Pilotte, 2013 NSSC 24*.

[42] In *Verdun v. Dorrance* (supra.), the Court categorized the parties' 14-year relationship as a "second medium-length marriage" and ordered the pre-cohabitation pension to be divided equally.

[43] In *Pilotte v. Pilotte* (supra.) MacDonald, J. ordered that the premarital portion of a pension be equally divided where the husband had nine years of military service before he met his spouse, and the parties were married for 16 years. In that case, before ordering the premarital portion of the pension to be shared, MacDonald, J. summarized the law with respect to section 13 of the *Matrimonial Property Act* and focused specifically on the relevant subsections of section 13(d) – the length of time that the spouses cohabitated during their marriage; and section 13(e) – the date and manner of acquisition of the assets.

[44] In *Pilotte v. Pilotte* (supra.), MacDonald, J. summarized as follows:

> [19] There appears to be a growing body of decisions suggesting it is generally considered "unfair and unconscionable" to equally divide premarital asset value in a short relationship. Similarly it is generally considered not to be "unfair and unconscionable" to equally divide premarital asset value in a lengthy relationship. The exact reason why this should be so is not often discussed. As a result it is difficult to understand how factors (d) and (e) should be applied in marriages greater than 5 years but less than 20. Within that range considerations that appear to influence the outcome are:
>
> - whether children were born of the relationship;
> - the age of the parties at separation;
> - whether the owner of the asset that has a premarital value was previously married and shared some portion of that asset with a former spouse;
> - whether the spouse seeking an equal division of premarital value has substantial non- matrimonial assets or will retain substantial matrimonial assets;
> - whether the spouse seeking an equal division of premarital value
>
> was a stay at home spouse who became financially dependent upon the other spouse.
>
> - whether the premarital value of the asset was directly or indirectly maintained or increased by the spouse requesting equal division; for example, the premarital value of a matrimonial home may be enhanced as a result of the labour of a stay at home spouse.

[45] I have considered the evidence, submissions of Counsel, statutory regime, and case authorities. I do not find that an equal division of Mr. Davis' pension – including the premarital contributions – would be unfair or unconscionable for the following reasons:

(a) As noted in *S.S. v. D.S.* (supra.), pension entitlements earned before and during marriage are presumptively divisible.

(b) Mr. Davis mischaracterizes the marriage as being a short duration. The duration of the marriage was 20 years and during that time, their children were born.

(c) At the date of separation, Mr. Davis and Ms. Davis were 49 and 54, respectively. Mr. Davis was already in receipt of his pension.

(d) Although Mr. Davis appeared to waive a claim to a division of his former partner's RRSPs in exchange for a waiver of his pension, there is no evidence to determine the value of the remaining assets.

(e) I distinguish the *MacLean v. Cox* (supra.), decision. In that case, Ms. MacLean contributed to her pension for almost 17 years before the parties began to cohabit and her pension contributions were almost twice as long as the parties cohabitated. That is not the case here. The parties were together for just under 47% of Mr. Davis' active service.

(f) I distinguish the *Bishop v. Bishop* (supra.) decision. In that case, as Leblanc, J. noted, Mr. Bishop made a payment of $20,000.00 to avoid a division of that pension. That is not the case here. The evidence does not support that finding. Mr. Davis did not transfer funds to his former common-law partner. Instead, he waived a claim

to dividing his partner's RRSPs. I am not satisfied or convinced that any waiver of claim to Mr. Davis' pension benefits was of significant consideration in the settlement as there are too many unknowns including the value of the other assets and debts.

[46] Mr. Davis bears the burden of proof to establish that an equal division would be unfair or unconscionable. Mr. Davis has not met that burden. Simply looking at the value and the number of years contributed to his pension while the parties were together, does not meet that stringent test. I order that Mr. Davis' entire Canadian Armed Forces pension be divided in accordance with the *Pension Benefits Division Act, SC 1992, c 46, Sch II*, which in part states as follows:

> 8 (1) A division of pension benefits shall be effected by
>
> (a) subject to subsection (4), transferring an amount representing fifty per cent of the value of the pension benefits that have accrued to the member of the pension plan during the period subject to division, as determined in accordance with the regulations, to the spouse, former spouse or former common-law partner, if that pension plan is a retirement compensation arrangement, or, in any other case, to
>
> (i) a pension plan selected by the spouse, former spouse or former common-law partner that is registered under the Income Tax Act, if that pension plan so permits,
>
> (ii) a retirement savings plan or fund for the spouse, former spouse or former common-law partner that is of the prescribed kind, or
>
> (iii) a financial institution authorized to sell immediate or deferred life annuities of the prescribed kind, for the purchase from that

financial institution of such an annuity for the spouse, former spouse or former common-law partner; and

(b) adjusting, in accordance with the regulations, the pension benefits that have accrued to the member of the pension plan under that pension plan, notwithstanding the provisions of that pension plan or the Act under which it is established or by which it is provided.

**Determination of period subject to division**

(2) For the purposes of subsection (1) but subject to subsection (3), the period subject to division is

(a) the period specified by the court order or agreement as the period during which the member of the pension plan and the spouse, former spouse or former common-law partner cohabited; or

(b) where the court order or agreement does not specify a period as described in paragraph (a), such period as may be determined by the Minister, on the basis of evidence submitted by either of the interested parties or by both, as being the period during which the member of the pension plan and the spouse, former spouse or former common-law partner cohabited.

**Idem**

(3) For the purposes of subsection (1), where the application is based on a court order and the order provides that pension benefits that have accrued to the member of the pension plan during a period specified in the order are to be divided, the period specified in the order is the period subject to division.

…

**Further Divisions Precluded**

9 Where a division of pension benefits that have accrued to a member of a pension plan during any period is effected under section 8, no further divisions may be made under that section in respect of that period.

[47] Counsel for Ms. Davis raised a logistical issue regarding the pension division. Specifically, Ms. Davis received correspondence from Public Works and from Service Canada dated June 30, 2021 (Exhibit 13), in response to a request to

obtain an estimated value of Mr. Davis' pension in the event the entire pension was shared. The letter reads in part as follows:

> Your PBDA pension division was calculated based on the following dates;
> Service Dates: September 25, 1989 to August 14, 2011.
> Cohabitation Dates: May 19, 2001 to June 3, 2020.
>
> **Please note: Under the Pension Benefit Division Act the maximum transferable amount (MTA) is 50% of the cohabitation period and not a member's entire pension. If Ms. Joanne Davis did not cohabitate with Mr. Donald Alexander Davis during his enrollment into the Canadian Forces on September 25, 1989, she would have no entitlement to his pension for that time.**
> …

[48] Based on the apparent conflict between the statement in the letter and section 8(3) of the *Pension Benefit Division Act*, I will retain jurisdiction to assist the parties should there be any issues or concerns with respect to the administrator's refusal to comply with the division order.

[49] The Pension Division Order shall state as follows:

(a) The pension administrator shall forthwith equally divide all pension benefit credits – including but not limiting the generality of the foregoing; all the pension benefit credits earned through employee contributions, through employer contributions, indexing, life expectancy and interest, to be divided between Mr. Davis and Ms.

Davis from Mr. Davis' service date (September 25, 1989 until the date of separation: May 28, 2020).

(b) Mr. Davis shall be the trustee for Ms. Davis with respect to the 50% of the premarital pension accumulation to which she is entitled.

(c) If the pension administrator is unable or unwilling to implement these terms, Mr. Davis will be the trustee for Ms. Davis in the fullest extent required to provide Ms. Davis with the benefits and rights contemplated by this decision.

(d) In the event of a dispute between the parties or with the pension plan administrator, with respect to the interpretation or implementation of this Order, the parties or pension plan administrator may apply to the Court for directions respecting the dispute. The Court retains jurisdiction to provide directions to resolve the dispute.

(e) Each party shall have access to information, communication and documentation respecting the pension until such time that the pension division is affected.

**RRSPs**

[50] Ms. Davis' RRSP account (26xxxxx79) statements show RRSP values as follows:

- June 30, 2020 - $32,479.38
- December 31, 2020 - $37,469.80
- March 31, 2021 - $39,325.16
- October 21, 2021 - $44,094.89

[51] Ms. Davis indicates that she did not make any contributions or withdrawals from her RRSPs since separation.

[52] Mr. Davis' RRSP account (39xxxxx36) is with the CIBC. The values of his RRSP are as follows (Exhibit 21):

- March 31, 2020 - $26,587.39
- October 29, 2021 $29,696.75

[53] Mr. Davis indicates he did not make any contributions or withdrawals from his RRSP since separation.

[54] The parties agree to divide their RRSPs equally and on the date of division for the RRSPs. Each party shall sign all documents necessary to complete a tax-free spousal rollover as permitted by the Canada Revenue Agency. Within ten

days from the date this Decision is released, each party shall provide to the other (through Counsel) a statement confirming the balance of their respective RRSP values along with written confirmation that there have been no withdrawals from their respective RRSP accounts since the last time the information was exchanged.

[55] Counsel for Ms. Davis asks the Court to retain jurisdiction in case Counsel disagree to the form of wording for the RRSPs transfer, or if the parties are unable to agree on any post-separation contributions or withdrawals.

[56] The process of equalizing RRSPs is straightforward. It should not result in disagreement. Nevertheless, in the event there is a disagreement, then I will retain jurisdiction to assist the parties/Counsel to complete this task. The Court shall also retain jurisdiction to hear from the parties on costs should it be necessary for me to further address this issue.

**RESPs**

[57] During the marriage, the parties accumulated a balance in a RESP account for the children. As of September 15, 2020, the parties' finances and bank accounts were still comingled and, in effect, both parties were making

contributions to the RESP account. The balance in the RESP account as of September 16, 2020, was $44,842.28 (Exhibit 17).

[58] The balance in the RESP account as of October 31, 2021 was $48,205.56 (Exhibit 21).

[59] Mr. Davis continued to contribute to the RESP in the amount of $200.00 per month. This was not challenged by Ms. Davis. Mr. Davis should be provided with a credit for his post-separation contributions to the children's RESP from October 2020 (after the joint bank accounts were closed) until such time as he stopped making contributions.

[60] The Court does not have evidence of any growth or loss due to market conditions in the RESP account. The fairest way to divide the RESP account is to "back out" Mr. Davis' post-separation contributions from the period of October 2020 until the last statement date of October 31, 2021 (12 months x $200.00 = $2,400.00).

[61] The balance of $45,805.56 ($48,205.56 - $2,400.00) is the amount that was accumulated during the marriage and available for the children to use for post-secondary education. These RESP funds shall be used for the cost of the children's education before either party is asked to contribute to the children's

post-secondary education costs. Any amount remaining in the RESP after the children have completed their post-secondary education shall be divided equally between the parties. This amount will not include any post-separation contributions made by either party to the RESP.

[62] It is abundantly clear that the parties are unable to agree on basic or inconsequential matters, let alone important decisions involving finances for the children's education. One party will be required to oversee the RESP. Ms. Davis has not raised this in any of her submissions. Mr. Davis has done so – in his post-trial Brief. I find that it is appropriate for one party to control and oversee the RESP, and I agree that Mr. Davis should manage the RESP.

[63] The RESP account shall be held in trust for the children of the marriage. Ms. Davis is entitled to annual disclosure of any activity in the RESP by July 1st of each year. Although solely managed by Mr. Davis, Ms. Davis reserves the right to make any Court application to seek an accounting and an adjustment to the amounts of the RESP monies spent each year for the period.

**Inherited Items Received by Mr. Davis**

[64] Both parties acknowledge that Mr. Davis inherited items from his father. The items are as follows:

(a) Boat and related trailer

(b) 2005 Honda ATV four-wheeler with snow plow

(c) Tools

[65] In *MacLean v. MacLean, 2019 NSSC 322*, Chiasson, J. provides a helpful summary of the legal principles involving division of matrimonial property and inherited property:

> [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), 1994 CanLII 5233 (NS SC), 129 N.S.R. (2d) 130 (N.S.S.C.) and Stoodley v Stoodley (1997), 1997 CanLII 11498 (NS SC), 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 para. 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.

[66] The burden of proving that an asset is not matrimonial by reason of exception falls upon the spouse making that assertion (*Cashin v. Cashin, 2010 NSCA 51*, para. 8).

[67] Section 4(1) of the *Matrimonial Property Act* qualifies an exception of an inheritance from division when an asset "has been used for the benefit of both spouses or their children".

***Boat and Trailer***

[68] Mr. Davis received his father's 1994 Bayliner boat as an inheritance. His father died on November 16, 2017.

[69] Ms. Davis says that in 2018 and 2019, the boat and trailer were kept in their yard at the family home; they had gone boating to Aylesford Lake; the boat

was taken to an Amherst location to her brother's cottage, and the trailer would have been required to transport the boat to the water each time.

[70] Mr. Davis says that the boat was transferred for the Amherst trip for the boating season in 2018 and 2019; Ms. Davis was on the boat no more than two or three times in two years; the children enjoyed the boat; he was on the boat with the children three to four times each year; and he purchased a sea biscuit – for behind the boat – at Costco in 2018 for between $200.00 to $300.00.

[71] Mr. Davis made a point in saying that Ms. Davis did not go on the boat at the time the boat was taken to her brother's cottage.

[72] Based on the evidence before me, I do not find that Mr. Davis has discharged the burden of proof establishing an exemption under s. 4(1) of the *Matrimonial Property Act*. Not only did the parties enjoy the use of the boat and the corresponding trailer, but the children did as well. I find that the boat and trailer is matrimonial property and subject to division.

[73] Mr. Davis requests that he be permitted to keep the boat and trailer as it belonged to his father and has sentimental value. Ms. Davis acknowledges that sentimental value may be a reason for Mr. Davis to retain the boat,

provided he accounts for its value, but argues that Mr. Davis did not get a proper appraisal as of the date of separation for the boat and trailer, and therefore, a sale can not be avoided. Ms. Davis asks the Court to Order the sale of the boat and trailer.

[74] I am not prepared to Order the sale of the boat and trailer. I am prepared to allow Mr. Davis to retain the boat and trailer and account for its value.

*The value of the Boat and Trailer*

[75] Neither party provided appraisals for the boat and trailer. Both parties indicate that the boat had an insured value of $3,000.00. The insured value is the only objective information that gives any sense of value, and therefore, for the purposes of division, I place the value of the boat at $3,000.00.

[76] Mr. Davis provided a Kijiji advertisement for a 2005, 19-foot boat trailer. The value placed in the advertisement was $500.00. Mr. Davis states that his trailer was over 25 years old and was not inspected. He believes that his 1994 trailer would be valued at less than the Kijiji advertisement and is not sellable until it has been inspected.

[77] Ms. Davis provided a Kijiji advertisement for a trailer listed at $2,200.00 (or best offer). The advertisement does not state the trailer's age, but says it has

new tires, bearings, springs and L.E.D. submergible lights. The description of that trailer is far different than Mr. Davis' trailer.

[78] The Court is left placing a value on an item with very little evidence. What evidence I do have leads me to conclude that the value of the 25-year-old trailer is closer to $500.00 than the amount of $2,200.00 suggested by Ms. Davis. I set the value of the trailer at $500.00.

***ATV and Snow Plow***

[79] Ms. Davis says that the family all went on trail rides behind their home on the four-wheeler. Ms. Davis acknowledges that Mr. Davis and the children did it more frequently than she did. Ms. Davis also says that the four-wheeler was used to plow snow and it was used more frequently for snow removal than the snow blower that was at the home.

[80] Mr. Davis says the ATV has a plow on it, and to the best of his knowledge, Ms. Davis was never on the four-wheeler. Mr. Davis says that it has been used very little since his father passed away.

[81] What little evidence I do have confirms that the ATV and snow plow were used by Mr. Davis and the children. Mr. Davis has not discharged the burden

of proof to exempt this asset from the division of matrimonial property. I find that the ATV and snow plow is matrimonial property and subject to division.

*Value of the ATV and Snow Plow*

[82] Mr. Davis values the 2005 Honda ATV with plow at the amount of $2,500.00. This value is based on a Kijiji advertisement that was submitted into evidence for a 2004 Honda ATV with plow.

[83] Ms. Davis says the value of the ATV with the snow plow is $6,000.00 "subject to appraisal". No appraisal was provided to her Counsel.

[84] Ms. Davis says that the Kijiji advertisement relied on by Mr. Davis was for a different year and model, nor was the odometer reading provided.

[85] The Court is left with various values, none of them satisfactory to accurately determine the value of the ATV and snow plow at the time of separation. I set a value of $4,500.00 for the ATV and snow plow which is the approximate difference between the parties' estimates.

[86] Mr. Davis will retain the ATV and snow plow and account for its value.

***Tools***

[87] Mr. Davis received several tools from his father as an inheritance. He says he did not use these tools for the upkeep of the family home since he had most of his own tools. He does say that since his father passed away, he rarely used the chop saw, skill saw and reciprocal saw that he received from his father.

[88] Ms. Davis provides a list of the items she says Mr. Davis received from his father as gifts when he was alive or after his death (Exhibit 13). These items are as follows:

(a) Chop saw

(b) Chainsaw

(c) Pressure washer

(d) Snowblower

(e) DeWalt Skill Saw

(f) Reciprocating Saw

(g) Air Compressor

(h) Refinished trunk - wedding gift

[89] I do not have any evidence showing which items in this list were inherited by Mr. Davis or were given to him as gifts. The only tools that Mr. Davis

inherited, which are in the evidence, are the chop saw, skill saw and reciprocal saw.

[90] Based on the limited evidence that has been presented, I am satisfied that the chop saw, skill saw and reciprocal saw are inherited items from Mr. Davis' father and are exempt from division.

**Expenses Incurred Post-Separation**

[91] Mr. Davis says that post-separation, he incurred expenses related to the boat for repairs, general upkeep, transportation, parts, and storage.

[92] The total amount is $1,731.38 and these costs should be taken into consideration. I interpret that to mean these costs should be shared between the parties.

[93] Ms. Davis argues that any post-separation costs for the boat and trailer (for which Mr. Davis has enjoyed the use of) is irrelevant to determine separation date value.

[94] Ms. Davis also raises concerns about the undocumented costs and references inconsistencies in Mr. Davis' evidence. For instance, in Mr. Davis' Affidavit

(Exhibit 22) he says the repair costs were $2,167.38 however, the receipts presented total $1,281.69.

[95] I have reviewed the invoices and records attached to Mr. Davis' Affidavit (Exhibit 22) and note they do not add up to the amount claimed. One invoice purport to be a claim when, in fact, it is a refund for $40.26.

[96] I am not prepared to Order the post-separation expenses be shared between the parties. Any post-separation expenses related to the boat and trailer shall be Mr. Davis' responsibility.

**Inherited Cottage**

***Background***

[97] Donald James "Jim" Davis (Mr. Davis' late father) died in November of 2017. Mr. Davis was named the Executor in his Will.

[98] Mr. Davis along with his sister, Denise Acton, were the beneficiaries. Mr. Davis received his father's cottage and land located at Five Islands, Colchester County, Nova Scotia and other items. Denise Acton received her father's home and land located in Rodney, Nova Scotia, and other items.

[99] Shortly after his father's death, Mr. Davis and Denise Acton entered into an oral agreement that they would sell the two inherited properties and equally share the proceeds of the sale of each property.

[100] On August 29, 2018, Mr. Davis placed Ms. Davis' name on the Deed to the cottage (Exhibit 5). In 2019, Mr. Davis intended to sell the cottage for $99,900.00, and later reduced it to $89,900.00. It did not sell.

[101] In October 2019, Ms. Acton sold the property in Rodney she inherited from her father. As a result of their oral agreement, she gave Mr. Davis $38,307.87. This amount was deposited into the parties' joint CIBC account on October 11, 2019 (Exhibit 19).

***Ms. Davis' Position***

[102] Ms. Davis claims a 50% interest in the cottage for the following reasons:

(a) Her 50% interest in the cottage was a gift from Mr. Davis when he placed her on the Deed in August of 2018. This removed any chance for arguing that it is exempt inherited property.

(b) Section 21(1)(a) of the *Matrimonial Property Act* provides *prima facie* proof that she has a one-half beneficial interest in the property. It provides as follows:

> …the fact that property is placed or taken in the name of spouses as joint tenants is *prima facie* proof that each spouse is intended to have on a severance of the joint tenancy a one-half beneficial interest in the property…

(c) Cottage finances were blended into the family finances and the money was not managed as one would manage a separate asset by setting up a separate bank account and keeping rent and expenses separate.

(d) Family money was used for repairs and expenses for the cottage.

(e) There was minimal opportunity to use the cottage for family purposes. The cottage was not winterized. The parties spent one day at the cottage in the summer of 2018; the cottage was rented on a short-term rental period in the summer of 2018; rented again in July 2019 onward, with the tenant being evicted from the cottage in October of 2019. There was no little opportunity for family use of the cottage.

***Mr. Davis' Position***

[103] Mr. Davis asks the Court to find that the cottage is excluded as a matrimonial asset, referencing paragraph 4(1)(a) of the *Matrimonial Property*

*Act* (inherited property), or alternatively, is seeking an unequal division of the asset pursuant to section 13 of the *Matrimonial Property Act*.

[104] In support of his position, Mr. Davis relies on the following:

(a) Originally Mr. Davis thought he may want to sell the cottage but upon reflection, he changed his mind. He grew up there and has memories there with his father – the cottage has significant sentimental value to him.

(b) Although Mr. Davis acknowledges placing Ms. Davis on title of the cottage property, he did so for estate planning purposes.

(c) Mr. Davis disputes that family money was used to pay for cottage utilities and upkeep.

(d) Ms. Davis could have used the property at the time but chose not to. Therefore, hers and the children's use of the cottage would be considered insignificant, at best. It should be considered exempt inherited property.

(e) Mr. Davis and Ms. Acton's oral agreement to share the two properties.

(f) The limited time the cottage was actually owned by Mr. Davis.

***Decision Regarding the Cottage***

[105] Once Mr. Davis placed Ms. Davis' name on the Deed to the cottage on August 29, 2018, Mr. Davis gifted Ms. Davis a share of the cottage. Therefore, the cottage presumptively became a matrimonial asset. This conclusion is supported by operation of section 21(1)(a) of the *Matrimonial Property Act*.

[106] Mr. Davis intended to have Ms. Davis receive half of the interest in the property. His own evidence placing Ms. Davis on title was done for estate planning purposes. Had he not wanted Ms. Davis to have a share in the property, he could have organized his affairs differently, thereby keeping the cottage separate and not providing Ms. Davis with any interest in the property. He could have deeded the property to himself and provided for title to pass to his sister in his Will or alternatively, could have deeded the property to himself and his sister and joint tenants. Instead, he named Ms. Davis.

[107] Upon a review of the evidence, the analysis of the bank accounts and rents (Exhibit 19), I find there was a blending of the cottage rent and expenses into the family finances, consistent with continuing to treat the cottage as a matrimonial asset.

[108] I am not persuaded that the oral agreement between Mr. Davis and Ms. Acton is relevant for the purposes of determining this issue.

[109] Mr. Davis has not discharged the burden of proof seeking to divide the cottage property unequally pursuant to section 13 of the *Matrimonial Property Act*. I do not find that an equal division would be unfair or unconscionable in light of all the evidence and my findings. Nor has Mr. Davis discharged the burden of establishing the cottage, or a part of it, should be considered inherited property and exempt from division. The evidence establishes that the asset has gone into the "matrimonial pot" and was not kept separate from the other marital assets. Therefore, Ms. Davis is entitled to a 50% interest in the cottage.

***Value of the Cottage***

[110] The parties agree that the 2021 comparative market analysis prepared by Lacey Fisher of RE/MAX County Line Realty Limited (Exhibit 27) confirms the current value of the cottage. The value is in the range of $129,000.00-$149,900.00. Ms. Fisher was not called as a witness to explain the value range. Based on my Decision regarding disposition costs and capital gains, I set the value of the cottage and corresponding land at $129,000.00.

[111] Mr. Davis ask the court to credit him with post-separation repair costs he says he paid for. These repairs are:

(a) Lifting cottage and updated plumbing for a cost of approximately $5,500.00 (Exhibit 22). Mr. Davis was asked to provide invoices and receipts for this work. Mr. Davis then said he paid $3,680.00 to lift the cottage and provided an invoice dated August 17, 2020 from Lone Wolf Construction (Exhibit 22).

(b) Other receipts, totaling $110.92.

[112] Upon hearing the testimony and reviewing the evidence, I am not prepared to credit Mr. Davis with these costs. The receipt from Lone Wolf Construction is not marked “paid”. Mr. Davis testified that he is acquainted with the owner, Jason Roberts. The other receipts totaling $110.92 were made out to either cash or paid with cash at Home Depot. I am left with doubt whether the receipts or invoices to prove those costs were incurred and/or relate to the cottage property.

***Capital Gains***

[113] Mr. Davis say that he has no intention to sell the cottage. He wants to keep the cottage in the family. Ms. Davis believes there will be a capital gains tax owing by her when she transfers her interest in the cottage to Mr. Davis.

***Ms. Davis' Position***

[114] Ms. Davis says that it is difficult to calculate any capital gains tax based on the adjusted value of the asset, without knowing whether Canada Revenue Agency will accept the value placed on the cottage by the Court.

[115] The capital gains would be triggered in the 2022 tax year, with payments to be made in 2023.

[116] Ms. Davis says there are many moving parts in this process, too many of which are unknown, and is seeking the Court to retain jurisdiction to deal with any issues that arise with respect to Ms. Davis' potential tax liability on the transfer of her interest in the cottage property.

[117] Ms. Davis is also prepared to waive any claim to the lump sum amount of $38,307.87 that Mr. Davis received from Ms. Acton (and placed in the parties' joint bank account) provided she receives the equivalent of half the value of the cottage, free from any capital gains she might otherwise have to pay for transferring her interest to Mr. Davis or any other notional disposition

costs he may have (real estate commission, legal costs to sell the property, etc.) in the future.

[118] Mr. Davis indicates he has no plans to sell the cottage property nor has he produced evidence of any disposition costs or expenditures with respect to potential capital gains tax.

[119] Counsel for Ms. Davis, in her post-conference submissions, refers to the decision of *Mohajeriko v. Gandomi, 2009 BCSC 393*. In that case, the husband, who retained a family business operating on a mixed use residential/commercial property known as the Kings Way property, argued that the value of the property should be reduced for capital gains tax. Accounting evidence was submitted calculating the tax implications. In declining to grant the deduction, Mackenzie, J. said as follows:

> [122] There was utterly no evidence that the defendant had any intention of selling the Kingsway property now, or later. In fact, there was ample evidence at trial of the defendant's commitment to Orient, and to his work there as the most important aspect of his life. Any notion of capital gains tax is, at best, speculative in this case. To suggest that Orient will at least be sold on the defendant's death is also speculative because he could just as easily leave it to his son, Hady.

[120] In *Mohajeriko v. Gandomi* (supra.) the Court cited, with approval, the Supreme Court of Canada decision of *Rick v Brandsema, 2009 SCC 10,*

*[2009] 1 SCR 295* as authority for the Court's discretion to refuse to deduct a contingent tax.

[121] In *Rick v Brandsema* (supra.) both parties produced expert evidence on the disputed deduction for the contingent tax liability. The trial judge did not make any deduction. The Supreme Court of Canada addressed this issue and upheld the trial level decision. Justice Abella stated:

> [56] Both the deduction made by the husband in his initial valuation of Brandy Farms Inc. and the one presented by his expert witness at trial reflected the high tax consequences of an immediate sale, a sale which was not contemplated at the time. In fact, the husband tendered *no* evidence as to the likelihood or date of an eventual sale. While it is true that at some point capital gains tax may become payable, in the absence of evidence from the husband of an imminent or eventual sale so as to justify *any* deduction, the trial judge's decision not to make a deduction was completely supportable.

[122] In *Wolfson v. Wolfson* (supra.), Justice Forgeron also had opportunity to comment on the appropriateness of calculating capital gains tax and disposition costs.

***Mr. Davis' Position***

[123] Mr. Davis did not address these issues in his post-trial submissions or oral submissions. Rather, his focus was on the exclusion of the $38,307.87 he received from his sister.

***Decision re: Capital Gains/Notional Disposition Costs***

[124] I have considered the evidence, submissions of Counsel, and the case authorities. I find that there is no evidence of any imminent or eventual sale of the cottage. To the contrary, Mr. Davis says that he and his sister do not wish to sell the cottage. There is no evidence of what any disposition costs would be or what any capital gains tax may be. It would not be reasonable to require Ms. Davis to receive less than an equal share of the cottage property reducing the value by any disposition costs, or capital gains that Mr. Davis may have.

[125] I follow the decision of Abella, J. in *Rick v Brandsema* (supra.) in not deducting capital gains tax that may become payable. In doing so, Ms. Davis agrees to waive any claim to the $38,308.87 received. The Order shall provide as follows to address any possible tax liability for Ms. Davis:

(a) The parties shall work promptly and cooperatively to find and engage an accountant with sufficient expertise in capital gains tax issues to determine Ms. Davis' potential tax liability as a result of the transfer of title to Mr. Davis – if it will trigger a direct tax liability (an adjusted cost-based calculation).

(b) This process should be done with the view of minimizing the accounting costs as much as possible, recognizing that it is important to get competent tax advice. Ms. Davis shall suggest two accountants and also provide information about their probable costs to Mr. Davis. Mr. Davis can select from those names or he may suggest an alternate if he provides similar information including their probable costs.

(c) If the parties are unable to agree on an accountant, the other party may bring the matter back to Court and the Court shall retain jurisdiction to address that issue.

(d) All costs associated with the advice as reflected in the previous paragraphs shall be shared equally between parties.

(e) In the event Ms. Davis can transfer her potential capital gains tax liability to Mr. Davis, she will promptly sign all documents to transfer her title in the cottage to Mr. Davis. Upon completion, Ms. Davis shall provide an executed Deed to transfer title whether it be by either Quit Claim Deed or by Warranty Deed (based on tax advice).

(f) In the event the process to transfer the capital gains tax liability is denied by the CRA, Mr. Davis will pay Ms. Davis the costs assessed by the CRA and indemnify her from costs associated with the assessment as a result of the transfer. These funds shall be paid by bank draft or by certified check to pay her capital gains tax ten days prior to the filing of her 2022 Income Tax return. Ms. Davis shall be required to provide Mr. Davis with a copy of her 2022 tax return in the form in which she intends to file it and include a final calculation of the portion of her Income Tax – that is due to capital gains – no later than four weeks prior to when the amount is due.

(g) Ms. Davis shall sign the Deed transferring her interest to the cottage to Mr. Davis to be held in escrow by her Counsel until she has the funds to pay her capital gains tax owed by Ms. Davis, as set out above, or where the parties have agreed on sufficient security to indemnify Ms. Davis from her capital gains tax liability.

(h) In the event that Mr. Davis decides to sell the cottage, any capital gains related to the sale in his line 150 income shall be deemed to be non-recurring and not factored into his income for the purposes of any support calculations.

**Household Contents and Items**

[126] Both parties presented proposals to divide the household contents and items. Ms. Davis wants to retain all of the contents in the family home until the home is sold. She then wants to keep some items and the balance will belong to Mr. Davis. Mr. Davis would have to account for the difference in values each is retaining. Ms. Davis estimated the value of the contents and items in the home (Exhibit 13).

[127] Mr. Davis provided a list (Exhibit 21). He values the items he is retaining at $4,740.00 and the contents that remained in the matrimonial home at $23,360.00. He is prepared to use the value of $20,000.00.

[128] I note that a number of items on the list from Mr. Davis are likely to remain with the house upon sale. This would include the fridge, stove, dishwasher, and overhead microwave.

[129] I indicated to Counsel during the trial that the lack of an appraisal on the value of the contents and household items is a problem. The parties are asking the Court to value items without providing any independent objective evidence. Mr. Davis estimates the value of the items remaining in the household significantly greater than what Ms. Davis suggests remains in the

home. Likewise, the parties do not agree on the value of the items Mr. Davis has retained. Ms. Davis also says that she may not have listed all of the items Mr. Davis removed from the home (examples: car washing supplies and a set of new snow tires).

[130] In *MacLean v. Cox* (supra.) Justice Jollimore commented on the difficulty judges have in valuing household contents:

> [10] Mr. Cox cross-examined Ms. MacLean at length, having her acknowledge that he owned most of the household contents before they began to live together.
>
> [11] When they separated, Mr. Cox removed his personal items from the home. Other items remained in the home. Some of these remaining items were thrown out because they were damaged or broken. Others were given to neighbours. Still others were sold with the home. The items which weren't thrown out, given away or sold with the home have been stored since mid-2015, either at Ms. MacLean's home or her mother's home.
>
> [12] While I heard considerable evidence about when the contents were acquired, I heard no evidence about their value. Mr. Cox didn't dispute that the items which were thrown out had no value. The value of the items which were sold with the house is reflected in the price paid for the house.
>
> [13] Some photographs of the household contents also pictured Mr. Cox's sons as toddlers and youngsters. His sons are now aged 19 and 23. This means that the furniture is at least 10 to 15 years old, and possibly older. The household contents are secondhand furniture.
>
> [14] The absence of evidence about of the value of household contents is a problem that various judges have commented on in earlier cases.
>
> [15] Judges are not appraisers and valuing household contents, item by item, is an "unnecessary and inefficient use of court time" according to Justice A. Boudreau in Robinson, 1992 CanLII 4690 (NS SC).
>
> [16] When provided with lists and photographs, it's "impossible" to determine whether contents are divided equally, according to Justice D. Campbell in SLK v. MMH, 2009 NSSC 319 at paragraph 19.
>
> [17] Where the parties said the contents were worth "little" or that their worth wasn't known, Justice Dellapinna assigned no value to household contents: Phillips-Curwin v. Curwin, 2008 NSSC 198 at paragraph 12.

> [18] I have no evidence about the value of the contents and I'm unable to value them. I will deal with their division later in my reasons.

[131] Jollimore, J. ordered Ms. MacLean to complete an inventory of all household contents that were stored at her and her husband's home. Once prepared, she was to divide the inventory into two lists of equivalent value. The completed inventory and the two lists would then be sent to Mr. Cox by a particular date. Mr. Cox was then to email Ms. MacLean which of the two lists he wished to retain. Items on the other list would then be retained by Ms. MacLean.

[132] Since neither Mr. Davis, nor Ms. Davis provided any objective evidence of the value of the contents, I will follow Justice Jollimore's solution.

[133] Ms. Davis shall provide Mr. Davis with a complete inventory of the household contents which are in her possession and are to be subject to division. Items that will not be included in the list are those items belonging to the children, any of the items already divided, or those determined not to be subject to division (inherited items).

[134] Since Ms. Davis says she is unaware of all the items Mr. Davis has taken from the home, I order that Mr. Davis prepare the same list of items in his possession and provide a copy to Ms. Davis.

[135] Both lists shall be completed within 30 days of receipt of this Decision.

[136] Once the lists are prepared and exchanged, Ms. Davis is to divide the inventory into two lists she feels are of equivalent value. The complete inventory and the two lists must be sent to Mr. Davis within 10 days. Mr. Davis will then have 10 days from receiving the two lists from Ms. Davis to indicate which of the two lists he selects. Items on the other list will belong to Ms. Davis.

[137] Once Mr. Davis communicates to Ms. Davis which list he selects, the parties will have 30 days to retrieve the items on the list that they are retaining. Each party must allow adequate time to remove items from the other party's respective locations. Any items that have not been removed by the deadline will belong to the other party and that party may do what they wish with the items. In this way no money or value will be exchanged.

**2020 Tax Returns**

[138] In 2020, Ms. Davis received a tax refund of $12,315.21. Mr. Davis had a tax liability of $2,149.90. The parties agree to share the refund and tax liability equally, prorated to reflect the period of cohabitation in 2020 (40.5%).

[139] The parties agree the adjusted refund for division purposes is $3,576.21. That amount, prorated, is $1,448.36. An equal sharing of that amount would result in a payment from Ms. Davis to Mr. Davis of $724.18.

[140] Mr. Davis' tax liability for 2020 was $2,149.90. The parties agree to adjust the figure to $1,703.90. That amount prorated is $690.07. The balance owing to Mr. Davis is $345.03.

[141] Ms. Davis is required to pay to Mr. Davis the total amount of $1,069.21.

**Vehicles**

[142] The parties have four vehicles:

(a) 2014 GMC Sierra SLE 1500 truck

(b) 2011 Honda Civic

(c) 2020 Toyota C-HR

(d) 2014 Toyota Corolla

[143] The parties disagree on the value of the vehicles.

***2014 GMC Sierra SLE 1500 truck (Sierra truck)***

[144] Mr. Davis has been in possession of the Sierra truck since separation. It was purchased in January 2020. At the time of separation, the vehicle had 114,000 kilometers. Ms. Davis places a value of $22,000.00 on the Sierra truck in her Statement of Property. Ms. Davis also presented a Kijiji advertisement for a 2014 GMC Sierra valuing what she said is a comparable vehicle at $22,500.00 (Exhibit 32).

[145] Mr. Davis values the Sierra truck at $14,000.00. He relies on the appraisal from Steele Valley Chevrolet dated August 11, 2021 (Exhibit 21).

[146] Mr. Davis confirmed that there was approximately 7,000 kilometers accumulated on the Sierra truck from the date of separation until the August 2021 appraisal date. Mr. Davis says he only provided the appraisal because it was required for Court. Mr. Davis was unable to say if the appraisal was for a "trade-in value" or "cash value" and acknowledged there was a difference. Mr. Davis was unable to confirm what some of the line items were on the appraisal such as the "Reconditioning Items" which included:

Full Detail: $150
Marketing Pack Cost: $450
MVI: $150

It was unclear whether the $150.00 would have been deducted from the value or not.

[147] When presented with the Kijiji advertisement (Exhibit 32), Mr. Davis confirmed that many of the items and features on the Sierra truck were similar to that on the advertised truck. He did point out the Sierra truck was not an eight-cylinder. Mr. Davis agreed that the value of the Sierra truck would have been greater in 2020 when the parties separated than on the date of the appraisal. When asked to try and provide a value of the vehicle at the date of separation, Mr. Davis indicated he is not an appraiser and responded, “not sure” when it was suggested that the value could be more than $14,000.00.

[148] As noted by Jollimore, J. in *Lockerby v. Lockerby, 2010 NSSC 282*:

> [98] In *Simmons*, 2001 CanLII 4617 (NS S.F.) at paragraph 34, Justice Campbell outlined general principles for determining the date on which to value an asset: use separation date values for assets which "tend to be consumed by actual usage or whose value has been earned or accrued by reference to the passage of time" and value other assets when the spouses do their accounting. While a trial decision, *Simmons*, 2001 CanLII 4617 (NS S.F.) has twice been lauded by the Court of Appeal: in *Moore*, 2003 NSCA 116 at paragraph 24, Justice Hamilton described the decision as "[a] good review of the rationale behind the choice of valuation date" and in *Morash*, 2004 NSCA 20 at paragraph 21, Justice Bateman said it provided "a comprehensive discussion of 'valuation date' ". Justice Campbell's general principles fit well within the context of the Court of Appeal's statement that there is "no requirement in Nova Scotia to assign a single valuation date for all matrimonial assets" in *Reardon v. Smith*, 1999 NSCA 147 at paragraph 38.

[149] In *Simmons v. Simmons, 2001 CanLII 4617 (NS SF)* at paragraph 34, Campbell, J. states:

> … fairness in the valuation process is achieved by applying separation date values to those assets which tend to be consumed by actual usage or whose value has been earned or accrued by reference to the passage of time and corresponding years of employment service or other earned basis. Other assets should be valued as of the date of division which is the date when an accounting occurs between the spouses.

[150] The Court does not have reliable evidence to determine the value of the Sierra truck at the date of separation. The $22,000.00 value identified in Ms. Davis' Statement of Property is qualified as being, "subject to an appraisal". The Kijiji advertisement (Exhibit 32) at first instance seems reasonable, yet there are differences as noted by Mr. Davis including the size of the engine. I have no evidence how the size of the engine can affect the value of the Sierra truck.

[151] I also have concerns accepting the value presented by Mr. Davis of $14,000.00 as noted in the appraisal from Steele Valley Chevrolet. These concerns include the following:

(a) 7,000 kilometres was accumulated on the Sierra truck from the time of separation until the date of the appraisal;

(b) Mr. Davis is unaware what the reconditioning items meant, and if they need to be subtracted from the appraisal amount;

(c) Mr. Davis is unable to say whether the appraisal summary was for a "trade-in" or a "cash value"; and

(d) The appraiser from Steele Valley Chevrolet did not give evidence at the hearing to address these discrepancies.

[152] Counsel for Mr. Davis indicates that the appraisal is the most reliable evidence before the Court. I disagree. The evidence on the customer appraisal summary is not reliable, just as the estimate by Ms. Davis is unreliable. Therefore, in order to do justice, I value the Sierra truck at $18,000.00, which is the difference between the two values proposed.

[153] Mr. Davis shall retain the Sierra truck and account for its value.

***2011 Honda Civic***

[154] At the date of separation, Ms. Davis was in possession of the 2011 Honda Civic. On May 30, 2020, one day after her mother passed away unexpectedly, Ms. Davis was involved in a motor vehicle accident.

[155] Mr. Davis asked Ms. Davis what she wanted to do about repairing the vehicle. Her response was clear that she did not care about the car.

[156] Mr. Davis paid the towing fee in the amount of $281.75 from the parties' joint bank account. He also paid to have the vehicle repaired in the amount of $4,603.68; $3,103.68 supported by receipts and invoices, and $1,500.00 cash without receipts or invoices.

[157] Once the vehicle was repaired, Mr. Davis took possession of the vehicle and permitted his partner, Ms. Hoogerwerf to drive the vehicle. She got into an accident with that vehicle in July 2020. It was "written off". There was no collision insurance on the vehicle.

[158] Mr. Davis consistently maintained that the value of the 2011 Honda Civil was nil as it was "written off".

[159] Ms. Davis provided her estimate of the vehicle at the time of separation in the amount of $7,550.00. That amount is based on a VMR Canada printout for retail value of a comparable vehicle. Upon review of the VMR statement, there is also a wholesale value of $5,650.00 and retail value of $7,550.00. The VMR Canada printout comparable is for a vehicle with an estimated 97,500 to 105,000 kilometres. Mr. Davis testified that there was 180,000 kilometres on the vehicle when it was towed following the accident in May 2020.

[160] I am not prepared to accept the value of the vehicle at $7,550.00 as suggested by Ms. Davis. There is no true comparable to arrive at that figure – it is not reliable. The Court has very little evidence to place a value on the vehicle. I accept that the repairs for the vehicle, both documented and undocumented, were $4,603.00. If one accepts the wholesale value of $5,650.00, and deducts the repairs costs, the net shareable value would be approximately $950.00. I find that the value of the 2011 Honda Civic is $950.00. Mr. Davis will need to account for this in the asset division as he had continued use of the vehicle when it was written off.

***2020 Toyota C-HR***

[161] This vehicle was purchased on March 30, 2020 for a total purchase price of $35,508.00 (Exhibit 30). $1,000.00 was paid in cash. The balance of the purchase price was financed with monthly payments of $604.69. At the time of separation, the outstanding balance on the 2020 Toyota C-HR loan was $33,412.37. Both parties agree that is the outstanding balance of the loan.

[162] The parties do not agree on the value of the vehicle. As with many other assets in this case, an appraisal was not completed and provided to the Court for assistance.

[163] Ms. Davis suggests the value of the vehicle should be $35,000.00. She asks the Court to conclude that very little depreciation occurred from the time the vehicle was purchased on March 30, 2020 until July 2020 when Mr. Davis took the vehicle back from Ms. Davis.

[164] Mr. Davis suggests valuing the vehicle based on the outstanding balance on the loan when he took the vehicle back, which was $33,412.37.

[165] In the circumstances, and based on the vehicle's use and outstanding balance, I agree that the value of the loan, $33,412.37 is an appropriate and fair way of valuing the 2020 Toyota C-HR. Mr. Davis shall retain ownership and possession of the vehicle, and account for its value, along with the outstanding debt.

***2014 Toyota Corolla***

[166] On July 11, 2020, Mr. Davis purchased the 2014 Toyota Corolla in the amount of $11,857.05 inclusive of tax. Mr. Davis made a down payment of $3,500.00 and financed the balance at 6.74%. Monthly payments were $201.48 commencing August 15, 2020 for a period of 48 months.

[167] Throughout the summer of 2020, the parties were unable to agree on which vehicle Ms. Davis would drive, pay insurance on, and cover repairs, etc.

[168] Ms. Davis says that from at least the Fall of 2020, Mr. Davis was pressuring her to decide if she wanted to take over the payments of the 2014 Toyota Corolla as she was driving the vehicle.

[169] In late December 2020, the parties came to an agreement with the assistance of Counsel. It was agreed that Ms. Davis would retain the 2014 Toyota Corolla and Mr. Davis would continue to make the monthly loan payments. Ms. Davis would be responsible to pay for the insurance on the vehicle and would pay for any repairs and routine maintenance. The parties agreed on a purchase price of $11,857.05. This amount would be paid to Mr. Davis upon finalization and determination of the division of matrimonial assets and debts (equalization).

[170] At the time of trial, Mr. Davis had not transferred ownership of the vehicle to Ms. Davis, nor had he provided her with the second sets of keys to the vehicle. Ms. Davis is concerned that if Mr. Davis became angry, he may use the second set of keys to take the Corolla away from her. She asks the Court to Order Mr. Davis to return them.

[171] I Order that Mr. Davis shall provide all keys in his possession to the 2014 Toyota Corolla to Ms. Davis within ten days of receipt of this Decision. He shall also complete the transfer with the Registrar of Motor Vehicles within

ten days of receipt of this Decision. The amount of $11,857.05 shall be accounted for as appears in Appendix A (Reconciliation of Amounts Owed).

**Bank Accounts**

[172] There are five bank accounts for review.

***Mr. Davis' TD e-Premium savings account xxxxx826***

[173] This account was opened on May 7, 2021. $100.00 was transferred into this account from the parties' joint bank account. That $100.00 is a matrimonial asset. The parties will share this amount.

***Mr. Davis' TD account xxxxx928***

[174] Both parties agree that the May 28, 2020 balance was $2,218.73. Mr. Davis also agrees to add back $1,290.00 and $149.53 into that account as sharable amounts from this account.

[175] The parties differ on whether or not Mr. Davis' pay deposited into this account on May 29, 2020 of $1,841.71 is a sharable amount.

[176] Ms. Davis says that this amount should be shared since her last paycheck in May (also deposited into their joint bank account) is shared. Mr. Davis says it

is not sharable as it was payment he received after the date of separation (May 28, 2020).

[177] The amount Mr. Davis received on May 29, 2020 was for work performed prior to that date. Mr. Davis is not paid in advance but rather, for work performed while the parties were still together.

[178] I find that it is appropriate to include Mr. Davis' pay of $1,849.71 as a shareable amount. Mr. Davis owes Ms. Davis the amount of $2,753.98 for this account.

***CIBC bank account xxxxx133***

[179] This account was a joint account used by both parties. Part of Ms. Davis' bereavement/sick pay after separation went into this account. This account was closed September 15, 2020 with a withdrawal of $1,551.00. At the time of separation, there was an account balance of $2,397.58.

[180] The only dispute is who removed the $1,551.00 when the account was closed. If I find that it was Mr. Davis, then he owes Ms. Davis $1,523.39. If I find that it was Ms. Davis, then she would owe Mr. Davis $26.44.

[181] I find it is more likely that Mr. Davis removed the $1,551.00 and closed this account. He is required to equalize this account by providing Ms. Davis with $1,523.39. I make this finding based on the following:

(a) On that same day (September 15, 2020) a debit memo of $200.37 was transacted which Mr. Davis acknowledges he received;

(b) On the same day (September 15, 2020) Mr. Davis admits that he withdrew the balance of $26.20 from the CIBC joint bank account (xxxxx230) and closed that account;

(c) On that same day (September 15, 2020) a $3,000.00 deposit was made to Mr. Davis' personal bank account at CIBC (Exhibit 20);

(d) Mr. Davis indicated he didn't recall closing the account on September 15, 2020 when cross examined; and

(e) Ms. Davis' Affidavit of January 2021 (Exhibit 3) and Affidavit of October 2021 (Exhibit 13), claims that Mr. Davis closed the account and removed the amount of $1,551.00. In response Mr. Davis, in his Affidavit of November 10, 2021 (Exhibit 22), advised that "I notified Joanne that I was closing the accounts".

***Bank Account CIBC xxxxx939***

[182] This is another joint bank account the parties had with the CIBC. It is agreed that the balance as of the date of separation was $2,900.53. This account was used for numerous preauthorized payments for the parties (mortgage payment, RESP, automatic withdrawals and power bills). Both parties deposited funds into this account prior to separation and post separation. The account was closed in September 2020.

[183] Mr. Davis agrees that he used the child tax benefit monies paid during this period of time until the account was closed. This amounted to $1,394.83. He agrees that this amount should be repaid to Ms. Davis. Mr. Davis calculates the balance as follows:

$2,900.53 ÷ 2
= $1,450.26
– $900.00
= $550.26
+ $1,394.83
= $1,945.09

[184] There are two points of contention. Firstly, who withdrew $900.00 on June 15, 2020 from this account. Secondly, the treatment of the post-separation monthly mortgage payments and the RESP payments until the account was closed in September 2020.

[185] Mr. Davis says he did not recall if he made the withdrawals of $400.00 and $500.00 on June 15, 2020. Mr. Davis believes it is reasonable to conclude that Ms. Davis removed the funds as she stated she still needed money to live on during this period of time.

[186] Ms. Davis agrees that the starting point on the shareable balance in this account is $2,900.53. She says when looking at banking activity during the period of time and the two withdrawals – which were taken at the Greenwood ATM – of $900.00 as well as deposits by Mr. Davis into his own TD account at the same time, that the logical inference is that Mr. Davis made those withdrawals. Ms. Davis also seeks to obtain credit for the $800.00 contributions she made to the RESP and her spousal RRSP between June to August, pre-authorized payments, and the June 2. 2022 mortgage payment of $873.46. From Ms. Davis' perspective, the shareable balance of family money would be $145.38 for which each party would be entitled to half, being $72.69, provided that:

(a) Any potential offset against child support for Mr. Davis paying the mortgage, would not start until July 2020.

(b) Any RESP contributions made up to and including September 15, 2020 will be shared.

(c) Any RRSP contributions are to be equalized which means that Ms. Davis has made equal contributions to her spousal RRSP post-separation up to and including August 31, 2020.

[187] I find that Mr. Davis withdrew the $900.00 from the ATM machine. It is more than a coincidence that he made two $400.00 deposits to a TD account.

[188] Mr. Davis is required to repay to Ms. Davis the amount of $1,467.52 as follows:

(a) $1,394.83 - Canada Child Benefit

(b) $72.69 – Which is 50% of the shareable balance taking into account the mortgage payment in June 2020 and pre-authorized RESP and RRSP payments.

***Bank Account CIBC Joint Account xxxxx230***

[189] The parties agree that as a starting point, Ms. Davis owes Mr. Davis $5,939.90 to equalize the balance in the account. Furthermore, Mr. Davis agrees that he is to account for his share of the overdue water bill. His share is $88.88.

[190] The parties disagree on whether or not Mr. Davis is required to contribute 50% of the cost to replace the pool cover. The cost of the pool cover is $229.94 (inclusive of HST). Mr. Davis will not be required to contribute to the pool cover that was purchased after separation. In total, Ms. Davis is required to pay to Mr. Davis the amount of $5,859.02.

[191] In summary, Ms. Davis is required to pay Mr. Davis the amount of $82.13 to equalize the bank accounts.

| **Account #** | **Owed to Ms. Davis** | **Owed to Mr. Davis** |
|---|---|---|
| CIBC xxxxx113 | $1,523.39 | |
| CIBC xxxxx939 | $1,467.52 | |
| TD xxxxx826 | $50.00 | |
| TD xxxxx928 | $2,735.98 | |
| CIBC xxxxx230 | | $5,859.02 |
| **Total Owed to Each** | $5,776.89 | $5,859.02 |
| **Final Equalization** | | **=$82.13** |

**Cash Balance in Mr. Davis' Possession**

[192] Mr. Davis testified at trial that he has $68,000.00 cash in a lockbox in his home. This information was not disclosed by Mr. Davis in either of his Statements of Property filed with the Court (his most recent one being November 10, 2021). When asked on cross examination how much cash he had when he swore his Statement of Property, he was unable to recall. When asked why he did not include the cash in his Statement of Property, he indicated that Counsel for Ms. Davis had records of the bank statements. When further pressed, Mr. Davis said "that amount is from (his) inheritance and back pay".

[193] Mr. Davis' response to questions by Counsel for Ms. Davis, and his overall evidence on this point is troubling. Mr. Davis, as a party in this matter, has a duty and responsibility to provide accurate, timely and fulsome financial information. He failed to do so.

[194] The evidence is that:

(a) Mr. Davis received $38,307.87 from his sister on October 11, 2019 and placed it into the parties' joint bank account (xxxxx230).

(b) Mr. Davis received $72,933.92 into the parties' joint bank account on December 4, 2019. This is the lump-sum amount Mr. Davis

received from the DVA for his section 45 disability award under the *Canadian Forces Members and Veterans Re-establishment and Compensation Act, SC 2005, c 21* ("New Veterans Charter"). When Mr. Davis responded on cross-examination to his "back pay", I understand he was referencing this amount.

(c) On May 4, 2020, Mr. Davis withdrew $110,000.00 from the parties' joint bank account and deposited it into his TD Account (xxxxx826). Between May 28, 2020 and September 15, 2020, the balance in Mr. Davis' account diminished by $100,000.00 with two significant transfers or withdrawals – $10,500.00 on July 16, 2020, and $80,000.00 on August 13, 2020.

(d) Mr. Davis could not recall with any certainty where he spent the money. He did recall purchasing vehicles for the children, putting a motor in a Honda, and other repairs and parts for the children's vehicles, etc.

[195] The Court is left with the realization that the only evidence the Court has with respect to the cash in Mr. Davis' possession is his own testimony and his difficulty accounting for how the money was spent.

[196] In light of Ms. Davis' waiver of her claim to the money from Mr. Davis' sister ($38,307.87), and my Decision to follow on the section 45 disability payment under the new Veterans Charter, it will not be necessary for Mr. Davis to account for any of the amount of cash he may have in his lock box at home.

***Interest on Cash***

[197] Ms. Davis seeks interest on the portion of money that was still in the family bank account when Mr. Davis removed the funds to his own account. Alternatively, I'm asked to award interest on some or all of the cash money that Mr. Davis withdrew that remains in the cash box. I'm asked to consider Civil Procedure Rule 70.07 which provides as follows:

> The rate and calculation to be used for prejudgment interest on a liquidated claim is five percent a year calculated simply, unless a party satisfies a judge that the rate or calculation should be otherwise.

[198] As an alternative submission, it was suggested that section 2(1) of the *Interest on Judgments Act, RSNS 1989, c 233* could secure an interest rate of 5% annually. Specifically, section 2 states:

> 2 (1) Until it is satisfied, every judgment debt shall bear interest at the rate of five per cent per annum or, where another rate is prescribed pursuant to subsection (2), at that other rate.

[199] In his post-trial submissions, Mr. Davis states the following:

> The Petitioner raises a new issue to adding interest to any funds not earning interest. Mr. Davis does not agree that the funds should be divided; however, if they are, then interest should not be added at a rate of 5%. The money was previously in a CIBC account before it was removed and prior to separation. If any interest is added, it should be in accordance to how the funds were deposited initially from the CIBC account, which was at an interest rate of less than 1%.

[200] The *Interest on Judgments Act* (supra.) is not applicable. There is no judgment or debt for that legislation to apply.

[201] Civil Procedure Rule 70.07 relates to an assessment of damages. The amount in issue is not an assessment of damages. Civil Procedure Rule 70.07 is not applicable.

[202] In this case I will not order any interest on any amounts of money Mr. Davis removed or continues to possess for the following reasons:

(a) The authorities for awarding interest (Civil Procedure Rule 70.07 and *Interest on Judgments Act*) suggested by Ms. Davis are not applicable. Even if they were applicable, I exercise my discretion and not order interest.

(b) It would be unfair to award interest on funds Ms. Davis has waived any interest in.

(c) A portion of the funds removed by Mr. Davis were amounts received by him from Veterans Affairs.

## TREATMENT OF MR. DAVIS' SECTION 45 DISABILITY AWARD

[203] The parties agree that Mr. Davis received a tax-free lump sum payment of $72,993.92 on December 4, 2019. It was deposited in the parties' joint bank account. The amount was received by Mr. Davis pursuant to section 45(1) of the *Canadian Forces Members and Veterans Re-establishment and Compensation Act, SC 2005, c. 21* (the New Veterans Charter) which provides as follows:

> 45. (1) The Minister may, on application, pay a disability award to a member or a veteran who establishes that they are suffering from a disability resulting from
>
> (a) a service-related injury or disease; or
>
> (b) a non-service-related injury or disease that was aggravated by service.

### Mr. Davis' position

[204] Mr. Davis argues that the lump sum disability amount he received from Veterans Affairs is a settlement of damages, and thus excluded from division pursuant to section 4(1)(b) of the *Matrimonial Property Act*. Alternatively, he says that if it is not exempt, the amount should be amortized over his anticipated lifespan and treated as income for support purposes.

[205] Ms. Davis' Counsel states in her pre-trial submissions:

> … there's no reason why the court can not take judicial notice of reliable sources of life expectancy statistics to make findings as to a payor's life expectancy.

[206] The test for judicial notice of facts is a stringent one. In *R. v. Find, [2001] 1 S.C.R. 863, 2001 SCC 32*, McLachlin, J., writing for the court, said at paragraph 48 as follows:

> …Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy.

[207] In the circumstances, I am prepared to take judicial notice of the Statistic Canada average life span of a male in Nova Scotia being 80.8 years (Tab A to Mr. Davis' pre-trial submissions). The average life span for males in Nova Scotia is capable of being demonstrated by accurate and indisputable information.

**Ms. Davis' position**

[208] Ms. Davis initially argued that the amount Mr. Davis received should be grossed up to reflect its non-taxable nature and amortized over a number of years to reflect Mr. Davis' life expectancy. This would then be treated as

income for child support and spousal support purposes, both retroactively and prospectively.

[209] In her post-trial submissions, Ms. Davis argues that once Mr. Davis elected to convert the monthly payments into a lump sum, the monthly payments became an asset and is asking the Court to Order the disability money be divided now to remove any need to speculate about life expectancy or the requirement to amortize the lump sum over a projected life span.

**Decision**

[210] The amount received by Mr. Davis is not "an award or settlement of damages" that is exempt under the *Matrimonial Property Act*. The amount received is for pain and suffering compensation. Veterans Affairs Canada provided correspondence to Mr. Davis on November 4, 2019 as follows:

> Affairs Canada wishes to inform you that your disability assessment will increase.
>
> With the introduction of Pension for Life under the Veterans' Well-Being Act, the disability award was replaced with pain and suffering compensation effective 1, April 2019. As a decision was not rendered on your Disability Award application before this date, your application is now considered an application for pain and suffering as of 1, April 2019, and must be processed under the new legislative provisions.

[211] I am not persuaded by the argument that the amount received by Mr. Davis, who elected to convert the monthly payments into a lump amount, became an asset.

[212] In *Hewitt v. Rogers, 2018 ONSC 1384*. Trousdale, J. was faced with a similar claim under section 45 of the New Veterans Charter. Trousdale, J. did a thorough review of the case law, as well as a review of the legislature's intent in enacting the New Veterans Charter and concluded that the amount of the award received should be spread over the course of the father's expected life span. Trousdale, J. stated as follows:

> …
>
> [107] On the evidence, the father has received a total of $343,459.16 in Section 45 lump sum disability awards to compensate him for the rest of his life for the serious injuries and/or disabilities suffered by him as a result of his military service. That is all that he can at this time count on receiving for those injuries and/or disabilities, other than the taxable financial assistance which already forms part of his Line 150 income.
>
> [108] On that basis, I find that it would be unjust to include the full amount of those lump sum amounts in the father's income in the years they were received, or to spread those payments out over a period of 10 or so years as put forward by the mother.
>
> [109] Nevertheless, I find that I cannot ignore that the father has received a substantial sum of money which has increased his financial means. In accordance with Section 1(a) of the Guidelines, one of the objectives of the Regulation is to establish a fair standard of support for children so that they benefit from the financial means of their parents. Accordingly, I find that the lump sum tax-free disability awards received by the father must be taken into account in some way in calculating the child support for the two children. In that regard, I find in the circumstances of this case that I should exercise my discretion to impute income to the father appropriate in the circumstances pursuant to s. 19 of the Guidelines. The circumstances set out in s. 19 are not exhaustive.

…

> [112] In the absence of any actuarial evidence, I find that as the Section 45 lump sums are intended as benefits to the father over the rest of his life, the fairest way to deal with these funds received by the father is to allocate the lump sums over the father's expected life span to come to a conclusion of the annual benefit to the father of the receipt of those funds. There is no evidence before me that the father's life expectancy would be shorter than the average male in Ontario.

[213] MacLeod-Archer, J. took the same approach with several lump sum disability award payments in *McKinnon v. Power, 2019 NSSC 324*. In arriving at her decision, MacLeod-Archer, J. accepted that the disability award should be income for purposes of support and accepted the rationale in *Hewitt v. Rogers* (supra.).

[214] A similar finding was reached in the decision of ACJ O'Neil in *Darlington v. Moore, 2013 NSSC 103* where he says as follows:

> [61] There is a long list of cases that stand for the proposition that a payor's disability income or income analogous to it should be considered when the quantum of spousal and child support are being determined.
>
> [62] Justice Gass and Justice Dellapinna of this Court have both ruled that the payor's DVA income should be grossed up to reflect a value comparable to earned income (see Bridger v. Bridger, 2008 NSSC 150 and Cramm v Mason-Cramm, 2009 NSSC 339).
>
> [63] Justice Ferguson did the same in Snelgrove v. Snelgrove, 2011 NSSC 77.
>
> [64] In the more recent case, Kelly v. Strickland, 2012 NSSC 207, Justice Legere Sers varied the parties' Corollary Relief Order and increased the payor's child support payment retroactively to reflect the payor's failure to disclose his tax-free DVA income.
>
> [65] Mr. Moore argues that the foregoing caselaw must be read with the more recent decision of the Federal Court in Manuge v. The Queen, 2012 FC 499 (CanLII), 2012 F.C. 499.

[66] In Manuge supra , Federal Court Justice Barnes ruled that long term disability benefits payable to disabled Canadian Forces members under the Canadian Forces income security insurance plan could not be reduced by the monthly amounts payable to the affected members under the Pension Act. The Court concluded that the offset was not contractually justified.

[67] The decision to exclude the disability benefits from the definition of income in Manuge supra was based on an interpretation of the governing contract of insurance. At paragraph 43, the Court identified its challenge and answered it as follows:

> [43] It is, therefore, left to the Court to determine what was intended by the phrase "the total monthly income benefits payable to the member under the Pension Act (including dependant benefits and retroactive payments . . .)". The task is not to interpret any particular word or phrase in isolation but, rather, in the context of the complete agreement and the surrounding circumstances. The search for meaning is performed by looking objectively for a common intention and one that achieves a fair and sensible commercial outcome for the parties.
>
> . . .
>
> [62] Viewed contextually and with the reasonable expectations of the parties in mind, what was the common intent behind the use of the word "income" to qualify the word "benefit"? Would anyone examining the SISIP Policy reasonably expect that a Pension Act disability benefit that bears no relationship to lost future income would, in the event of a disabling injury, be deducted from a CF member's SISIP income replacement benefit? Of perhaps greater significance is whether a CF member who suffers a catastrophic combat injury at a level approaching 100% disability would expect to effectively receive nothing more than 75% of his CF income and to be treated the same as a CF member with a disability of lesser functional significance arising outside of his military service.
>
> [63] It seems to me that to ask these questions is to answer them. Giving effect to the SISIP offset of Pension Act disability benefits wholly deprives disabled veterans of an important financial award intended to compensate for disabling injuries suffered in the service of Canadians. The SISIP offset effectively defeats the Parliamentary intent that is inherent in the Pension Act which is to provide modest financial solace to disabled CF members for their non-financial losses. The approach adopted by the Defendant does not lead to a fair or sensible commercial result and defeats the reasonable expectation of CF members. CF members looking at the SISIP Policy and, in particular Article 24, would expect that they were obtaining a meaningful and not illusory LTD benefit payable over and above their Pension Act disability entitlement for the loss of personal

> amenities. This view is enhanced by the fact that disabled CF members who continue with their active service are entitled to be paid and to keep their Pension Act disability benefits and by the fact that they lose their right of action against the Crown to pursue claims to damages (including income losses) if a Pension Act benefit is payable: see Crown Liability and Proceedings Act, RSC 1985, C-50, s 9. The practical consequence of the claimed offset is to substantially reduce or to extinguish the LTD coverage promised to members of the Class by the SISIP Policy with particularly harsh effect on the most seriously disabled CF members who have been released from active service. That is an outcome that could not reasonably have been intended and I reject it unreservedly.
>
> [64] Even if I am wrong in the interpretation I have placed on Article 24(a)(iv), the issue must be resolved against the Defendant on the basis of the principle of contra proferentem. Where a policy of insurance contains exceptions and limitations to coverage, it is incumbent on the drafter to use language that clearly expresses the extent and scope of those limiting provisions: see Indemnity Insurance Co of North America v Excel Cleaning Service, 1954 CanLII 9 (SCC), [1954] SCR 169 at para 35, 1954 CarswellOnt 132 (WL Can). Here, the offset Canada has applied represents a substantial limitation to a CF member's LTD coverage: a limitation that effectively deprives the most seriously disabled CF members from recovering much, if anything, for their income losses. Because the CDS did not make it "perfectly clear" that he could deduct a member's Pension Act disability pension from the SISIP LTD benefit, any ambiguity stands to be resolved in favour of the Plaintiff and the other members of the Class: see Canada Life v Donohue, above, at para 14.

[68] The Manuge decision is distinguishable on this basis.

[69] The calculation of child support and spousal support requires the Court to interpret statutory instruments that address broad policy objectives.

[70] When determining the quantum of spousal support, the Court has wider latitude to consider disability income received by a payor. For example, s.15.2(4) of the Divorce Act directs that spousal support, if any, will reflect the "condition, means, needs or other circumstances" of either spouse. The MCA at s.4(l) directs the Court to consider the payor's ability to pay when considering the amount of "spousal" maintenance to be ordered.

[71] In my view, this broad language requires the Court to consider the fact a payor has disability income when called upon to determine a quantum of spousal/partner maintenance.

[72] The case for considering a payor's disability income is made more obvious when one asks whether disability income in the hands of a prospective recipient of "spousal" support should be considered when determining the quantum of "spousal" support to award. It should.

> [73] In conclusion, I am satisfied that both the Divorce Act and 'MCA' direct that income for child support and spousal/partner maintenance purposes includes tax free disability income. The disability income should be grossed up.

[215] Based on the evidence, legislation and the authorities, the amount of $72,993.92 received by Mr. Davis shall be considered income for the purposes of support and shall be amortized over the period of an average Nova Scotia male's life expectancy, being 80.8 years old.

[216] When Mr. Davis received the funds, he was 49 years old. Therefore, the amounts he received will be amortized over a period of 32 years. The effect of this amortization will require Mr. Davis to include in his income, the amount of $2,240.00 per year commencing 2020.

**CHILD SUPPORT**

[217] The first step in addressing child support is determining the income of each party.

**Mr. Davis' Income**

[218] Mr. Davis is a retired non-commissioned member with the Canadian Armed Forces. He was with the Canadian Armed Forces from 1989 and retired from regular service in 2011. Mr. Davis receives pension income of $23,416.00

annually. Since he retired, Mr. Davis has also been working part-time – for the most part – as the Administrator for the Respiratory Protection Program at the DND base in Greenwood, Nova Scotia. Mr. Davis also receives employment insurance for part of each year.

[219] Mr. Davis has provided his Income Tax returns for the years 2018-2020 with his Notice of Assessment. He also provided confirmation of his income year to date for 2021.

[220] I have also included in Mr. Davis' income the amortized amount of $2,240.00 for his pain and suffering compensation.

[221] Mr. Davis projects his 2022 income to be $73,674.00. This projection is based on a number of contingencies including a division of a portion of his pension in 2022 and a reduction of $8,000.00 in employment income in comparison to 2021 due to the one-time retroactive payment received in 2021. I assess Mr. Davis' 2022 income, inclusive of the amortized amount of pain and suffering, at $80,594.00.

[222] In summary, I assess Mr. Davis' annual income for the purposes of support (retroactive and prospective) as follows:

| Year | Income | Monthly Child Support |
|---|---|---|
| 2020 | $84,733.00 | $1,189.00 |
| 2021 | $89,369.00 | $1,252.00 |
| 2022 | $80,594.00 | $1,132.00 |

**Ms. Davis' Income**

[223] Ms. Davis is employed at Tibbetts Home for Special Care in Wilmot, Nova Scotia (Tibbetts). She accepted a part-time housekeeping position in October of 2011, which became a full-time position in April 2012. She worked at Tibbetts full-time until she went on sick leave after the parties separated in 2020.

[224] Ms. Davis provided her Income Tax returns and Notices of Assessment for the years 2018-2020, along with financial information for her 2021 income (Exhibit 14).

[225] Ms. Davis also testified that while working at Tibbetts, she can sometimes do care-giver work which provides her a higher hourly wage than housekeeping. As a caregiver, she can earn $18.87 per hour whereas working as a housekeeper, she earns $16.40 per hour. She also receives a weekend premium of an additional $1.85 per hour.

[226] The parties agree that Ms. Davis' income for 2020 is $31,551.00. The parties disagree on what Ms. Davis' income is for 2021 and what it should be for 2022.

***2021 Income for Ms. Davis***

[227] Mr. Davis is asking that I impute income to Ms. Davis for 2021; finding that her income is $29,926.00, which is consistent with her sworn Statement of Income of November 2021, which showed a projection of income based on working 66 hours bi-weekly with 22% of those hours being personal care work (at a higher hourly rate).

[228] Mr. Davis also argues that Ms. Davis chose not to work full-time. He accepts that she went through a stressful and emotional time but argued it did not give her the right to stop working indefinitely, and that there was no proper evidence before the court that Ms. Davis was incapable of working.

[229] Ms. Davis says that her income for 2021 is her actual income earned which, after deducting union dues, amounts to $20,741.00.

[230] Ms. Davis argues that income should not be imputed to her. She says there is evidence to establish health reasons for her not being able to work for part of 2020 and 2021.

[231] A detailed letter from Nurse Practitioner, LeeAnne White-Young dated November 10, 2020 (Exhibit 3) summarizes Ms. Davis' condition and provides reasons for Ms. Davis being off work since June 8, 2020 to deal with a number of events in her life including the death of a close friend's daughter, her mother's death, a car accident, and the parties' separation.

[232] Ms. Davis was off work for a period of ten months. During that time, Ms. Davis received sickness benefits through Employment Insurance (E.I.) that she thought would continue into 2021. She was eventually cut off of E.I. benefits and as a result, received one month of social assistance. In March 2021, she then felt she had no choice but to return to work.

[233] Ms. Davis did not feel that she could resume personal care work, and instead, returned to housekeeping duties. She returned to work with a commitment to work 60 hours bi-weekly to ease back into her job. She eventually returned to personal care work. In September of 2021 she was asking for extra shifts to increase her income.

[234] The request to impute income appears to be for the period of time when Ms. Davis collected E.I. and social assistance in 2021 (January to March).

[235] Pursuant to the *Federal Child Support Guidelines* at s. 19(1)(a):

> 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;

[236] In *Standing v. MacInnis, 2020 NSSC 304*, Justice Forgeron summarized the law imputing income as follows:

> [22] In Smith v. Helppi, 2011 NSCA 65, Oland J.A. confirmed the factors to be balanced when assessing income earning capacity at para. 16, wherein she quotes from the decision of Wilson J. in Gould v. Julian, 2010 NSSC 123. Oland J.A. states as follows:
>
> > 16 Mr. Smith argues that the judge erred in imputing income as he did. What a judge is to consider in doing so was summarized in Gould v. Julian, 2010 NSSC 123 (N.S.S.C.), where Justice Darryl W. Wilson stated:
> >
> > > Factors which should be considered when assessing a parent's capacity to earn an income were succinctly stated by Madam Justice Martinson of the British Columbia Supreme Court, in Hanson v. Hanson, 1999 CanLII 6307 (BC SC), [1999] B.C.J. No. 2532, as follows:
> > >
> > > > 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor". ...
> > > >
> > > > 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
> > > >
> > > > 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale,

> courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
>
> 4. Persistence in unremunerative employment may entitle the court to impute income.
>
> 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

> [23] As also noted, in Nova Scotia the test to be applied when determining whether a person is intentionally under-employed is reasonableness, which does not require proof of a specific intention to undermine or avoid a support obligation: Smith v Helppi, supra.
>
> [24] In Drygala v. Pauli, 2002 CanLII 41868 (ON CA), [2002] O.J. No. 3731, the Ontario Court of Appeal confirmed a three-pronged approach to determine under-employment. I will now follow that approach. First, I will decide whether Mr. Standing is under-employed. Second, I will canvas whether this is caused by any identified s.19(1)(a) needs. Third, I will decide what quantum of income should be imputed.

[237] I have considered the evidence and the statutory framework of section 19(1)(a) of the *Federal Child Support Guidelines*, as well as the case law. I find that it would not be appropriate to impute income to Ms. Davis as suggested by Mr. Davis for 2021. I base my Decision on the following reasons:

(a) Ms. Davis did not stop work indefinitely as suggested by Mr. Davis, Instead, I accept that Ms. Davis experienced a number of major, unexpected, life-changing events as confirmed in her Affidavit and

the unchallenged letter from her Nurse Practitioner, Ms. White-Young.

(b) If Ms. Davis was underemployed, which I do not find, I am satisfied that Ms. Davis proved that her underemployment or reduced income was required by her health needs. In other words, her inability to work at full capacity for that period of time in question was compromised by her ill health;

(c) Ms. Davis returned to work full-time as soon as she was capable, although the motivation may have been more to do with financial need as opposed to medical advice.

[238] Ms. Davis' income for 2021 is assessed at $20,741.00 as opposed to the amount suggested by Mr. Davis of $29,686.00.

***2022 Projected Income for Ms. Davis***

[239] Ms. Davis projects an income for 2022 in the amount of $30,974.00. This amount takes into account union dues of $240.00 and assumes that Ms. Davis will be relocating closer to her family in Springhill, Nova Scotia once E.D. completes high school.

[240] Mr. Davis suggests – at a minimum – Ms. Davis' income should be set at $31,440.24 which is an estimate of her prospective income in accordance with her earning potential at Tibbetts. He argues that it would not be appropriate or fair for Ms. Davis to voluntarily leave her place of employment to earn less money somewhere else.

[241] Mr. Davis asks the court to take judicial notice that the Province of Nova Scotia has increased personal care wages by 23% and therefore, Ms. Davis' income could be even greater.

[242] While the province of Nova Scotia may have announced an increase in personal care wages by 23%, Ms. Davis' Counsel argues that there still remains a number of uncertainties with respect to any increased wage as it relates to Ms. Davis. She raises the following;

(a) There is no evidence of when the start date will be;

(b) It is unknown whether or not Ms. Davis – who is grandfathered to do personal care work through a specific employer – will qualify for any wage increase;

(c) It is not known whether the increase will be phased in over time or provided immediately.

[243] The statement that the Province has increased personal care wages by 23% is not something so notorious or generally accepted, nor capable of a complete and accurate demonstration to permit the court to take judicial notice of it. I therefore decline to do so.

[244] Based on the evidence, I assess Ms. Davis' income in 2022 at $30,734.00 which is approximately $700.00 less than what Mr. Davis is suggesting.

[245] In summary Ms. Davis' annual income is as follows:

| Year | Ms. Davis' Annual Income |
|---|---|
| 2020 | $31,551.00 |
| 2021 | $20,741.00 |
| 2022 | $30,734.00 |

**Prospective Child support**

[246] Child support is payable for a "child of the marriage". The *Divorce Act* R.S.C., 1985, c. 3 (2nd Supp.) at section 2(1) – this means a child who is either:

> (a) is under the age of majority and who has not withdrawn from their charge, or
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

[247] The *Federal Child Support Guidelines* provides as follows:

> **Amount of Child Support**
>
> **Presumptive rule**
>
> 3 (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> > (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
> >
> > (b) the amount, if any, determined under section 7.
>
> **Child the age of majority or over**
>
> (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> > (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
> >
> > (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[248] Both children have lived with Ms. Davis since separation. The parties' eldest child, B.D. turned 19 on November 30, 2021. Therefore, the presumptive right to the table amount of child support is in effect for two children until November 30, 2021.

[249] Where B.D. turned 19, according to the guidelines, the presumptive rule applies for child support for a child over the age of majority unless "the court considers that approach to be inappropriate".

[250] Mr. Davis agrees to pay child support for both children while they continue to reside with Ms. Davis. Therefore, he is required to pay the total amount of

child support for the two children in the amount of $1,125.00 per month commencing August 1, 2022.

[251] The amount of child support will likely need to be re-evaluated once the living arrangements and children's educational circumstances are known.

**Retroactive Child Support**

[252] In his post-trial brief and oral submissions, Mr. Davis acknowledges that child support was required to be paid from the date of separation. Therefore, it is not necessary to apply the analysis for retroactive support set out in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra, [2006] 2 S.C.R. 231, 2006 SCC 37*. The total amount of retroactive child support for the period June 2020 until July 2022 is as follows:

| Time Period | Monthly Amount | Total for the Period |
|---|---|---|
| June – December 2020 | $1,207.00 | $8,449.00 |
| January – December 2021 | $1,269.00 | $15,228.00 |
| January – July 2022 | $1,124.00 | $7,868.00 |
| **June 2020 – July 2022** | **-** | **$31,545.00** |

***Mr. Davis' Position***

[253] Mr. Davis asks the Court to give him credit for amounts he spent on the children in 2020, 2021, and 2022, along with all of his mortgage payments made since separation.

***2020***

[254] Mr. Davis claims the following:

(a) Money spent on the children = $3,323.09 (List found in Mr. Davis' Affidavit of April 26, 2021, Exhibit 22, Tab 3, para.s 49-57). The expenses include driver's education training, Aikido, pre-registration for driving school, hockey, clothing expenses for both children, cell phone payments for the children, Netflix, Spotify, Costco expenses, dental expenses, medical coverage, and Amazon Prime.

(b) Mortgage payments in 2020 for seven months = $6,113.80 ($873.40 per month). Ms. Davis argues that if the Court is prepared to consider the mortgage payments as a credit for retroactive child support, then it should be only for six months as the June payment was already made prior to the parties' separation. Therefore, any credit that Mr. Davis may be entitled to for mortgage payments made for six months would be $5,240.60.

[255] The total credit Mr. Davis seeks for 2020 is $8,563.49.

***2021***

[256] In 2021 Mr. Davis seeks credit for:

(a) The total expenses he paid for the children = $5,574.71

(b) Credit for the mortgage payments made = $10,530.60 (nine months at a rate of $873.40 and three months at $890.00)

[257] The total credit Mr. Davis seeks for 2021 is $16,105.31.

***2022***

[258] In 2022, Mr. Davis seeks credit for mortgage payments made for six months (at $890.00 per month) for a total amount of $5,340.00.

[259] In total, Mr. Davis is claiming credit for $30,008.80.

***Ms. Davis' Position***

[260] Ms. Davis asks the Court to disregard many of the expenses that Mr. Davis paid for since separation.

[261] Ms. Davis says that any clothing and occasional food purchases should not factor into any claim for retroactive support awarded, taking into account the

actual time Mr. Davis spent with the children. Furthermore, the amount of money that Mr. Davis may have spent on food sent to the home or clothing for the children can not compensate for the lack of monthly child support. Likewise, Mr. Davis' claim for costs for the children's cell phones, media online (Netflix, Spotify, Amazon Prime) be disregarded as a part of the cost of Mr. Davis providing entertainment to the children when parenting.

[262] I have considered the evidence and submissions of the parties. I find it would be inappropriate to provide Mr. Davis with credit for the expenses he seeks against retroactive child support. On examination of the child expenses he is seeking credit for, some of them such as hockey fees, soccer, Aikido, may be considered appropriate section 7 expenses. Other expenses such as clothing for the children, cell phone charges, Netflix, Spotify, Amazon Prime, Costco expenses, etc. are costs that one would consider a parent would pay for without any credit against child support.

[263] The mortgage payments paid by Mr. Davis from June 2020 until 2022 make up the majority of the expenses he seeks credit for.

[264] Ms. Davis argues that the simplest way to ensure that both parties get an equal share of their portion of the proceeds from the sale of the matrimonial home, is to treat the mortgage payments made by Mr. Davis as family debt. In

that way, the net sale proceeds would first be divided equally. Then, half of Mr. Davis' mortgage payments (inclusive of interest) would be deducted from Ms. Davis share from the net sale proceeds and provided to Mr. Davis.

[265] Mr. Davis seeks to value the mortgage as of the date of separation and seeks to use the mortgage payments he has made since the date of separation against retroactive child support. He further states that Ms. Davis would be credited for the mortgage payments from the date of separation until she either leaves the home or the house is sold, and any equity in the home is divided.

[266] In either scenario, the most important factor in determining the process of adjusting the mortgage payments is to ensure there is no double credit. To use the date of separation and have the retroactive child support offset by the mortgage payments, could see that occur.

[267] I order that the mortgage payments made by Mr. Davis from July 2020 until July 2022 shall be considered family debt to be accounted for after the sale of the home. Once the home is sold, Mr. Davis shall provide Ms. Davis with an accounting of the mortgage payments he has made (including interest between July 2020 and July 2022) and shall be credited with 50% of that amount, to be deducted from Ms. Davis' share of the net proceeds from the sale of the matrimonial home.

[268] Mortgage payments to be made on a go forward basis (until the house is sold) shall be shared equally between the parties. Each party is to pay half of the monthly mortgage payment (including interest).

**Section 7 Expenses**

[269] The *Federal 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.

[270] In *Boylan v. MacLean, 2018 NSSC 15*, Justice Jollimore outlines the general approach to section 7 expenses at paragraph 38. She notes that if the amounts

claimed were proper section 7 expenses, the court has discretion to require payment of some, all, or none of them. Furthermore, the guiding principle provides that the expense should be shared in proportion to the parties' incomes where the child is not contribution to those costs.

[271] There is a distinction between special expenses and extraordinary expenses. Both of them must be reasonable and necessary. The *Bodine-Shah v. Shah, 2014 BCCA 191* decision provides a helpful commentary on the distinction of special and extraordinary expenses:

> [66] Special expenses listed in ss. 7(1)(a)-(c) and (e) are distinct from extraordinary expenses referred to in ss. 7(1)(d) and (f). Special expenses are defined as relating to child care, medical or dental insurance premiums, health-related costs, and post-secondary education. They must be found to be reasonable and necessary. Extraordinary expenses are not defined. Their extraordinariness is determined in the context of the combined income of the spouses, as well as other considerations, including the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the child, and the overall cost of the activities. They also must be found to be reasonable and necessary. Relevant considerations for the tests of necessity and reasonableness include whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to separation…

[272] I have reviewed the expenses Mr. Davis paid for the children in 2020, 2021 and 2022 and find that the following meet the test for being special and extraordinary expenses and are deemed reasonable and necessary:

| **Mr. Davis' 2020 Section 7 Expenses Paid** | |
|---|---|
| **Expense** | **Amount of Expense** |

| | |
|---|---|
| B.D. – Driver's Education | $526.00 |
| B.D. – Aikido | $405.00 |
| E.D. – Driver's Education Registration | $250.00 |
| E.D. – Hockey | $250.00 |
| Medical/Dental family coverage ($93.03 x 7 months) | $651.21 |
| **Total** | **$2,092.21** |

| **Mr. Davis' 2021 Section 7 Expenses Paid** | |
|---|---|
| **Expense** | **Amount of Expense** |
| B.D. – Aikido | $510.00 |
| E.D. – Hockey | $400.00 |
| E.D. – Soccer | $50.00 |
| E.D. – Driver's Education | $543.50 |
| E.D. – Summer Soccer | $189.75 |
| E.D. – Kingstec Registration | $200.00 |
| E.D. – Prom dress | $847.00 |
| Medical/Dental family coverage ($93.03 x 12 months) | $1,106.36 |
| **Total** | **$3,856.61** |

| **Mr. Davis' 2022 Section 7 Expenses Paid** | |
|---|---|
| **Expense** | **Amount of Expense** |
| Medical/Dental family coverage ($93.03 x 7 months) | $651.21 |
| **Total** | **$651.21** |

[273] I have also reviewed the expenses Ms. Davis paid for the children in 2020, 2021 and 2022 and find the following meet the test for being special and extraordinary expenses and are deemed reasonable and necessary:

| Ms. Davis' 2020 Section 7 Expenses Paid | |
|---|---|
| **Expense** | **Amount of Expense** |
| B.D. – Contact lenses/Dental (less CAF reimbursement) | $227.40 |

| Ms. Davis' 2021 Section 7 Expenses Paid | |
|---|---|
| **Expense** | **Amount of Expense** |
| Post-secondary expenses for both B.D. and E.D. (application fees) | $165.00 |

| Ms. Davis' 2022 Section 7 Expenses Paid | |
|---|---|
| **Expense** | **Amount of Expense** |
| E.D. Prom Expenses (Exhibit 13, para. 68 – shoes, flowers, hair, nails, makeup) | $318.00 |

[274] The expenses identified above shall be shared by the parties in proportion to their incomes as follows:

| Proportional Income Chart for Calculating Section 7 Expenses | | |
|---|---|---|
| **Year** | **Mr. Davis** | **Ms. Davis** |
| 2020 | 73% | 27% |
| 2021 | 81% | 19% |
| 2022 | 72% | 28% |

[275] The breakdown for the division of the Section 7 expenses Mr. Davis incurred is as follows:

| Responsibility for the Section 7 Expenses Incurred by Mr. Davis | | | | | |
|---|---|---|---|---|---|
| **Year** | **Total Expense** | **Mr. Davis' Percentage** | **Ms. Davis' Percentage** | **Mr. Davis to pay** | **Ms. Davis to pay** |
| **2020** | $2,082.21 | 73% | 27% | $1,520.01 | $562.20 |
| **2021** | $3,856.61 | 81% | 19% | $3,115.75 | $730.86 |
| **2022** | $651.21 | 72% | 28% | $468.87 | $182.33 |

[276] The breakdown for the division of the Section 7 expenses Ms. Davis incurred is as follows:

| Responsibility for the Section 7 Expenses Incurred by Ms. Davis | | | | | |
|---|---|---|---|---|---|
| **Year** | **Total Expense** | **Mr. Davis' Percentage** | **Ms. Davis' Percentage** | **Mr. Davis to pay** | **Ms. Davis to pay** |
| **2020** | $227.40 | 73% | 27% | $166.00 | $61.40 |
| **2021** | $165.00 | 81% | 19% | $133.65 | $31.35 |
| **2022** | $318.00 | 72% | 28% | $228.96 | $89.04 |

[277] In order to account for payments made, Ms. Davis is to provide to Mr. Davis $946.78 ($1,475.39-$528.61). This does not include E.D.'s graduation fees paid by Mr. Davis (yearbook, graduation hoodie, and graduation fee) as those are offset against expenses paid by Ms. Davis in 2021 for E.D. to attend a friend's prom (Exhibit 13).

[278] Commencing in August 2022, the parties shall share the costs of the children remaining on Mr. Davis' CAF insurance plan in proportion to their incomes (Mr. Davis at 72% and Ms. Davis at 28%).

[279] Any future medical or dental expenses shall be shared in proportion to the parties' income if any expense is not covered by the medical or dental plan.

[280] Any future extra-curricular expenses must be agreed to in writing in advance of the expense being incurred in order for the parties to expect reimbursement for the expense.

## SPOUSAL SUPPORT

### Prospective spousal support

[281] Ms. Davis is seeking spousal support on both a compensatory and non-compensatory basis.

[282] In his post-trial brief and oral submissions, Mr. Davis argues that Ms. Davis does not have a compensatory claim but concedes that Ms. Davis has a non-compensatory claim to spousal support.

[283] Justice Keith, in *Churchill-Keating v Keating, 2020 NSSC 205*, provides an excellent summary of the principles and concepts for spousal support:

**SPOUSAL SUPPORT**

**a) The Law**

[31] Section 15.2(1) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) (the "Divorce Act") confers the requisite jurisdiction to "make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse."

[32] As the proposed recipient of spousal support, Mr. Keating bears the burden of proof.

[33] The analytical path for determining spousal support begins with the preliminary, threshold issue of entitlement. Where there is a demonstrated entitlement to spousal support, the analysis shifts to quantum (how much?) and duration (for how long?).

[34] Before focussing on these discrete elements of spousal support (entitlement, quantum, and duration), it is helpful to identify several concepts which inform the analysis.

[35] The Court's discretion to award spousal support is broad but it is obviously not arbitrary. In Fisher v. Fisher, 2001 NSCA 18, Cromwell, J.A. (as he then was) described the overall principles and goals which govern any determination of spousal support. He wrote that:

> The fundamental principles in spousal support cases are balance and fairness. All of the statutory objectives and factors must be considered. The goal is an order that is equitable having regard to all of the relevant considerations. (para 82)

[36] The Divorce Act provides more specific objectives and factors which help guide the Court towards a balanced and fair result. Section 15.2(4) of the Divorce Act states that the Court:

> shall take into consideration the condition, means, needs and other circumstances of each spouse, including:
>
> 1. the length of time the spouses cohabited;
>
> 2. the functions performed by each spouse during cohabitation; and
>
> 3. any order, agreement or arrangement relating to support of either spouse.

[37] These factors must be examined in light of Section 15.2(6) of the Divorce Act which states that:

> an order … for the support of a spouse should
>
> a) recognize the 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.

[38] Bearing these broad objectives and factors in mind, a more focussed assessment of each element of the claim for spousal support can begin.

[39] As to the threshold question of entitlement, there are three bases upon which a claim for spousal support may be advanced: compensatory, non-compensatory and contractual. As indicated, there is no contractual basis for spousal support in this case. Mr. Keating's claim for spousal support is compensatory and/or non-compensatory in nature.

[40] With compensatory support, the Supreme Court of Canada confirmed that compensatory spousal support often focuses on the economic losses or disadvantages which arise as a result of roles taken during the marriage (Moge v Moge, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, referred to as "Moge").

[41] Moge recognized that the roles taken (or contributions made) by a spouse during marriage may involve personal sacrifices including, for example, impairment of income-earning potential; or foregoing one's own educational and career opportunities; or contributing to the career development of the other spouse. Compensatory spousal support recognizes the financial impact of these contributions or sacrifices. And it provides for a financial response which the Court considers just in the circumstances. As L'Heureux-Dube, J explained in Moge, spousal support on a compensatory basis: "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse." (at para 74)

[42] Facts which influence a claim for compensatory support include such things as whether the person claiming support or seeking support has primary care for children after separation; or whether that person contributed to the education or career of the person from whom support is being requested. The form of contribution can vary, but includes direct financial assistance, or physically moving to remain together as a family unit or sacrificing one's own career opportunities to advance those of a spouse.

[43] As to non-compensatory support, the underlying philosophical underpinnings and related financial concerns are different. Compensatory support is premised upon an underlying assumption of independence between spouses. Thus, for example and as indicated, compensatory support offers redress for losses or disadvantages arising out of certain sacrifices made during the marriage. As the Supreme Court of Canada indicated in Bracklow v Bracklow, 1999 CanLII

> 715 (SCC), [1999] 1 S.C.R. 420 ("Bracklow"), compensatory support seeks to ensure that the "clean break", or process of detachment, which follows marital breakdown includes "in a restitutionary sense any economic costs of the marriage on the other spouse" (para 24).
>
> [44] By contrast, non-compensatory support is premised on an underlying interdependence within the marital relationship; and it assesses the extent to which the spouses relied upon (or reasonably expected) a shared life and standard of living. Non-compensatory support seeks to ensure that the financial repercussions associated with ending the marriage recognize the interdependence or merger of interests which developed over time – and offers redress in a manner which is reasonable and equitable. As the Supreme Court of Canada in the leading case of Bracklow stated: "marriage is an economic partnership that is built upon a premise (albeit rebuttable) of mutual support." (at para 32). Thus, non-compensatory support can ameliorate significant declines in the standard of living suffered by one spouse following the end of a marriage.
>
> [45] When considering, non-compensatory support, the focus also shifts to a comparison of the "needs" and "means" of the parties. On that issue, the court is required to consider the actual ability of the spouse seeking support to fend for himself or herself and the effort that has been made to do so, including efforts made after the marriage breakdown.
>
> [46] Facts which influence non-compensatory claims include the length of the relationship, economic hardship, or a drop in standard of living after separation. (Professor Carol Rogerson and Professor Rollie Thompson, "Spousal Support Advisory Guidelines: The Revised User's Guide", Final Draft, February, 2016, p. 10)
>
> [47] If the person seeking spousal support demonstrates entitlement, the analysis advances to the related issues of quantum and duration. These issues are typically addressed through the Spousal Support Advisory Guidelines, including the Revised User's Guide released in 2016 (collectively, "SSAG").Compensatory Support

[284] This was a long-term traditional marriage. When the parties were married, Ms. Davis was still working as a bartender in Springhill, Nova Scotia. She was unemployed for a few months after moving to Greenwood, Nova Scotia, then started working with children at Roo's Playhouse. Mr. Davis was posted to Victoria, British Columbia from Greenwood in 2003. The parties' eldest

child, B.D. was only 8 months old at the time of the move. E.D. was born in Victoria.

[285] While in Victoria, Ms. Davis cared for the home and the children, and earned income by caring for four other children in the family home. At the time they were in Victoria, there were numerous postings on ships in which Mr. Davis was gone for months at a time. Mr. Davis was then re-posted to Greenwood, and Ms. Davis returned part-time at work at Roo's Playhouse in the summer of 2007.

[286] In 2009 Ms. Davis got a second job working as a casual housekeeper at Tibbetts and also worked at a school cafeteria. She was offered a part-time housekeeping position in October of 2011, and full-time in April of 2012.

[287] A summary of the mobility of the parties is provided in Ms. Davis' Affidavit of October 2021 (Exhibit 13). There were numerous moves over the years. Mr. Davis confirmed that Ms. Davis' account of his deployment and where the parties resided is accurate.

[288] Mr. Davis also confirmed that his two children from a previous relationship lived with them each summer after school ended, until shortly before school resumed, and also spent every Christmas break with the parties.

[289] Ms. Davis worked at non-pensioned jobs, often part-time, to accommodate family responsibilities which permitted Mr. Davis to advance in his career to the point of retiring in 2011. Ms. Davis worked but her employment was always secondary to that of Mr. Davis. I am satisfied that Ms. Davis made sacrifices during their marriage for the sake of their family, and those sacrifices created at least a degree of economic disadvantage sufficient for spousal support on a compensatory basis.

***Non-Compensatory Support***

[290] Mr. Davis concedes that Ms. Davis has a non-compensatory claim to spousal support. I find that Ms. Davis has suffered a measure of economic hardship due to the marital breakdown and the related loss. Ms. Davis was completely financially dependent on Mr. Davis. Mr. Davis was in control of the family finances and made the financial decisions.

***Quantum***

[291] Both parties provided the court with various calculations for spousal support using the SSAG's and accounting for a number of different contingencies such as imputing income, division of Mr. Davis' pension, and the amortization of the disability compensation received by Mr. Davis

[292] In *Strecko v. Strecko, 2014 NSCA 66* and also as confirmed in *MacDonald v. MacDonald* (supra.), the Court of Appeal held that although the Spousal Support Advisory Guidelines (SSAG) are not law, they are nevertheless a useful tool which can enhance the legitimacy and consistency in setting the appropriate spousal support amount.

[293] I have reviewed the factors and objectives of the *Divorce Act*, the parties' budgets, and the SSAG. In doing so, I find that Ms. Davis proved that she is entitled to spousal support on a compensatory and non-compensatory basis for the following reasons:

(a) Ms. Davis was employed part-time for approximately the first ten years of their marriage while Mr. Davis continued to advance his career;

(b) Ms. Davis resumed primary responsibility for the care of the children, as a result, Ms. Davis' employment income continued to be secondary to that of Mr. Davis;

(c) Mr. Davis' employment was not affected by the birth of the children because he was not the primary care provider. Mr. Davis was able to prioritize his career because of the economic sacrifices of Ms. Davis;

(d) The parties were married for 19 years – their marriage was not a brief marriage;

(e) Ms. Davis became financially dependant on Mr. Davis because he was the primary wage earner;

(f) At separation and currently, there was (and continues to be) a significant disparity of income between the parties;

(g) Ms. Davis continues to be the primary caregiver of the children; and

(h) Mr. Davis has re-partnered with Ms. Hoogerwerf who contributes to their living expenses including rent, utilities and their grocery bill.

[294] I have also reviewed the parties' evidence and budgets, and note some of the following:

(a) Ms. Davis' budget is reasonable with very little room for reductions. It does not include costs for shelter or for a vehicle. Based on the evidence, the cost of the vehicle will be paid out by the equalization of the matrimonial property. Ms. Davis will have shelter costs once she vacated the matrimonial home;

(b) Mr. Davis' budget will be reduced following this Decision. He will no longer be paying the entire mortgage ($890.00) or the Toyota

Corolla ($201.00). In addition, it does not appear that there are any extra-curricular activities ($145.00) or activities and allowances ($100.00). The amount of boat maintenance ($214.20) per month is excessive in light of the evidence before the court.

[295] I have examined the SSAG based on the parties' incomes under the "with child support formula". The low amount of monthly spousal support is $0.00. The midrange is $14.00. The high range is $378.00. The SSAG also suggest a range of indefinite duration, subject to variation and review.

[296] Given the factors and objectives in the *Divorce Act*, the parties' budgets, and all the evidence, I find that Mr. Davis shall be required to pay monthly spousal support to Ms. Davis in the amount of $250.00 commencing August 1, 2022, and continuing monthly until further agreement, or variation of the Court Order.

[297] There are many questions still to be determined to make this a final Order. These include:

(a) When will Mr. Davis' pension division take place?

(b) The affect on both parties' income upon the division of Mr. Davis' pension; and

(c) The determination of the children's post-secondary school expenses and living arrangements.

[298] Therefore, once these questions are answered – if the parties are unable to agree – either party can have the matter returned to court for review. I will retain jurisdiction to address any issues should the parties be unable to agree.

**Retroactive Spousal Support**

[299] Ms. Davis is also seeking retroactive spousal support from the time of separation.

[300] Mr. Davis argues that Ms. Davis should not receive any retroactive spousal support and relies on the results of the SSAG "with child formula" for the respective years and parties' incomes.

[301] Mr. Davis also argues that Ms. Davis remained in the matrimonial home with a pool, three bedrooms, and lived mortgage free since separation. She also had a vehicle without monthly car payments. Mr. Davis paid the mortgage and had to pay his own rent in addition to the monthly car payment for Ms. Davis.

[302] Ms. Davis acknowledges that the results of the SSAG "with child formula" for the respective years reflects the priority given to child support and does not leave sufficient funds to pay spousal support. She points out that this does not determine a lack of entitlement to retroactive spousal support.

[303] The law on retroactive spousal support is set out in *Kerr v. Baranow, 2011 SCC 10*. The same factors for a claim to retroactive child support apply to claims for retroactive spousal support.

[304] In addressing the spousal support factors and objectives contained in the *Divorce Act*, the Supreme Court of Canada in *Bracklow v. Bracklow, [1999] 1 S.C.R. 420* at 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.

[305] Ms. Davis is entitled to retroactive spousal support. I have considered and applied the appropriate *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra* (supra.) factors. In particular, I note there was no delay in Ms. Davis seeking spousal support. She filed a Notice of Motion claiming spousal support in February 2021. Ms. Davis did not delay in bringing forward the issue of support. There was also a need for the support during this time. I balance these factors with the fact Mr. Davis continued to pay the

mortgage and car payment for Ms. Davis which thereby relieved her of any immediate payment for those expenses.

[306] There was little evidence of any debts Ms. Davis incurred during this period of time over and above her monthly expenses which resulted in a monthly deficit of $384.00 (Exhibit 19).

[307] There was no evidence that Ms. Davis incurred any loans or increased any existing credit. Her legal bills are not to be considered when deciding the question of support.

[308] I have reviewed the SSAG "with child formulas" for the respective years, the parties' incomes, and expenses. I am not prepared to order a monthly retroactive amount from the date of separation. Instead, I award Ms. Davis retroactive lump sum spousal support in the amount of $2,500.00. This amount shall not be taxable to Ms. Davis and shall not be tax deductible for Mr. Davis.

**INSURANCE (MEDICAL AND LIFE)**

[309] Mr. Davis has family medical and dental insurance.

[310] Mr. Davis has life insurance through CAF (SISIP). This policy insures his life for $340,000.00.

[311] Ms. Davis has life insurance through her present employment.

[312] The following provisions shall be included in the CRO:

(a) Mr. Davis must maintain medical and dental insurance for the children for as long as they are eligible to be covered under his insurance plan.

(b) Mr. Davis shall maintain Ms. Davis on his medical and dental insurance for as long as she is eligible to be covered under his plan.

(c) Mr. Davis shall maintain Ms. Davis as beneficiary under his life insurance policy through CAF (SISIP) in the amount of $340,000.00 to secure the payment of child and spousal support. This obligation shall continue until Mr. Davis' obligation to pay support terminates, the parties agree to a reduced amount, or the Court orders otherwise.

(d) Ms. Davis shall maintain life insurance available through her present employment (or any subsequent employment where life insurance is provided) for the benefit of the children and she shall name Mr. Davis as beneficiary until both children are no longer dependent.

(e) Each party shall supply the other with proof of compliance of the life insurance premiums annually.

(f) In the event either party fails to abide by the terms of these insurance provisions, their respective estates shall be liable to the other party for the amount of the policy that otherwise would be payable.

**Summary**

[313] The Divorce is Ordered.

[314] The parenting and decision-making arrangement are as stated in this Decision.

[315] Matrimonial property is to be divided in accordance with the Asset Division Chart and the equalization payment to be paid to Ms. Davis is $77,974.00.

[316] The reconciliation of amounts owed by each party requires Mr. Davis to pay $20,089.83 to Ms. Davis.

[317] Child support is to be paid by Mr. Davis in accordance with the *Federal Child Support Guidelines* in the amount of $1,125.00 per month commencing August 1, 2022.

[318] The Section 7 expenses are to be shared in proportion to the parties' respective incomes.

[319] Medical, dental, and life insurance provisions are as stated in this Decision.

[320] Spousal support is to be paid by Mr. Davis in the amount of $250.00 per month commencing August 1, 2022.

[321] Mr. Davis must pay retroactive spousal support of $2,500.00 (reflected in the reconciliation amount above).

[322] Upon the sale of the matrimonial home, Mr. Davis shall provide an accounting of the mortgage payments he has made inclusive of interest from July 2020 until July 2022. He shall be credited with 50% of that amount to be deducted from Ms. Davis' share of the net proceeds of the matrimonial home.

[323] The Court will receive written submissions on costs within 30 days after the release of this Decision if the parties are unable to agree.

Berliner, J.

# Appendix A

| ASSET DIVISION CHART | | |
|---|---|---|
| **Asset** | **Mr. Davis** | **Ms. Davis** |
| **Matrimonial Home** | *To be sold and proceeds divided equally* | |
| **Household Contents and Items** | *To be divided equally in accordance with the procedure in the Decision* | |
| **Cottage** | $129,000.00 | |
| **Other Assets** | | |
| Boat | $3,000.00 | |
| Trailer | $500.00 | |
| ATV and Snow Plow | $4,500.00 | |
| **RRSP's** | *To be equalized by way of spousal rollover* | |
| **Vehicles** | | |
| 2014 GMC Sierra | $18,000.00 | |
| 2011 Honda Civic | $950.00 | |
| 2020 Toyota C-HR | $33,412.37 | |
| 2014 Toyota Corolla | *To be retained by Ms. Davis and accounted for in the reconciliation* | |
| **TOTAL ASSETS** | $189,362.37 | |
| **DEBTS** (2020 Toyota C-HR) | $33,414.37 | |
| **NET MATRIMONIAL ASSETS** | $155,948.00 | |
| Equalization ($155,948.00 ÷ 2) | ($77,974.00) | $77,974.00 |
| **TOTAL TO BE PAID TO MS. DAVIS** | | **$77,974.00** |

| RECONCILIATION OF AMOUNTS OWED TO EACH PARTY | | |
|---|---|---|
| | **Owed to Mr. Davis** | **Owed to Ms. Davis** |
| Bank Accounts | $82.13 | |
| 2020 Tax Return | $1,069.21 | |
| Retroactive Child Support | | $31,545.00 |
| Section 7 Expenses | $946.78 | |
| Retroactive Lump Sum Spousal Support | | $2,500.00 |
| 2014 Toyota Corolla Vehicle Purchase | $11,857.05 | |
| **TOTAL AMOUNTS OWED** | **$13,955.17** | **$34,045.00** |
| ($34,045.00 - $13,955.17) | | |
| **TOTAL RECONCILED AMOUNT TO BE PAID TO MS. DAVIS** | | **$20,089.83** |