SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Volcko v. Volcko, 2013 NSSC 342

Date: 2013-12-30
Docket: 1201-64277
Registry: Halifax

Between:

John B. Volcko

Petitioner

v.

Susan Scheuermann Volcko

Respondent

Judge:	The Honourable Justice Carole A. Beaton
Date of Hearing:	October 7-10, 2013, in Halifax, Nova Scotia
Written Decision:	December 30, 2013
Counsel:	William Ryan, Q.C. & Sara Scott , for the applicant Gordon Kelly & Adrienne Bowers for the respondent

By the Court:

Introduction:

[1] The parties came before the court in October 2013 for a four day divorce trial concerning various matters of corollary relief in dispute. There was surprisingly little disagreement between the parties as to many of the facts surrounding the disputed matters; rather the primary focus during the hearing was on how the facts would inform the application of legal principles.

[2] At the outset, the parties did identify certain agreements consistent with their overall intention to effect an equal division of matrimonial assets, reached prior to trial:

(a) the value of the matrimonial home to be retained by the Respondent is $1,022,500.00.

(b) the vehicles possessed by each party are valued in the amounts identified by the Petitioner.

(c) the Petitioner's employment pension (from PCL) and the Respondent's employment pension (from JP Morgan) shall be equally divided for the period of the marriage, calculated at the discount rate amounts (which assume tax considerations) identified by the Respondent.

(d) in July 2010 the parties divided equally a TD Waterhouse Investment Account with each party realizing $162,787.50.

(e) the Aeroplan points shall be equally divided.

(f) RRSP's (less tax consequences) and other savings and investments shall be equally divided.

(g) certain monies (non-registered investment accounts no. 5******18 and no. 5***79 held at TD Bank; GIC's and bank

> accounts held in trust at CIBC bank) previously earmarked and intended for the benefit of the adult children of the marriage do not form part of the pool of matrimonial assets available for division.

[3] During closing arguments it became apparent the parties were in agreement as to the need to have the Petitioner secure an accounting to reconcile the financial records of certain bonuses and dividends received by the Petitioner during the years 2006-2009. Subsequently the Court received on December 11, 2013, with consent of the Respondent, the Petitioner's Supplementary Affidavit attaching that reconciliation.

[4] The parties married in 1990 and began living apart in late 2006. They are the parents of two adult children, the younger of whom remains dependent as a university undergraduate student. Since the late 1990's the Petitioner (hereinafter "the Husband") has been the sole income earner for the family, following the parties mutual decision that the Respondent (hereinafter "the Wife") would leave the workforce to focus on raising the children and thereby provide the Husband with greater employment flexibility.

[5] The court received the Affidavit evidence of the Husband and his witnesses Andrew Wallace, Stephen Vaslet, Jim Mills and Tom Vincent; only the Husband was subject to cross-examination. The Wife also provided Affidavit evidence and was subject to cross-examination.

Issues:

[6] The outstanding issues for determination are as follows:

(a) What is the correct date of separation?

(b) Are certain shares held by the Husband properly characterized as matrimonial assets and subject to equal division between the parties, or are they business assets?

(c) Child support: prospective (quantum) and retroactive; section 7 expenses.

(d) Spousal support: prospective (quantum and duration) and retroactive.

(e) Regarding certain matrimonial assets (household contents and furnishings; a golf membership), how are these items to be divided?

Issue No. 1- What is the date of Separation?

[7] The Husband maintains the parties separated in October, 2006; the Wife maintains the separation occurred in June, 2008. The breakdown of a marriage is addressed in s. 8 of the *Divorce Act*, R.S.C. 1985, c. 3:

> 8 (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.
>
> (2) Breakdown of a marriage is established only if
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> (*a*) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and part at the commencement of the proceeding; or
>
> (*b*) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,
>
> (I) committed adultery, or
>
> (ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

> (3) For the purposes of paragraph 2(a)
>
> (*a*) spouses shall be deemed to have lived separate and apart or any period during which they lived apart and either of them had the intention to live separate and apart from the other...

[8] In determining the date of separation, each case must be examined on its own facts; while a certain factor or combination of factors might lead to a particular determination in one case, it does not necessarily follow that the presence of the same factor(s) would always lead to a similar determination in another case: *Dupere v. Dupere* (1974) 9 N.B.R. (2d) 554 (QB); *French v. French* (1997) 162 N.S.R. (2d) 104 (SC); *Gardner v. Gardner* (2005) 232 N.S.R. (2d) 68 (SC)**.**

[9] The parties agreed in their evidence that the Husband moved out of the matrimonial home on Thanksgiving weekend in 2006, and soon purchased another residence without the input of the Wife. When the Husband left, the parties were very concerned about the children because the Husband's difficult childhood experience had been the acrimonious divorce of his parents which had a "significant impact" on him; the Husband was "determined" that his children would not have a similar experience.

[10] Both parties testified as to the details regarding the Husband's determination to avoid conflict, including him spending a number of "family occasions" with the children and the Wife (e.g. birthdays, Christmas, out-of-province travel to one of the children's sports tournaments and to his father-in-law's birthday, mutual golf games with the children, and attendance at the children's school events). The Husband told the Court "...throughout the years between 2006 and 2009 [the Wife] and I continued to live separate lives but with the children in common".

[11] Under cross-examination the Husband testified that between 2006 and 2009 he chose to stay in close contact with the Wife so as to maintain harmony within the family and to continue to focus on the children. The Husband testified that when he moved out he wanted the children to feel as though they were part of a family even though he considered the marriage to be over, because he was concerned the Wife would try to draw the children into the parties' issues or alienate the children if he did not strive to keep daily life as normal as possible for

all concerned. For the same reasons, he was worried about raising the subject of divorce with the Wife.

[12] Under cross-examination the Husband described having been questioned by friends and reporting to them that he was separated but keeping the matter quiet for the benefit of the children. Independent evidence to that effect was also provided by the witnesses:

(a) Mr. Vaslet, who testified he was aware of the parties separation shortly after the Husband moved out of the home in 2006. He heard the Husband express concern for the children and that the marriage was over.

(b) Mr. Vincent, who testified as to the same, and stated he became aware of the separation in 2007.

(c) Mr. Mills, who testified he met the Husband in 2008 and learned the Husband was separated "over the course" of discussions; it was clear to him the Husband felt there would be no reconciliation.

[13] While none of those three witnesses provided specific dates in their evidence, none of them were cross examined. The cumulative effect of their evidence was that it corroborated the Husband's evidence that after he left the matrimonial home, friends/business associates in the community understood from him that the marriage was over.

[14] The Husband's evidence was that he told the Wife "on numerous occasions" that the marriage was over, nonetheless he continued to attend marriage counselling with her. Although he believed the Wife may have attended counselling in an attempt to reconcile, he did so to have the process confirm his view that there was no hope of reconciliation.

[15] The Husband was cross-examined concerning 14 emails which he and/or the Wife authored over the time period from February, 2007 to November, 2008. The majority of the messages related to the subject of coordinating events involving the

parties and the children. Two exchanges in particular (Exhibit 24, March 31, 2008 and Exhibit 26 , October 5, 2008) contained replies by the Husband to the Wife's comments about their ongoing counselling, including that he was committed to the process, that the Wife was not wasting her time and that there was "still hope". The Husband agreed with counsel for the Wife that during those exchanges she had given him an opportunity to be honest by asking him directly about his level of commitment to the process and he had mislead the Wife.

[16] By contrast, the Wife testified that throughout the period from late 2006 to June 2009 she "truly believed that [the Husband] and I were working on the issues that had arisen in our marriage and I did not believe or intend that our marriage was at an end", although she did agree that after it happened, she had discussed the 2006 separation with a number of her friends. The wife pointed to events the parties shared, the frequency and types of communication between them, the continued sharing of finances and the ongoing attendance at marriage counselling as proof of the lack of intention of the parties to sever the marital consortium.

[17] The Wife relied on *Miller v. Miller* 2000 NSCA 64 in support of her position that while the parties may have lived in separate residences after 2006, the nature and frequency of their interaction and their continued counselling meant they were not separated. In *Miller* (supra), Bateman, J.A. described the parties' circumstances as follows:

> [4] The trial judge aptly described the circumstances of the parties' separation as unique. The Wife testified that on October 24, 1995 she moved into a friend's home, she and Mr. Miller having agreed to live in different residences while they worked on their marital problems. From that time forward they spent the majority of weekends together, had regular sexual relations, shopped, dined and attended social functions together as they had always done. She testified that although the parties were living in separate accommodations it was with a view to working out their differences, not ending their marriage. During the months preceding Christmas of 1997 they began to spend less time together and were arguing frequently. In March of 1998 the Wife initiated divorce proceedings. The Wife's evidence in this regard was uncontradicted. Justice Haliburton found that January 1, 1998 was the date of separation. Counsel for Mr. Miller submits that the trial judge should have choose October 24, 1995 or, alternatively, some date between then and January 1, 1998. We are not persuaded that Justice Haliburton erred in law in fixing the separation date as he did on these unusual facts...

[18] There is a sharp distinction to be drawn between the factual circumstances in *Miller* (supra) and this case. Here, the parties did not spend the majority of their free time together, they did not engage in regular sexual relations, they did not shop together, and they did not attend social functions together as they had previously done. Rather, their contact centred around their children, with the exception of their attendance at marriage counselling. Each had a different motivation for participating in counselling, with the Wife seeking to repair the marriage and the Husband looking to finalize its end. In *Miller*, *both* parties, while living in separate residences, were mutually intending to resolve their marital problems.

[19] The Wife also relies on *J.L.L. v. G.A.L.* 2010 MBQB 39 in support of her position as to the later date of separation. In that case, Menzies J. stated at paragraph 4:

> The test to determine whether parties have been living separate and apart is not a contentious issue in law. As stated by Douglas, J. (as she then was) in Field v. McLaren, [2009] M.J. No. 155 (Q.B.) beginning at paragraph 10:
>
> > "Certainly I accept it is settled law that the intention of one party to separate may be sufficient to sever the relationship. The person desiring to separate must act in a way consistent with an intention to separate...
> >
> > ... It is the difficultly inherent in determining intention that has lead numerous judges to consider actions and behaviour as relevant to the determination of whether there was an intention to separate. *Behaviour ought to reflect a party's intention* or how can a court objectively determine a date of separation?" (Emphasis added).

[20] In considering the Husband's actions over the period from October 2006 to June 2009 I am satisfied on the evidence before me that he not only formed an intention to live separate and apart from his wife when he departed the matrimonial home in October 2006, but he demonstrated that intention in every way, save and except maintaining a harmonious relationship with the Wife, which centered around the children. (To that extent, both parties went to admirable lengths to protect the children's sense of security in a manner that might well be the gold standard for separated parties looking to focus on the best interests of the children).

[21] The Husband's intention was illustrated in the presence of the following factors:

(a) the children were told the parties *"separation"* was an interim or trial event.

(b) the parties never again engaged in sexual relations or shared sleeping quarters.

(c) the parties did not spend time alone with one another except to engage in "homework" prescribed at their marriage counselling sessions, which consisted of occasionally eating dinner together.

(d) the Wife no longer attended any of the Husband's work related social events or functions.

(e) the Wife did not take part in the Husband's selection of a residence nor did she ever visit him there.

(f) the parties took separate vacations with the children.

(g) the parties did not shop together, perform household tasks for one another, or engage together in any of the routine activities of daily life.

[22] Objectively assessed, the Husband presented through his actions, and interactions with his Wife, as possessing an intention to live separate and apart. Although the Husband, perhaps somewhat disingenuously, hadn't raised the subject of a divorce with the Wife in 2006, he was clearly not intending to remain married. The separation went on for an extended period, but nothing about the nature of the parties ongoing contact could reasonably permit any determination other than that these parties were separated but behaving maturely for the children's sake. The Husband clearly formed an intention to live separate and apart and outside a married state in 2006. The Wife's evidence supports that she

did not view the purpose of marriage counselling as being for any reason other than to save the marriage, but I can be satisfied the Husband had already formed the requisite intention to separate, as required by section 3(a) of the *Act,* in 2006.

[23] The Wife testified she was confident the Husband had always understood that a "line in the sand" for her, in terms of keeping the marriage intact, would be if he became involved with another woman. Indeed, on two separate occasions after 2006 but before 2009, the Wife confronted the Husband and he denied the same. The Wife testified she declared the marriage over in June 2009, once she learned through the counselling process that the Husband was now involved with another woman. That was the Wife's measure as to the end of the marriage. The Wife may have chosen to interpret the Husband's actions in a particular light during the period between 2006 and 2009; those same actions, viewed objectively, satisfy me the Husband demonstrated the requisite intention to separate from the Wife and sever the "marital consortium", despite his efforts to remain amicable.

[24] Section 8 of the *Divorce Act* does not require a mutual intention to end the marriage, as discussed in *O'Brien v. O'Brien* 2013 ONSC 5750, per McDermot, J. at paragraph 50:

> Unlike the decision marry, the decision to separate is not a mutual one. It is a decision which is often made by one party over the objections of the other. Those protestations matter not: once one party has decided to permanently separate and has acted on it, the other party has no ability to stop the process or object to it. This is confirmed by section 8(3)(a) of the *Divorce Act*, which states that "spouses shall be deemed to have lived separate and apart for any period during which they lived separate and apart and *either of them* had the intention to live separate and apart from the other" (emphasis). As stated by D.L. Corbett J. in *Strobele v. Strobele*, [2005] OJ 6312 (S.C.J.), the separation occurs when "the parties knew or acting reasonably, ought to have known that their relationship was over and would not resume"[paragraph 29].

[25] The facts here may be distinguished from those in the recent case of *Morrison v. Morrison*, 2013 NSSC 358 wherein Forgeron, J. was satisfied that although the parties had been unhappily married for a number of years, because they presented to family, friends and the broader community as a married couple, separation only occurred once the husband purchased a property without discussing it with the wife, and she followed that by signing a Petition for Divorce. Here, both parties were presenting to family, friends and the broader

community as a separated couple by 2006, even though divorce was not raised until 2009.

[26] I do not accept the Wife's assertion that 2009 was the date of separation because she was "mislead" by the Husband about his intentions between 2006 and 2009 while the parties were engaged in marriage counselling. The parties circumstances during that period were very different from reported cases where parties were found to have separated even though they continued to live under the same roof (*French v French*, [1997] N.S.J. 287) or where parties lived separately but continued to engage in sexual relations (see *K.L.S. v. D.R.S* 2012 NBCA 16). I do not accept these parties' participation in marriage counselling had the effect of blunting or negating sufficiently the cumulative effect of all of the other factors discussed earlier herein which so clearly point to a separation in 2006.

[27] In *K.L.S.* (supra) Green, J.A. on behalf of the majority, in listing factors relating to the circumstances of the parties that a court may look to in determining whether parties are living separate and apart, noted:

> [22] This list is not intended to be exhaustive. As part of an analytical framework, these and similar factors should be considered collectively, and the Court should base its finding on whether the parties are at law living separate and apart based on the whole of the evidentiary record. It is not necessary for each individual factor to point conclusively to legal separation. As well, no one factor should be given undue weight, especially to the exclusion of some or all of the others which may point to a contrary result.(emphasis added)

I conclude that to place greater weight or emphasis upon or ascribe a greater significance to the Husband's participation in marriage counselling would be to do so to the exclusion of virtually all of the other factors that establish these parties separated in October, 2006.

[28] The parties relationship after October 2006 was in the context of their mutual concern and consideration for their children. The only significance of 2009 is that it was the point at which the Wife accepted that the marriage, already over, would not be resurrected. The date of separation, for the purposes of identifying the matrimonial asset pool available for division, the duration of

spousal support, and the period(s) of any retroactive payments, is fixed at October 31, 2006.

Issue No. 2- The Shares

[29] The Husband asserts shares (hereinafter "the shares") held in his name with PCL (his employer) constitute business assets as the same are defined in the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275.

[30] Section 2(a) of the *Act* defines business assets as follows:

> 2 (a) "business assets"means real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes.

[31] The Wife argues the shares are matrimonial assets pursuant to section 4 of the *Act* and therefore subject to equal division between the parties. Section 4 provides that matrimonial assets are defined as follows:

> 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
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> (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;
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> (b) an award or settlement of damages in court in favour of one spouse;
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> (c) money paid or payable to one spouse under an insurance policy;
>
> (d) reasonable personal effects of one spouse;
>
> (e) business assets;

(f) property exempted under a marriage or separation agreement;

(g) real and personal property acquired after separation unless the spouses resume cohabitation.

[32] The onus is on the Husband, as the party who asserts the shares are excluded from division under the *Act*, to establish on a balance of probabilities that the shares are exempt under section 4(1)(e) as business assets: *L.(J.W.) v M.(C.B.)*, 2008 NSSC 215.

[33] The Husband relied on the fact he began accumulating the shares prior to the marriage, and that they are not able to be divided because they are required to be held only in the name of the employee. While the Wife asserted the shares do not fit within the definition of business assets under the *Act,* she agreed the shares are not divisible per se, so that it would be necessary to calculate her beneficial interest in them.

[34] The Wife did not challenge the Husband's evidence that the shares cannot be controlled by him and are contingent on his ongoing employment with PCL, and that she had no involvement in acquiring the shares; at most, she read from time to time literature the Husband brought home regarding the subject.

[35] The affidavit evidence of PCL legal counsel, Andrew Wallace, which I accept, attached a "Share Ownership" document which confirms that:

(a) the offering of shares for purchase and the number of shares that may be purchased are matters in the control of the company;

(b) the shares have no commercial market value outside of the company;

(c) share valuation is determined once per year;

(d) shares must be held in the name of the employee;

(e) each employee is responsible to secure individual financing to purchase shares; and

(f) the purchase of shares represents investment in a construction company with "significant inherent risk".

[36] Both parties referred the Court to a number of authorities distinguishing matrimonial versus business assets, including *Clarke v. Clarke*, [1990] 2 S.C.R. 795; *Hickey v. Hickey* [1999] N.J. No. 259; *S.L.K. v. M.M.H.* 2009 NSSC 319; *Bishop v. Drohan,* 2004 NSSF 77. These cases discuss the distinguishing features of business assets as being those that involve an entrepreneurial act or possess an entrepreneurial sense. The Husband maintains his investment in the shares was and is an entrepreneurial act on his part. In *S.L.K.* (supra), Campbell, J. discussed the notion of "entrepreneurial sense" in assessing whether certain "flow through shares" held by the Husband were business assets*:*

> 74. I am familiar with a number of cases in this court which have held that stocks and various other forms of financial investment portfolios are matrimonial assets. Those cases might support the notion that these flow through shares are matrimonial assets.
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> 75. The Supreme Court of Canada in *Clarke v. Clarke*, [1990] 2 S.C.R. 795 analysed the definition of business assets as that term is used in the MPA in the context of whether or not pensions are business assets. In concluding that pensions are not business assets, Justice Wilson at paragraph 42 that "it seems to me that business assets are assets which have as their purpose the generation of income in an entrepreneurial sense". This reference to an "entrepreneurial sense" has been relied upon in a number of cases in this province.
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> 76. After hearing the evidence of the parties, I was left with the distinct impression that the husband was very much an entrepreneur in terms of the family's financial life. The Canadian Oxford Dictionary defines "entrepreneur" as ""a person who starts or organizes a commercial enterprise especially one involving financial risk". In my view the term implies business decision-making and risk taking. Here the investment was purchased entirely with borrowed money; it obviously involves risk since its value is substantially less than the balance of the Lines of Credit from which the purchase money came; it is a rather complicated form of

> investment; and, it required careful decision-making which would need to employ sharp investment skills to determine, for example, how and when to convert the flow through shares to mutual funds. I am satisfied that there was significant entrepreneurial effort coming from the husband in regard to this asset. I therefore classify this asset as a business asset and I will exclude it from division.

[37] In *Osmond v. Clarke*, 2006 NLCA 47 the Newfoundland Court of Appeal, in determining the husband's acquisition of certain shares was not entrepreneurial in nature, examined the shares in the context of an "entrepreneurial element":

> 29. Where is the entrepreneurial element in the Loan Plan Shares? I see none. There is no venture undertaken nor any enterprise conducted by the husband (other than his work at CHC). As the Nova Scotia Court of Appeal stated in *Tibbetts v. Tibbetts* (1992), 119 N.S.R. (2d) 26 (NSCA) at para. 17:
>
> > ... generally speaking, an investment portfolio of stocks, bonds, GICs, mutual funds or the like does not involve the employment of capital for the purpose of generating income in an "entrepreneurial sense". An entrepreneur is defined in the **Concise Oxford Dictionary** as a "person in effective control of commercial undertaking"; one who "undertakes a business or enterprise, with chance of profit or loss". Holding a stock portfolio does not normally equate with operating a business.
>
> 30. Here there is provision for soft loans (all interest-free, some limited recourse) to provide enhanced benefits to a handful of senior executives in CHC. (The CHC Stock Purchase Loans Term Sheet quoted above referred to these shares as "a significant portion of [the senior executives'] total compensation".) Accessing such soft loans to invest in these shares is simply *not* in any meaningful sense entrepreneurial.
>
> 31. Thus, the Trial Judge committed an error of law in the application of the test as to whether the Loan Plan Shares are a business asset. They are not. They are a matrimonial asset and, as such, subject to equal division.

[38] The Wife cautions, and I agree, that the intention of the investor cannot be looked at in isolation or to the exclusion of how the asset functions - whether it "is working or being worked in an entrepreneurial way" (paragraph 24 Wife's Pre-trial Brief). In *Hickey* (supra), decided before *Osmond* (supra) the same Court of Appeal expressed concern about defeating the intention of matrimonial property

legislation by giving "business assets" an overly broad interpretation. There, the court instructed trial judges that the manner of holding the asset and statements made about the specific intention for which the asset is held may inform the purpose of having the asset, but are not determinative of the question "whether the asset is held for the purpose of generating income in an entrepreneurial sense". (paragraph 25) In that case, the Court found the Appellant's purpose in holding the asset for future needs, but in an interest-earning fashion, did not amount to use of the asset in an entrepreneurial sense.

[39] Contrary to the circumstances in *Osmond* (supra) and *Hickey* (supra), the evidence in this case is that the purchase of the shares in question is not an automatic or mandatory feature of the Husband's employment compensation. Furthermore, I am not persuaded that the purchase of the shares was a cornerstone of the parties' long term financial planning. The history of financial decisions made by them has clearly resulted in them having paid down debt early on and having accumulated a healthy asset pool. However, regarding the shares, the Husband alone assumed the risk associated with them and he alone carried the loans associated with them.

[40] It is clear the Wife understood the inherent risk associated with ongoing acquisition of the shares, supported by her statement during cross examination that when she stopped working in 1998 the shares accumulated to that date were an uncertainty and therefore a "very small piece" of the parties' "financial pie", but she was "prepared to bet on my husband". This notion of "betting" by the Wife underscored the point that the value of the shares is subject to risk, in the performance of not just the Husband but also many others in the company, and the overall yearly success of PCL. In purchasing the shares, the Husband has had to use his knowledge of the company's past and projected performance and that of the construction industry each time he decided to make a purchase. The choice to purchase shares has been his alone, requiring him to exercise his expertise.

[41] The Husband has established and the evidence supports that the shares in question possess the requisite entrepreneurial sense that makes them business assets. The shares are easily distinguishable by their features from those kinds of assets that have in the past been determined to be matrimonial as opposed to business, such as, for example, pension plans and investment portfolios where the asset was passively held. Accepting the definition of "entrepreneur" discussed in

Osmond (supra), citing from *Tibbetts v. Tibbetts* (1992), 119 N.S.R. (2d) 26, as "a 'person in effective control of commercial undertakings'; one who 'undertakes a business or enterprise, with chance of profit or loss'" (paragraph 29), the Husband has not controlled the company, but he has controlled his decisions about whether to buy shares in it0, and he has borrowed money to do so. This is not a situation where the Husband simply put money in an account, plan or portfolio to let it grow in the nature of, for example, a pension or savings fund. These share were and are intimately tied to the fortunes of the company, and the Husband has used his expertise and knowledge of the company and the industry, but also to some extent "gambled" on the performance of others, in deciding each year whether to accept the risk and purchase shares.

[42] If a spouse cannot "own" the business assets of the other spouse, relief may be found in other sections of the *Act.* Here, the Wife did not pursue alternate relief under sections 13 or 18 of the *Act;* that is to say, given the Court is persuaded the shares are not matrimonial assets and therefore not available for division, the Court is not being asked to consider an unequal division of matrimonial assets in the Wife's favour in recognition of her contribution to the acquisition by the Husband of non-matrimonial property (s. 13), nor whether the Wife contributed to a business asset acquired by the Husband (s. 18).

Issue No. 3-Child Support

Prospective

[43] The parties younger child, aged nineteen, is presently in the second year of undergraduate university studies in another province. There was no dispute that the Husband's 2012 income for the purpose of calculating support is $686,936.00. The Wife seeks child support in the table amount ($5,301.00) for the months when the child is not in attendance at school and residing in her home, and child support at fifty percent of the table amount ($2,650.50) for the months when the child is in school, asserting she is responsible for the child's clothing, toiletries and activities while the child is attending school. The Husband maintains that he should not be obligated to pay child support as he is prepared to pay all expenses associated with the child's education and overaged dependency that are not otherwise funded by RESP's already accumulated for that purpose.

[44] Section 3(2) of the *Federal Child Support Guidelines* , SOR 97/175 provides:

> (2) Child the age of majority or over - 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 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 fo 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.

[45] The evidence of the Wife established that the dependent child earned income from employment during the summer of 2012, however no amount of earnings was identified. The Wife testified she incurs additional expenses in having the child in her home over the summer period, however no specifics as to those costs or the Wife's cost of contributing to the child's expenses while at university were provided (in any event, it would seem that any contribution made by the Wife would ultimately be funded by the Husband, as spousal support is the Wife's sole source of income). The Court heard no evidence as to whether it is the child's intention to again reside in the home of the Wife for the summer upon completion of the 2013-2014 academic year. There are RESP funds marked for, and historically used by the parties, to assist in funding the children's education, although information as to the actual costs (e.g. tuition, books) of the younger child's education were not before the Court.

[46] The evidence is much too vague upon which to conduct the appropriate analysis under either section 3(2) (a) or (b) of the *Guidelines* (supra). There is not a sufficient evidentiary foundation upon which to consider the question of prospective child support. Furthermore, the evidence clearly established the Husband has historically financed the children's education above the parties' application of funds specifically designated for that purpose. The Court, and the Wife, can be confident the Husband will fulfill his undertaking provided at trial that he will continue to do so. The Corollary Relief Judgement shall reflect the Husband's obligation to fully fund the dependent child's education and living expenses. To require monies to flow from the Husband to the Wife as child support would serve only to transfer cash, the proper amount of which could only be speculated upon, for purposes that cannot be supported by the evidence.

Retroactive

[47] In October 2011 the parties executed a without prejudice Interim Agreement which stated in part that "The Husband has paid child support for the children since separation, and paid their private school and university expenses." It also required the Husband to pay child support of $2,645.00 per month.

[48] The Wife seeks a payment of $60,000.00 representing her calculation of the shortfall between the child support actually paid and the amounts attracted by application of the *Guidelines* (supra) tables, for the period from June 2009 to the date of the hearing.

[49] In *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Heimstra v. Heimstra*, [2006] S.C.J. 37 the Supreme Court of Canada identified the four factors that must be considered in assessing whether an award of retroactive child support is justified. Those factors are: (a) the reasonable excuse as to why support was not sought earlier; (b) the conduct of the payor parent; (c) the circumstances of the child; (d) the hardship associated by a retroactive award. No one factor takes precedence over any other factor.

[50] In this case, the evidence does not illustrate any excuse as to why retroactive support was not sought earlier, nor any evidence of wrongdoing or misconduct by the payor Husband. As to the circumstances of the children, the whole of the evidence can only lead to the singular conclusion they were well cared for and had all of their needs and wants met by two attentive parents, as funded by the parties' use of their joint account between 2006 and 2009, and later as funded by the Husband directly and/or through payment of child support to the Wife. The evidence does not provide any basis upon which an award of retroactive support ould be justified in this case. As noted by Bastarache, J. In *D.B.J.* (supra):

> 95. It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be

> appropriate for a court to enforce this obligation once the relevant time period has passed.
>
> 96. Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable status quo; retroactive awards serve to supplant it.
>
> 97. Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due....

[51] Here, there is no situation that the children are required to be returned to, and no discernible benefit for them to recapture by such an award. The evidence does not permit a determination that the children, or either of them, were deprived of any benefit of such support during the retroactive period.

Section 7 Expenses

[52] The Wife testified that in 2010 and 2011 she "reimbursed" herself $37,000.00 and $23,000.00 respectively by removing monies from the children's RESP account on the basis she had been paying all of the university costs for the oldest child. This may suggest something in the manner of "double dipping" by the Wife given her source of income after separation was monies from the parties joint account and later on, spousal support paid by the Husband. This would also seem to have been contrary to the Agreement referred to earlier which identified the Husband was responsible for university expenses. The Wife was unable to recall if she put the "reimbursed" monies back into the joint account or into her own savings account, which seemed odd, given that the Wife is obviously both intelligent and financially savvy.

[53] The Wife seeks reimbursement for section 7 medical expenses for her and the children incurred during the period from June, 2009 to the date of trial. She testified (at Exhibit 4):

> 89. As I was the parent responsible for all of the children's medical and dental appointments, I paid their expenses, usually by credit card. The receipts for me and the children would then be provided to the Petitioner to submit through the group medical plan. The Petitioner did not reimburse me or return the funds to the joint bank account, and this includes expenses that have been incurred since June 2009. Attached at Tab #G of the Exhibit Book are copies of the medical and dental expenses for me and the children since June 2009, along with a summary that I prepared. The total of the expenses incurred from June 2009 until August 2013 is $12,250.61.

[54] On cross examination, the Wife was very frank in agreeing with counsel for the Husband that between 2006 and 2010, because her Visa bill was paid out of the parties' joint bank account as funded by the Husband, there was no real loss to her when the Husband did not then deposit their medical insurance plan reimbursement funds to the joint account. As to the expenses incurred by the Wife between 2010 and present, she was also very frank in agreeing that she had failed without good reason to give some of the 2010 and 2011 receipts to the Husband in time to be eligible for reimbursement. At the risk of being seen to ignore the Wife's culpability in that respect, it is nonetheless appropriate that the 2010 through 2013 expenses for the children be reimbursed as these funds were, in effect, being subtracted from the child support payments because the Wife was paying them out of one or both of her sources of funds, being child and spousal support. The Husband shall reimburse the Wife no later than April 30, 2014 for all amounts set out in Exhibit 4, Tab G that relate to the children's medical expenses. The Husband's ongoing financial obligation to the parties overaged dependent child, as discussed earlier herein, dictates that any ongoing section 7 expenses for that child will be a matter between the Husband and the child.

Issue No. 4-Spousal Support-Prospective and Retroactive

Prospective Support

[55] The parties were married for sixteen years and for half of that time the Wife, having left her own highly lucrative career, was entirely dependent on the Husband, by their mutual agreement. There can be little doubt the Wife has an entitlement to both compensatory support (*Bracklow v. Bracklow*, (1999) 1 S.C.R. Y20) and non-compensatory support *(Moge v. Moge*, (1992) 3 S.C.R. 813).

[56] Sections 15.2(4) and 15.2(6) of the *Divorce Act, supra*; sets out the legal principles and objectives to be considered in assessing a spousal support award:

> 15.2(4) **Factors-** In making on order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses co-habitated;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.
>
> 15.2(6) **Objectives of spousal support order**- An order made under subsection (1) or an interim order under subsection (2) that provides or the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[57] The Wife claims support of an unlimited duration and relies on the *Spousal Support Advisory Guidelines* (SSAG) mid-point range of $20,036.00 per month calculated upon the Husband's 2012 income (for support purposes) of $686,936.00. The Husband does not challenge the Wife's entitlement nor the

calculation of his income, but asserts both that the quantum sought is excessive and the support obligation should be time limited.

[58] As identified in the parties' October 2011 interim agreement, the Husband paid effective August 2011 "...spousal support totalling $12, 355.00 per month (consisting of $9,355.50 cash and a $3,000.00 tax hold back payable to CRA by the Husband on behalf of the Wife)."

[59] From 2006 to 2009 the Wife had unlimited access to matrimonial bank accounts including the joint chequing account, and matrimonial assets. In 2009, she removed $50,000.00 from the joint asset pool and placed it in her name when the Husband requested a divorce, although the evidence before me did not identify the Wife's purpose in doing so.

[60] The Husband objected to the Wife's Statement of Expenses sworn July 23, 2013 (Tab 4, Exhibit 4) identifying monthly expenses of $6,350.00 excluding costs when the younger child, a university student, would be at home. The Wife's evidence was that hers is a "bare-bones", "minimal budget" reflecting "... the amounts that I have spent, not because it is an accurate budget, but because the Husband controls the income I receive. There are numerous items I have been unable to pay for, including routine maintenance and repairs on the home or setting aside money to purchase a new vehicle." This was in sharp contrast to the Wife's significant evidence during cross-examination that the source of monies she holds in an account she acquired since separation, containing approximately $143,000.00 is "from my monthly spousal support cheques". While her Statement of Expenses did not estimate what the future costs of home repairs or purchase of a vehicle might be, the Wife is presently entirely dependant on the Husband for income. Her budget includes allowances for recreation, holidays and entertainment, but not income tax.

[61] The evidence supports and I can be satisfied there has been no change in the Wife's day-to-day lifestyle since the parties' 2006 separation, following which she carried on her spending patterns uninterrupted. She testified that since separation she has been very careful about expenditures because the Husband controlled the amount of money available to her, although during that time the Wife continued unimpeded her pursuits of volunteering, travel and recreation. I took her evidence

to mean "control" to the extent that the Husband alone was her sole source of income.

[62] Spousal support payments are not meant to be a blank cheque, in the sense that there must be some nexus between the Wife's legitimate needs and the sum awarded, while trying to achieve as much as possible an equalization of the parties' lifestyles within the context of the Husband's ability to pay.

[63] In conducting the "means and needs" analysis referred to in *Bracklow* (supra) the Wife's need is difficult to assess. Her Statement of Expenses shows monthly expenditures that are less than the present spousal support payment being made by the Husband. Furthermore, the application of the *SSAG* is discretionary and while the numbers suggested in the DivorceMate calculation relied on by the Wife can provide a range, there is also the inherent caution about the accuracy of the calculations when a payor's income exceeds $350,000.00. It is difficult to accept, on the evidence before me and the application of the factors set out in section 15.2(6) of the *Act* (supra), that a spousal support payment in excess of $20,000 per month is justified in this case.

[64] The Wife will have an asset pool as a result of the division of matrimonial property, which should provide her with a limited ability to generate a modest income. In addition, the Wife will not bear any of the expenses associated with the overaged dependency of the parties' younger child. There is also the matter of the Wife's obligation to make all reasonable efforts at self sufficiency. The Wife is 56 years of age and in good health. She is well educated (Batchelor of Science in Kinesiology; Masters of Business Administration) with a solid employment record to 1998, when, after being laid off from Scotia Capital. Markets, the couple decided she would stay home with the children for the reasons discussed earlier herein.

[65] The Wife's evidence made it abundantly clear that she *chooses* not to work at this time, which is much different than being unable to work or being able to work only to a limited extent. The Wife stated in her evidence "Given my age and how long I have been out of the workforce, it is unrealistic and not practicable to attempt to return to paid employment". However, there is no evidence the Wife cannot realistically secure *some* modest measure of employment - she simply has not tried to test the job market. The Wife's own evidence was that she was

approached by the husband of a friend in 2011 to take a short term position with TD Waterhouse. After a very brief time there she quit, and in an effort to retain her the bank then offered to create a different job opportunity for her, which the Wife turned down. In cross-examination, she acknowledged to counsel for the Husband that she does not wish to work. While that may be the Wife's choice, it does not eliminate her legal obligation to explore, in so far as it may be possible or achievable, a reasonable measure of self-sufficiency.

[66] While the Wife has established a claim for both compensatory and non-compensatory support, spousal support is not to be seen as a lifetime pension. The Wife has been supported by the Husband for seven years since separation; how long the Husband's support obligation should continue is not easily determined at this time. Given the Wife's financial statement, the history of the marriage and the whole of the evidence before me, I exercise my discretion to set spousal support at $15,000.00 per month, payable effective November 1, 2013. Given the date of this decision, any arrears outstanding shall be due and payable in full no later than April 30, 2014. The parties are required to disclose their income information to one another no later than May 15 of each year; if any adjustments are needed they can become effective on July 1 of that year.

[67] The Husband urged the Court to impute annual income to the Wife of $90,000.00 - $100,000.00 on the basis of her failure to attempt self-sufficiency. I decline to do so in the absence of any evidence whatsoever as to what that number might be based upon, relative to the Wife's work experience, skill set, level of education, and the current labour market in this region. The range suggested is purely speculative; rather than speculate it is appropriate to limit spousal support to an amount that can be supported by the evidence. If either party seeks a variation of spousal support in the future, at that time a Court might choose to examine the matter of self-sufficiency of the Wife.

Retroactive Support

[68] The considerations on a question of retroactive spousal support were identified by Cromwell, J. in *Kerr v. Baranow*, [2011] S.C.J. No. 10 at paragraph 207:

> While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spouse support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support...

[69] It is difficult to accept that any hardship might be suffered by the Husband were he required to make payment of the retroactive amount claimed by the Wife; his overall financial picture could hardly sustain a suggestion that he might be prejudiced under the weight of such a payment, positioned as he is with income and assets at his disposal sufficient to meet the amount claimed. Nevertheless, I decline to require the Husband to pay retroactive support in any amount as the evidence does not establish any disadvantage suffered by the Wife during the retroactive period; rather the Wife's entitlement to have her pre-separation standard of living perpetuated as far as possible was met by the Husband during the relevant period. The Wife's own evidence, in addition to documentary evidence before the court support that the Wife's spending patterns continued, without any appreciable change from 2006 - 2009. After 2009, the parties came to an agreement on interim support, as had been discussed elsewhere herein. During all of that time (2006 to date) her lifestyle continued, uninterrupted. There is no evidentiary basis upon which it could be said that additional need or hardship on the part of the Wife existed that must now be reimbursed by the Husband.

[70] The evidence does not point to or allow me to conclude the Wife suffered any economic displacement during the period in question. Permitting the Wife's claim for retroactive support would remedy no loss to her; it would serve only to transfer monies to her under the thinly veiled guise of spousal support.

Issue No. 5- Other Matrimonial Assets

Household Contents

[71] The parties agree the contents of the matrimonial home are worth $12,313.00 as appraised. Their dispute is as to how those contents are to be

divided. The Husband seeks to sell the contents at auction and divide the proceeds equally. The Wife seeks to retain all the contents and give the Husband credit for half the value in the equalization payment that will result from the division of all matrimonial assets, rather than forcing her to purchase new contents.

[72] During closing submissions the Husband's counsel produced a list of "personal and incidental items not appraised" which the Wife's counsel then advised had already been agreed upon as items to be transferred to the Husband. In addition, the Husband identified various of the appraised items he seeks to retain totalling $2,490.00 in value. It would seem appropriate to require the Wife to turn over those items to the Husband by January 31, 2014 and reduce the Husband's one-half share by that same amount (to $6,156.50); the Wife shall retain the remaining household contents.

[73] As to the non-transferrable golf memberships, the Husband wishes to retain both memberships and the Wife wishes to have her membership. Both parties testified the membership can only be used in Ontario, so the present utility to either party is questionable. No dollar value for the memberships was identified. In the spirit of an equal division of assets that is the backbone of the financial consequences of this divorce, it only makes sense that each party retain for their own use one each of the memberships.

Conclusion

[74] The parties will need to prepare an equalization chart representing an equal division of matrimonial assets based on the October 31, 2006 separation date and reflecting this decision. Any equalization payment required to flow from one party to the other to effect an equal division shall be due no later than April 30, 2014.

[75] Counsel for the Husband is asked to prepare the appropriate Corollary Relief Judgement to be consented to as to form only by counsel for the Wife.

[76] The parties sought to reserve the right to address the Court on the matter of costs. In the event the parties are unable to reach an agreement on the matter of costs by January 24, 2014, counsel are authorized to contact the Devonshire

scheduling office to request one hour on my docket to present oral argument on the matter. In anticipation of the same, counsel for the Petitioner would be required to file a brief 7 days in advance, and counsel for the Respondent would be required to file a brief 3 days in advance.