

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Wetzel v. O'Quinn, 2013 NSSC 301

Date: 20130712

Docket: 1201-066603

Registry: Halifax

Between:

Duncan Troy Wetzel

Petitioner

v.

Charyl Lynn O'Quinn

Respondent

Judge: The Honourable Justice Mona M. Lynch

Heard: July 9, 10, 11 & 12, 2013, in Halifax, Nova Scotia

Written Decision: September 30, 2013

Counsel: Sally Faught for the Petitioner, Duncan Wetzel
Tanya Jones for the Respondent, Charyl O'Quinn

By the Court (Orally):

[1] We are here on the decision on the Wetzel and O'Quinn matter. It is a divorce proceeding and Mr. Wetzel is the Petitioner. Ms. O'Quinn is the Respondent. I am not going to go through the history of the relationship because that is in the material that has been provided to the court. It is in the affidavits; it is in the briefs that were filed.

[2] The parties started living together in 1992 and were married in 1995. They separated in 2008 and they have four children from the marriage: Nathan who is 17; Chandler who is 15; Kiersten who is 10 and Raena who is 5.

[3] The children have been in the primary care of either of the parents at different times since the separation of the parties.

[4] Since December 21, 2012 the four children have been in the primary care of Mr. Wetzel.

[5] The issues to be decided are the divorce, the parenting arrangement and the child support. There was a claim for spousal support, which I understand that Mr. Wetzel is not pursuing, and property division and debt division.

[6] As I indicated, I believe it was Wednesday, I am satisfied that all of the jurisdictional requirements for the divorce and the grounds for divorce have been satisfied. I am satisfied that there is no possibility of reconciliation between the parties and I grant the divorce.

[7] One of the things that I had to consider when I was making my decision was credibility and when I am determining credibility I look at the inconsistencies and the weaknesses in testimony.

[8] In December 2012 Ms. O'Quinn came to the court and indicated she was moving to Cheticamp; that she was moving there for financial reasons. She gave up her job, apartment and was moving. In March when she appeared she indicated that she had left for medical reasons and indicated in that, as well as her other evidence, that she has a high risk pregnancy. However, no medical evidence was

provided and it is in her power to provide the medical verification but she did not do so although it was raised as a flag in March.

[9] Ms. O'Quinn also indicated that Mr. Wetzel has not answered her telephone calls; that she called many many times to have contact with the children and that he was thwarting and not answering her calls. Mr. Wetzel provided documentation from Bell Mobility to show that was not the case and there was very little communication from Ms. O'Quinn. I do not believe her on this point.

[10] Ms. O'Quinn also indicated she was not able to come to court in January 2013 because of the miscarriage that she had in December, shortly after the 21st, as I understand. But there was no call; there was nothing from her at all until the day before the Date Assignment Conference at the end of March when she tried to file an interim motion.

[11] Demeanor evidence is to be used with caution but when I look at the demeanor while answering the questions and the manner in which the questions were answered, I find that Mr. Wetzel answered in a straightforward and forthright manner and Ms O'Quinn was guarded and sarcastic in her responses.

[12] So where the evidence of the parties conflict, I believe the evidence of Mr. Wetzel.

[13] The first issue I will be deciding is the parenting arrangement.

Parenting Arrangement

[14] There are many cases that review the principles that a judge should consider when making a decision on parenting of children. In the **Divorce Act** the only consideration for me is the best interests of the children as determined by reference to the condition, means, needs and other circumstances of the children. I am also, by the **Divorce Act**, to ensure that maximum contact - that each of the children should have as much contact with each parent as is consistent with their best interests and I am to take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[15] There is the **Foley** decision and others which talk about considerations and I am going to go through some of those.

Physical Environment

[16] One of the things that I am to look at is the physical environment. Mr. Wetzel has had the children with him since December 2012. I understand that the girls share a bedroom and the boys have their own rooms. Ms. O'Quinn has a three bedroom apartment and she will have the girls sharing a room and the boys sharing a room, each with bunk beds.

[17] I am satisfied that both parents can provide an adequate and appropriate physical environment for the children. I would not be concerned that the boys would have to share a room.

Discipline

[18] With regard to discipline the parents do not seem to get along very well but they have worked together recently regarding discipline for Chandler when he was in trouble on his Grade 9 trip to Quebec. Mr. Wetzel contacted Ms. O'Quinn and they met to discuss the matter with Chandler.

[19] This was a very good thing that they were able to communicate in that way and get together but that has not always been the case - that there was support for discipline. Ms. O'Quinn, in her Facebook communication with Chandler, has suggested to Chandler that his father is a loser; his father is not to be trusted; the court order was not to be complied with. Those are very inappropriate things to say to a fifteen-year old and are very disturbing. The effect is to undermine and not support Mr. Wetzel. She also did this by going behind the back of Mr. Wetzel who is the primary caregiver of the children. She went to school to see Kiersten without Mr. Wetzel's consent or knowledge and to a sporting event for Chandler, again without informing Mr. Wetzel. These actions, as I said, undermine. They do not support the primary parent and are contrary to the current court order which requires the parents to agree on parenting time for Ms. O'Quinn.

[20] Mr. Wetzel described the discipline that he provides and the support he provides for Chandler as he appears to be the most challenging child. All was very appropriate, firm but fair, and are appropriate responses such as speaking to the principal about Quebec, getting counselling in place and setting up appropriate activities and chores and paid work.

[21] With regard to Ms. O'Quinn, I accept the evidence of Mr. Wetzel as to what happened in October 2012. She called him at work upset that Chandler was out and he was not listening to her. Mr. Wetzel did not go to Ms. O'Quinn's that night because it was late. He obtained advice from the child welfare authorities. The next day he went to Ms. O'Quinn's and took Chandler out and had a talk with him and dropped him off again at her home. On his way home, there was a call from Ms. O'Quinn telling him to come and get Chandler who was sitting in the rain on the step.

[22] That was not the only time that the children were placed in Mr. Wetzel's care by Ms. O'Quinn without notice. They were dropped off to Mr. Wetzel by Ms. O'Quinn when she was upset with their behaviour. That was in August 2010 - all the children were dropped off at his work and were not appropriately dressed for where they were. I am concerned that part of her discipline regime, when frustrated, appears to be kicking the children out and telling them that they cannot continue to live with her. That is not appropriate discipline.

Role Models

[23] With regard to role models, both parents have worked for a living and provided for the children. There was some concern about the back and forth of the children between the parties. I am very concerned about the comments of Ms. O'Quinn to Chandler on Facebook. As I indicated before, "Dad's a loser, spoiled rotten brat, Dad is not to be trusted". Those are not the actions of a good role model. They are totally inappropriate, as I have already said. As concerning were her responses to Ms. Faught on cross-examination. When asked about the "spoiled rotten brat" comment, Ms. O'Quinn said, "You didn't put in what he wrote to me", as if there would be something that a fifteen-year old would say that would justify those remarks. A good role model and a good parent must remember who is the parent and who is the child. Ms. O'Quinn did not demonstrate that.

[24] There was also concern about the response as to where Ms. Faught got the information from Facebook. There did not appear to be any apparent apology or shame for writing the remarks but concern that the words were discovered.

Wishes of the Children

[25] Nathan and Chandler seem to want to continue to live and attend school in Dartmouth and both parents agree with that. I do not really have any evidence as to what the girls want and their ages are not an age when that would be as big a consideration.

Religious and Spiritual Guidance

[26] Both parents are Roman Catholic. Ms. O'Quinn appears to practice more of her religion but I am satisfied that either parent can provide religious or spiritual guidance for the children.

Experts

[27] With regard to experts, I do not have any expert evidence but I understand that Chandler is in counselling with Roger Godin. Ms. O'Quinn should have been consulted on this before it happened as Chandler is in the joint custody of the parents. However, I do find it was quite appropriate that Chandler was in

counselling as the evidence before me shows that Chandler appears to need counselling. The other thing that helps is that Chandler was willing to go which can be more than half the battle with a fifteen-year old.

Time Availability of a Parent for a Child

[28] Currently Ms. O'Quinn is not working and has much more time available for the children. Mr. Wetzel is working and divides his time appropriately with the children. Soon Ms. O'Quinn will have a new baby which will decrease her time availability.

Cultural Development

[29] Ms. O'Quinn indicates, and I agree, that the children should be exposed to their Acadian heritage and I trust that she will ensure that that happens.

Physical and Character Development of the Children

[30] Both parents have ensured, at least so far the three oldest, have been enrolled in appropriate activities and sports. Nathan is in football, Kiersten is in horseback riding and Chandler in football, guitar and art and the Duke of Edinburg. Raena, we have yet to see, but I am confident that she will be involved in appropriate activities. Mr. Wetzel has continued the children's involvement in their appropriate and wholesome activities.

Emotional Support

[31] This is the court's biggest concern. I accept that on one other occasion Ms. O'Quinn left HRM for an extended period of time, moved to Cheticamp and had little contact with the children. I do not accept Ms. O'Quinn's evidence that Mr. Wetzel did the same for months in 2011. I find that the period when he had little to no contact with the children was no more than a few weeks' period while he was moving.

[32] My biggest concern has been since December 2012. Ms. O'Quinn applied for and received permission to take an unpaid leave of absence from her employment as a teacher with the Halifax Regional School Board where she was making \$65,000 to \$68,000 a year. I accept that she did not tell Mr. Wetzel of her plans but did plan to serve him with documents to allow for the move. Mr. Wetzel found out from Kiersten about the move before Ms. O'Quinn's application or motion could be perfected and Mr. Wetzel applied for an interim motion to prevent Ms. O'Quinn from moving to Cheticamp with the girls.

[33] The matter came before the court on December 21, 2012 and Ms. O'Quinn was quite understandably looking to retain counsel. The court made an order to maintain the status quo until evidence could be heard, with the children remaining in HRM, and that was the plan. Ms. O'Quinn indicated she had given up her apartment, had taken a leave of absence for financial reasons including daycare costs being too expensive, and that she was going to live with her boyfriend in Cheticamp and try to get some substitute teaching. Mr. Wetzel would have been satisfied at that time with the girls remaining and living with Ms. O'Quinn in HRM until the evidence could be heard but Ms. O'Quinn said she was going to

live in a shelter with the children. As a result, an interim order was made that placed the girls in the primary care of Mr. Wetzel until the matter could be heard.

[34] A conference was scheduled for January 31, 2013 to allow Ms. O'Quinn to obtain counsel. Ms. O'Quinn did not appear on January 31, 2013 and did not have any contact with the court to reschedule the conference. She had no further contact with the court until the day before the Date Assignment Conference at the end of March 2013.

[35] Ms. O'Quinn has asserted that she left her job because she was pregnant and it was a high risk pregnancy. She could easily have verified that by providing the medical records and the paperwork from her leave of absence request. Neither were provided.

[36] Much more disturbing than not having contact with the court, Ms. O'Quinn had little to no contact with the children. She did not see them from December until the end of March 2013. She submitted to the court and swore in her affidavit that she made many attempts to call Mr. Wetzel to arrange access but he was denying and thwarting her access. I do not find this to be true. Mr. Wetzel

provided phone records showing that between December 2012 and April 2013 he called Ms. O'Quinn more than she called him. Most of Ms. O'Quinn's calls to Mr. Wetzel in December were prior to December 21, 2012, the court appearance on that day. She called once in January, not at all in February and once in March. She obtained a cell phone in April and still did not place calls to Mr. Wetzel.

[37] Even if the cell phone records do not show calls where no voice mail was left, Ms. O'Quinn has not provided a reason why she would not leave a voice mail. She cannot assert that she tried to contact Mr. Wetzel for access but did not leave a message to tell him what she wanted. While Mr. Wetzel provided his phone records, she has provided nothing to substantiate her claim and I accept the evidence of Mr. Wetzel which was corroborated by the cell phone records.

[38] Ms. O'Quinn submits the lack of contact and failure to appear in court are a result of a miscarriage in December 2012 and the lasting emotional effects of that. It still does not explain why she did not call the court and ask for an adjournment and it does not explain why she did not see her children from December to March. It does not explain her lack of phone calls to the children. She was putting her emotional well being before that of her children.

[39] If she was emotionally supporting her children she would have been in contact with them. I do not accept her reasons for not being in contact with the children.

[40] I also accept Mr. Wetzel's evidence that she did not provide a contact telephone number or address.

[41] There is also the very disturbing contact she had with Chandler. Both parents acknowledge that Chandler is the most challenging of the children. He is the one most affected by the breakup of the parents. He has been described as withdrawn and emotionally detached. While acknowledging the concerns about Chandler and the fact that he would be missing contact with her, Ms. O'Quinn was in contact with him on FaceBook writing hurtful, immature and disturbing messages that could only be very damaging to his emotional and mental health. Again, this is very concerning. It is not a way to develop a child's self esteem and confidence by calling them "a spoiled rotten brat" and undermining their father.

[42] Ms. O'Quinn complained about poor decisions made by Mr. Wetzel. I find her decisions to uproot the children to go to Cheticamp which would take them from their other parent, their siblings, their extended family and friends; having no communication with them; and when having communication with Chandler, making those horrible comments - I find those to be focused on what Ms. O'Quinn wants. They were not child focused decisions.

Financial Contribution

[43] Ms. O'Quinn earned, and has the capacity to earn, much more than Mr. Wetzel. She was the primary earner in the family, however, Mr. Wetzel has been supporting the children without any assistance from Ms. O'Quinn since December 2012 when she left her job. She then received EI and has now indicated she is going to apply for Income Assistance but does not seem to have a solid financial plan to support the children other than relying on her fiancé.

Extended Family

[44] With regard to extended family, while the children have been in the care of Mr. Wetzel he has continued their contact with Ms. O'Quinn's family who live in the area or are visiting the area, also with his own family and with Ms. Gallant's family.

[45] Ms. O'Quinn has been in Cheticamp and has not exposed the children to extended family recently.

Willingness to Facilitate Contact with Other Parent

[46] Ms. O'Quinn does not want to provide Mr. Wetzel with any decision making for the children although he has been making all of the decisions during the last seven months due to her dropping out of the children's lives. Mr. Wetzel recognizes the need for the children to have contact with their mother and has facilitated that contact with her having the children every second weekend since she came back to HRM and he has had a way to contact her.

[47] Ms. O'Quinn seemed to indicate during her testimony that the boys needed to have contact with their father but the girls had a lesser need for contact with their father. There is not a gender presumption that female children live with their female parents and male children live with their male parents. I found Ms. O'Quinn's dismissal of the need for Mr. Wetzel in the girls' lives disturbing.

[48] Ms. O'Quinn raised concerns about not being provided report cards and material by Mr. Wetzel. She can get report cards directly from the school. There was no evidence that she tried to get information from the school or the website for sports, etc.

[49] Ms. O'Quinn complained that Mr. Wetzel changed Raena's daycare. However, she was concerned about the cost of it in December when she made the court appearance. I accept that Mr. Wetzel understood that Ms. O'Quinn had given up the daycare spot for Raena. He had no choice but to find another daycare for Raena so he could work. Also, it would be difficult to consult when no contact information was provided.

Plans

[50] Mr. Wetzel's plan remains the same, he is taking correspondence courses to upgrade his position in his current employment and plans to stay where he is. Ms. O'Quinn was not very clear on her financial plans or future living arrangements. She was not clear about going back to work in 2014. She did not rule out moving back to Cheticamp. For the time being she is going to live in Dartmouth, separate from her fiancé, and will have her new child and parent her current children.

[51] The past is usually a good predictor for the future. Mr. Wetzel has been much more stable and consistent which is something important for children. He has had few moves and few changes in employment. Ms. O'Quinn has been less stable. She has had many moves and has given up financial stability.

[52] It is clear that it is in the children's best interest to maintain a stable, consistent and appropriate home where the children's physical, mental and emotional health will be provided for. I find that this can only occur if the children remain with their father.

[53] The starting point for a custody arrangement, according to our Court of Appeal, is to start with shared and joint custody, equal time if that is in the best interests of the children. I do not find that equal time would be in the best interests of the children because of the lack of communication and mistrust. It is not possible because of the lack of support that Ms O'Quinn has provided for Mr. Wetzel's parenting. She has undermined his decisions and has gone behind his back to contact the children contrary to the court order.

[54] The parents have problems communicating effectively but they have done so recently for Chandler.

[55] I do find it is in the best interests of the children to remain in the joint custody of the parents as long as clear schedules and decision making power is spelled out.

[56] So the children, all four of them, will remain in the primary care of Mr. Wetzel.

[57] Regular parenting time, for Ms. O'Quinn, will be every second weekend from Friday at 5:00 p.m. until Sunday at 5:00 p.m. If the Friday is a day with no school, and I am not including in that specified holidays and summer, then it will be 5:00 p.m. on Thursday and if Monday is a non-school day then 5:00 pm. on Monday will be the return time. Ms. O'Quinn will also have the children every Wednesday from 4:00 p.m. until 7:30 p.m., understanding of course that Chandler and Nathan both will have a big say in their own schedules, particularly Nathan who has work schedules and Chandler's commitments that he has made.

[58] Ms. O'Quinn shall ensure the children attend their extracurricular activities and obligations that they have made for employment, etc., when in her care.

[59] The communication will be by email. I understand the history in the proceeding and that Mr. Wetzel appeared at a court proceeding with a stack of emails. Ms. O'Quinn does not want contact by email but Mr. Wetzel, I understand at that time, felt he had to respond to allegations of inappropriate communication. Email provides a clear picture of communication and it is not as expensive as getting a landline which can be done if that is agreed or decided. It concerns me when one parent or party does not want to communicate in a manner

that has a clear record. I always think, “What is there to hide?”. The communication is to be by email and the response is to be within 48 hours; if no response is provided then the parent can call the number that is provided for communication with the other parent

[60] With regard to decision making – Mr. Wetzel will consult with Ms. O’Quinn in relation to all major decisions regarding the children’s education, health and well-being. The parties have shown that they can consult, however, if there is no agreement between the parties as to what the appropriate decision is, Mr. Wetzel will have the final say. He has shown that his decisions are more child focused.

[61] The day to day decisions for the children will be made by the parent in whose care the children are in.

[62] Both parties will provide contact information, including a telephone number and address, to allow contact with the other parent. Mr. Wetzel is to provide Ms. O’Quinn with all of the information about the children which she would not have access to from the school, websites, other things, etc. That is to be provided to

Ms. O'Quinn. Both are entitled to attend school functions and parent-teacher meetings, sporting events, those types of things.

[63] Medical emergencies - the parent in whose care the children are in will see to the medical emergency and will notify the other parent as soon as possible at the number provided.

[64] Ms. O'Quinn, as I said, will ensure that the children attend their extracurricular activities and obligations while in her care such as mowing lawns, etc., which Chandler has committed to this summer.

[65] Parenting time and arrangements are to be made between the parents and not with the children directly.

[66] The children are not to be used to communicate information from one parent to another.

[67] Ms. O'Quinn will not have contact with the children outside the parenting schedule without discussing it with Mr. Wetzel and providing details of her planned contact.

[68] Both parents are entitled to receive information from professionals who are involved with the children including, teachers, doctors, dentists and counsellors.

[69] The transfer of the children will be at the Tim Horton's on Main Street unless the parents agree to a different transfer place.

[70] Any non-emergency request to change parenting time will be made 72 hours in advance.

[71] The special parenting time will include the Thanksgiving weekend which will be from Friday at 5:00 p.m. until Monday at 5:00 p.m. and that is to alternate between the parents with Mr. Wetzel having Thanksgiving in 2013 and all odd-numbered years and Ms. O'Quinn will have the children in her care in even-numbered years.

[72] For the Easter weekend, if the parents have a residence within an hour's drive of each other, as they currently do, they are to be shared. Mr. Wetzel will have the children in his care from Holy Thursday to Easter Saturday at 7:00 p.m. and Ms. O'Quinn will have the children from Saturday at 7:00 p.m. until Easter Monday at 5:00 p.m. This is because Ms. O'Quinn has Easter Monday off and Mr. Wetzel does not. If the parents do not live within an hour of each other then Easter will alternate with Mr. Wetzel having odd-numbered years and Ms. O'Quinn having even-numbered years from Thursday at 5:00 p.m. until Monday at 5:00 p.m.

[73] The summer will be divided equally in two week blocks. Ms. O'Quinn currently has the summers off and Mr. Wetzel does not so Mr. Wetzel shall inform Ms. O'Quinn of the weeks that he will have the children in his care, on or before March 31 of each year.

[74] The Christmas vacation is from the last day of school before Christmas at 5:00 p.m. until 5:00 p.m. the evening before school resumes in January. One parent is to have the children from 5:00 p.m. the last day of school at the commencement of the Christmas Break until the 25th at 2:00 p.m. The other parent

will have the children in their care from the 25th at 2:00 pm until 5:00 p.m. the evening before school starts. And that first half and second half will alternate so Ms. O'Quinn will have the first half which is 5:00 p.m. the day school is being let out until 2:00 p.m. on the 25th in odd-numbered years and Mr. Wetzel will have the first portion in even-numbered years. I am making it a clear time rather than them deciding each year based on the Christmas holidays so it is clear and not something that needs to be discussed. You can change it, as I will note later, but that is the fall-back schedule if there is no agreement.

[75] Mother's Day weekend, the children will be in Ms. O'Quinn's care from Friday at 5:00 p.m. to Sunday at 5:00 p.m.

[76] Father's Day, Mr. Wetzel will have the children in his care.

[77] March Break, if the parents are living within an hour of each other again as they do now, the March Break will be divided equally unless otherwise agreed.

The first half is 5:00 p.m. on the last day before March Break until Wednesday at 3:30 p.m. The second half is 3:30 p.m. Wednesday until 5:00 p.m. the evening before school commences again after the March Break. Mr. Wetzel will have the

first half in even-numbered years and Ms. O'Quinn will have the first half of odd-numbered years. If the parents agree, one parent may have the children for the entire March Break in a given year and the other parent will have the children for the entire March Break the following year. If the parents are not living within an hour from each other then March Breaks will alternate and Ms. O'Quinn will have the children in her care for the entire March Break in odd-numbered years and Mr. Wetzel's in even-numbered years.

[78] The parent who does not have the care of a child on the child's birthday or other special event will make arrangements to celebrate the event at a time when the child is in that parent's care.

[79] For travel, if there is travel to be outside of the province or country, the parent will provide the other parent notice with an itinerary by email, setting out all of the details, where they will be, the dates for travel. For out of country travel, the other parent will provide the consents and travel documents necessary for out of country travel.

[80] Each parent will speak in a respectful manner to and about the other parent and not allow others to speak in a disrespectful or negative manner about the other parent in any of the children's presence. They are also to speak in a respectful manner about the partner of the other parent and not make disrespectful or negative comments about that person or allow anybody else to make disrespectful or negative comments about that person in the presence of the children.

[81] All other holidays, including but not limited to Victoria Day, Canada Day, August Civic Holiday, Labour Day and Remembrance Day will follow the regular schedule.

[82] Parenting time shall only be altered on the written consent of the parties or further court order.

[83] There will be no make up time for missed parenting time unless the parents agree otherwise.

[84] Each parent will accommodate and not unreasonably withhold agreement to the special events in the lives of the other parent and the parents can agree on other parenting time, again as long as it is in writing.

Child Support

[85] With regard to child support, Mr. Wetzel is asking that I impute income to Ms. O'Quinn. Ms. O'Quinn was employed as a teacher with the Halifax Regional School Board until she took an unpaid leave of absence in December 2012. Mr. Wetzel is asking that income be imputed under s. 19(1)(a) of the Child Support Guidelines for being intentionally under-employed or unemployed other than by needs of a child or health needs.

[86] Justice Forgeron in the **Parsons** case, which is 2012 NSSC 239, set out the law on the imputation of income at paragraphs 32 - 35. In that decision it says:

[32] Section 19 of the *Guidelines* provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:

- a. The discretionary authority found in s.19 must be exercised judicially, and in accordance with rules of reasons and justice, not arbitrarily. A rational and solid evidentiary foundation, grounded in

fairness and reasonableness, must be shown before a court can impute income: **Coadic v. Coadic** 2005 NSSC 291.

b. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49.

c. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her income has been reduced or his/her income earning capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34; **MacGillivray v. Ross**, 2008 NSSC 339.

d. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors. The court must also look to objective factors in determining what is reasonable and fair in the circumstances: **Smith v. Helppi** 2011 NSCA 65; **Van Gool v. Van Gool**, (1998), 113 B.C.A.C. 200; **Hanson v. Hanson**, [1999] B.C.J. No. 2532 (S.C.); **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.

e. A party's decision to remain in an unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-induced reduction in income: **Duffy v. Duffy**, *supra*; and **Marshall v. Marshall**, 2008 NSSC 11.

[33] 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] 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.

...

[33] In Nova Scotia, the test to be applied in determining whether a person is intentionally under-employed or unemployed is reasonableness, which does not require proof of a specific intention to undermine or avoid child maintenance obligations.

[34] In **Gill v. Hurst** 2011 NSCA 100, Bryson J.A. affirmed the trial judge's decision, [2010] N.S.J. No. 645, to impute income where the father's attempt to justify his under-employment for health and educational reasons was rejected: paras. 30 and 31. In addition, Bryson J. held that the trial judge made no error by imputing the "modest sum" of \$25,000 to the father.

[35] In reviewing the under-employment issue, this court (this is Justice Forgeron speaking – **added**) will follow the three pronged analysis suggested in **Drygala v. Pauli**, [2002] O.J. No. 3731. First, I will determine whether Mr. Parsons is under-employed. Second, I will canvas whether this is caused by the health needs of Mr. Parsons. Third, if not, I will decide what quantum of income should be imputed.

[87] So that is the law that I have to consider.

[88] Ms. O'Quinn left her employment making \$65,000 to \$68,000 a year and took an unpaid leave of absence. She knew at the time she took the leave that she had an obligation to support her four children and I am satisfied that she is intentionally unemployed, I am sorry, now unemployed. She does not need to do that in order to thwart child support.

[89] With regard to her health needs, while the onus is on Mr. Wetzel to show why I should impute income, it shifts to Ms. O'Quinn if she is asserting a medical need to not be employed. I do not have any evidence of a medical need other than

pregnancy that Ms. O'Quinn describes as high-risk with no medical evidence. This evidence is easily obtained and I am not satisfied that her leave is medically necessary so I am satisfied that she is intentionally unemployed and it is not necessary for health reasons. I have to look at the amount of income. Justice Forgeron looked at what Mr. Parsons was capable of earning based on last year's income when he worked and I think this is a fair and reasonable manner to determine quantum of income. Had she not taken the leave of absence, Ms. O'Quinn would be earning as a teacher, making approximately \$66,000 a year so Ms. O'Quinn will pay the table amount of child support for the four children which, based on the Child View calculations, is \$1,437 a month commencing January 2013 and continuing up until October 1, 2013.

[90] I am satisfied as well that there are child care costs for Kiersten and Raena and I find them to be reasonable and necessary in order to allow Mr. Wetzel to work. The net amount of those, according to the Child View calculations, is \$692 a month and by the Child View calculations Ms. O'Quinn should be paying those at a rate of 73.81% and Mr. Wetzel sharing those at 26.19%. That would mean that Ms. O'Quinn is to pay the child care amount, sorry I am using income for her of \$66,000 and Mr. Wetzel of \$22,224; both from their 2012 income tax returns.

Ms. Quinn shall pay \$510 a month from January 1, 2013 to and including June 1, 2013. I am not going to order it to be paid in the summer as Ms. O'Quinn has offered to take the children for the summer, in her care, and Mr. Wetzel has asked for that not to happen. So, I am not ordering the child care costs for the summer months, only the Table Amount of \$1,437 a month.

[91] There are other costs which are for the children's extracurricular activities and given the situation with Ms. O'Quinn, I am not going to order that they be paid although I do find that most of the activities are reasonable for the children and that will be revisited or can be revisited when Ms. O'Quinn is actually back at work.

[92] Commencing October 1, 2013 and until October 1, 2014 Ms. O'Quinn is to pay, based on the income she would have received on maternity leave under the contract from the Nova Scotia Teachers' Union, including the Employment Insurance she would receive and any top up of those wages, for the period of time specified in the contract. If the parties cannot agree on what that amount is, once Ms. Jones has received that information from the Teachers' Union, the matter can be set before me again for determination.

[93] Commencing November 1, 2014 Ms. O'Quinn will be paying the table amount again based on either \$66,000 a year or the amount that she will be earning commencing in 2014. And she is to provide that information to Mr. Wetzel.

[94] The parties are to exchange their income tax returns, including all of the attachments, and Notices of Assessment on or before June 15th of each year.

Property

[95] Most of the property was divided between the parties' separation date and today but there are a couple of outstanding issues.

[96] There is the loan to GMHC on the vehicle. As I have indicated I have received different amounts and so Ms. Faught is going to be finding out the correct amount of that. I believe one party said \$14,000 and one said \$16,000. There was another indication of a \$3,000 amount. Mr. Wetzel indicates that this was a family vehicle and the loan was a family loan. I understand the size of the vehicle

adds to it being a family vehicle. It was repossessed about three months after the physical separation of the parties which occurred at the end of June. Ms. O'Quinn, in her affidavit, refers to the car as the family vehicle. I do not find it was in an accident as a result of actions of Mr. Wetzel's father but I do find that it is a matrimonial debt and it is to be divided equally between the parties. They are both equally responsible for the current amount owing on that debt.

[97] There was an indication of a loan from Ms. O'Quinn's mother but our Court of Appeal is pretty clear on what is necessary to show that and I do not have any documents. I do not have anything to distinguish it from a gift so it is something that is easily alleged but I am not satisfied that there is a legally enforceable matrimonial debt.

[98] With regard to the pension of Ms. O'Quinn, there is a presumption that that is to be divided equally and I would need to be satisfied under Section 13 that an unequal division would be unfair or unconscionable, and the only ground that has been raised was the contribution that Ms. O'Quinn made at the end of the relationship after separation to the expenses for the home and other expenses. Mr. Wetzel was not working at that point and had not been working when they

were together. Ms. O'Quinn continued to pay the bills as she did when they were together. He had no ability to pay the bills and she was living in the house. He did not contribute toward the home but she did not pay occupational rent for using the joint asset that was owned by the parties. So I am not satisfied that it would be unfair or unconscionable to divide the pension equally. The pension is to be divided equally from the date that Ms. O'Quinn started her employment until the date of separation.

[99] And the other piece of information that I am missing is the type of long term service award or severance package that Ms. O'Quinn is entitled to for her years of employment that is normally a matrimonial asset. That is to be divided equally and I do find in this case it is anything that exists of that sort and is to be divided equally from the date she started her employment as a teacher in Nova Scotia up until December 2008.

J.