

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: K.A.M. v. K.C.M., 2008 NSSC 82

Date: 20080331

Docket: 1201-059376

SFHD 37472

Registry: Halifax

Between:

K. A. M.

Petitioner

v.

K. C. M.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Lawrence I. O'Neil

Heard: November 15 and 16, 2007, in Halifax, Nova Scotia

Counsel: Susanne Litke and Mark Stebbins, for the Petitioner
S. R. L., for the Respondent

By the Court:

Overview of Facts

[1] The parties married July [...], 1989 at Mount Uniacke, Nova Scotia. They separated January [...], 2005. There is one child of the marriage, J. C. M., born October [...], 1993, hereinafter referred to as J..

[2] When Mr. M. left the matrimonial home on January 5, 2005, J. also left with him. He has continued to live with Mr. M. and has remained in his primary care. Ms. M. has had parenting time with J..

[3] For some time prior to the parties' separation and until the date of the hearing, the Petitioner has been treated for mental health issues, beginning with post partum depression in 1993 and later for a severe schizoaffective disorder, depressive type. She remains off work on long term disability, receives long term disability benefits from her employer's insurer and the Canada Pension Plan.

[4] She currently receives electroconvulsive therapy every week as part of maintenance treatment. Efforts to stabilize her and to prevent recurrence have not been successful.

[5] Mr. M. is currently in a new relationship. He and J. share a home with S. L. and her two children. Ms. M. lives alone.

Legal History

[6] The Petition for Divorce was filed by Ms. M. February 21, 2005. With it, she filed an Interim Application to deal with custody, access, child and spousal support.

[7] In response to the interim application by Ms. M., an interim order dated March 7, 2005, was issued. It provided that joint custody and primary care of J. would rest with Mr. M.. Ms. M.'s access was outlined in that order. The order further provided that Ms. M. would not pay child support. Mr. M. was ordered, however to pay spousal support in the amount of \$600 per month, and to continue medical, dental and drug plan coverage for Ms. M. and J..

[8] The Answer and Counter-Petition were filed December 6, 2006. The court received a request for a trial date from Mr. M. on February 1, 2007. He further requested that the Divorce Judgment be granted and to sever its granting from the Corollary Relief Judgment. On April 25, 2007 the parties were divorced. The

Certificate of Divorce is dated July 5, 2007. A pre-trial conference was held April 11, 2007. November 2007 trial dates were set.

[9] Unresolved issues of corollary relief remained for trial on the previously scheduled November 2007 trial dates. Other aspects of the March 7, 2005 order were continued. Following a Pre-trial on April 25, 2007, the court ordered a narrow assessment of J., concerning his functioning in his then living situation and his wishes respecting his living situation. The pre-trial identified the anticipated trial issues to be:

- (1) custody of J.
- (2) spousal support
- (3) on-going medical coverage for Ms. M.
- (4) Ms. M.'s designation as beneficiary under Mr. M.'s life insurance
- (5) an overpayment to Ms. M. of the child tax credit. The court was advised that the division of property had been mostly agreed upon.

[10] The issues were further refined for trial and are listed at para. 53 following.

Issues Settled Before Trial

Matrimonial Debt

Custody, Access and Division of Property

[11] The issues of custody, access and division of property were settled by the time the trial was to begin. The terms of the settlement are as outlined in Exhibit #13. The parties agreed that the property matters were concluded on October 18, 2007 with Mr. M.'s payment of \$700 to Ms. M.. They also agreed that J. would remain in the joint custody of the parties with Mr. M. having day-to-day care and control. The parties further advised the court that Ms. M. would continue to have parenting time with J..

Pre-Trial Motion(s)

[12] At the written request of counsel, the court was convened on Tuesday, November 13, 2007 to consider two issues. Counsel for Ms. M. made an application to strike certain affidavits filed on behalf of Mr. M., and for an order that other affidavits be withdrawn.

[13] Counsel for Mr. M. sought a further ruling that Ms. S. L., Mr. M.'s new partner, and a non practising member of the Nova Scotia Bar could not represent Mr. M. in the subject proceeding.

[14] Following submissions, the parties agreed that four affidavits filed on behalf of Mr. M. should be removed from the file and three others should be withdrawn. K. M.'s affidavits of February 1, April 3 and April 5, 2007 and Ms. L.'s affidavit of April 5, 2007 were expunged. The November 1, 2007 affidavits of J. M., M, M. and G. S. were all withdrawn.

[15] The court heard argument on the application to strike out the entire affidavit of T. M. and paragraphs 1-17, 20-30 and 33-35 of K. M.'s November 5, 2007 affidavit.

[16] The court ruled the following morning that certain paragraphs of Ms. M. November 1, 2007 affidavit would be struck. The edited affidavit is Exhibit #14. Certain paragraphs of Mr. M.'s affidavit were edited or struck in their entirety by

the court. The edited affidavit is Exhibit #3. The court's reasons form part of the record and will not be repeated.

[17] The court heard submissions on whether Ms. L. could act for Mr. M.. This issue was resolved with an agreement that Ms. L.'s proposed evidence about her financial circumstances would be given by Mr. M..

Summary of the Evidence

[18] Oral evidence was offered by the Petitioner, K. M.; Ms. M., a friend of the M. family and by the Respondent, Mr. M..

Evidence of the Petitioner

[19] Ms. M. adopted the contents of the documents submitted on her behalf and appearing at Tabs 10-18 inclusive of Exhibit #1. These are two affidavits sworn by her on October 22 and November 8, 2007 and various financial statements filed by her.

[20] Ms. M. was asked to respond to statements of T. M. as put forth in Exhibit #14. Ms. M. disagreed with the suggestion that only Mr. M. cared for their son J.. She stated that when she was well, she also cared for him and performed the household chores.

[21] She said she did not experience depression until after the birth of J.. She denied ever attributing her depression to childhood experiences as Ms. M. stated. Ms. M. also took issue with Ms. M.' description of how much time Ms. M. spent in the M. home. This evidence goes to the opportunity for Ms. M. to know the M. family dynamics.

[22] Ms. M. was also asked to comment on Mr. M.'s evidence as reflected in Exhibit #3. Again, Ms. M. disputed ever attributing her poor mental health to childhood experiences.

[23] The Petitioner testified that she was employed as a salesperson at a local business services company until J. was born. She explained that she had worked for this company from her early adult years until she left for maternity leave. She recalled her salary as \$500 - \$600 every two weeks.

[24] Ms. M. agreed that she and Mr. M. called each other during the day. She did not agree that after J.'s birth, her calls became more frequent and burdensome for Mr. M.. She agreed that she had threatened suicide but never to "take J. with her". She further acknowledged having been addicted to gambling. She said Mr. M.'s spending habits also help explain the family's financial problems. The parties declared bankruptcy on January 27, 2005 shortly after the parties separation.

[25] She said that until the separation she believed that she and Mr. M. appreciated each other and that they had a good marriage. She was surprised when Mr. M. told her it was over.

[26] The Petitioner gave evidence of her hospitalization and more recent treatment. She explained that one of the consequences of her ongoing electroconvulsive treatment is a loss of short term memory. She explained that her short term memory will recover after a day or two.

Cross Examination of the Petitioner

[27] Cross examination initially focussed on how her depression impacted upon her on a day to day basis. She did not recall telling Mr. M. or Ms. M. that her father's remarriage was a source of stress for her. Her attention was drawn to Tab 4 of Exhibit #1 and it was suggested that the discharge report dated June 20, 1994, seemed to say this as well. Ms. M. responded by saying that the organizational details of the remarriage were stressful, not the fact of remarriage itself.

[28] She was questioned about household purchases while she lived with Mr. M.. She was then questioned on the reason certain medications were prescribed. Ms. M. confirmed that they are to treat a variety of conditions including depression, cholesterol, hormonal issues, "voices", diabetes and reflux. She confirmed that she smokes three quarters of a pack of cigarettes every day.

[29] Ms. M. reviewed the history and diagnosis of her post partum depression. It was diagnosed by Dr. Jo-Anne MacDonald shortly after J. was born. Ms. M. explained that over the years, medications have been tried unsuccessfully to treat

her. She explained that until recently, ECT was applied every two weeks but is now a weekly treatment.

[30] Ms. M. was asked a series of questions about her access costs, where she picked up J. and when she attended J.'s hockey games. She said she often travelled 100 kms one way, on the weekends, to attend J.'s hockey games. She testified that returning J. to Mr. M.'s home was also costly, given that Mr. M. lives 37-38 kms away and a return trip was about 75 kms.

[31] Ms. M. said she contacted the government to stop payment of the child tax credit when she learned she should not be receiving it. This issue is raised in Ms. M.'s supplementary affidavit dated November 8, 2007, appearing at Tab 11 of Exhibit #1.

[32] Ms. M. was questioned on her statement of expenses (Tab 17 of Exhibit #1).

[33] In response to a question from the court, evidence was offered that Ms. M. has been hospitalized 13 times in 12 years (Dr. Buffett's report at Tab 5). Ms. M. could not provide this information from memory or even estimates.

[34] Overall, the court's conclusion about Ms. M. is that she is very ill and that she has been since the birth of J.. She has great difficulty communicating because she seems unable to fully understand questions and to recall information that would assist her in responding. As a consequence, she often appears confused and unaware. The court accepts and agrees with the conclusion of both the Petitioner and the Respondent that Ms. M. will not be able to re-enter the work force.

[35] The Petitioner concluded her evidence. The documents forming Exhibit #1 were entered with the consent of the Petitioner.

Evidence on Behalf of Mr. M.

Evidence of Ms. T. M.

[36] Ms. M. adopted her affidavit evidence. On cross-examination, Ms. M. repeated aspects of her evidence as contained in her affidavit, Exhibit #14.

[37] She testified that she was frequently in the M. home over a 5-6 year period. She explained that she would be with Ms. M. during the day and visited in the evenings. Ms. M. said that Ms. M. told her about her over spending. Essentially she testified that Mr. M. shouldered the main responsibility for raising J. following his birth and while the parties were together. She also testified that the Respondent assumed the management of the home and performed the bulk of the household duties following J.'s birth. The court finds as a fact that this was the case. Ms. M. was a credible witness as was Mr. M.. They both testified that this was the case. Ms. M.'s evidence can not be relied upon.

Evidence of the Respondent

[38] On direct, Mr. M. adopted his evidence as contained in Exhibit #2 - 15 inclusive.

[39] On cross-examination, Mr. M. was questioned in detail about his records of income, Exhibit #4, 5, 6 and 7, being a record of his income for the period 2001-2004. Mr. M. described himself as a service consultant employed in auto service stations. In 2006, he switched employers, moving to [...]. He explained that he did so because of a better base pay and bonus package available at [...].

[40] He expects his salary in 2007 to be \$45,000 plus a bonus described in Exhibit #7. He said he has recently learned that he will now be receiving the CPP child benefit given that J. is living with him. This benefit is payable because Ms. M. is in receipt of CPP disability benefits.

[41] He said he was agreeable to keeping the Petitioner on his medical plan at [...]. He testified that the [...] plan was unusual because it provided for coverage of former spouses. Mr. M. argues that the cost should be a credit for purposes of spousal support calculations

[42] Mr. M. was questioned in detail about his assertion that the cost of this dependency coverage, \$172.78 was of no benefit to him. Mr. M. argues that he can get coverage under his partner's plan and but for continuing the coverage for Ms. M., he would not continue the coverage at all.

[43] On cross examination, Mr. M. agreed that regardless of Ms. M.'s needs, certain costs associated with the benefit plan would be borne by him because the deductions are mandatory. He, at times, agreed and disagreed that he can waive long term disability coverage, which represents a cost of \$53 per month and incidental death and dismemberment coverage (\$1.30 per month). He also agreed that he is the beneficiary of insurance on the Petitioner's life. This cost is .90 cents per month and is included in the \$172 cost of benefits provided by [...].

[44] Mr. M. was then questioned about the benefit of continuing two medical plans for him, J., S. and her two children. It was suggested that a non insured cost from one plan could be covered by the second plan. For example, prescriptions are covered to 80% under S.'s plan and counselling services are covered to a maximum of \$1,000 per year under one plan. Mr. M. agreed that on occasion, he

or S. had applied to both plans to get coverage for an uninsured cost under the terms of the other plan.

[45] As a result of agreement between counsel, Mr. M. was permitted to answer questions concerning Ms. L.'s filings. Issues of hearsay were expressly waived. As stated earlier, this was to permit Ms. L. to represent Mr. M. in these proceedings.

[46] Mr. M. agreed that because he is sharing expenses with Ms. L., he has more disposable income. He also stated that some expenses have increased by virtue of his improved circumstances. He explained that he lived with family for periods post separation. He now shares household expenses with his partner, Ms. L..

[47] Mr. M. was questioned about the child care expense shown on his tax return for 2006 (Exhibit #7). He was asked whether Ms. L.'s former husband was involved in the activities of Ms. L.'s two children.

[48] Mr. M. agreed that the biggest increase in his expenses is his payment of one half of the mortgage on the property he shares with Ms. L..

[49] Mr. M. disagreed with the suggestion that he is currently over spending or imprudently managing his income. He also disagreed with the suggestion that he and Ms. L. are exaggerating their costs.

[50] Mr. M. was cross examined about his employment history since his marriage to Ms. M.. In general terms, he agreed that he underwent ongoing training and upgrading.

[51] He was asked about his home life with the Petitioner after she became ill. He agreed that he and Ms. M. agreed that she would return to work outside the home after the birth of J..

[52] On redirect, Mr. M. stated that as shown on Exhibit #15, Ms. L. does not pay a premium for her medical and dental plan. He also stated that he learned in June of 2006 that Ms. M. was receiving the child tax benefit and should not have been. He has more recently, learned that Ms. M. has been receiving the disabled contributor's child benefit from CPP and that she should not have been receiving it.

[53] Mr. M. explained why he believed he had not been getting the CPP Children's benefit. He believed the paperwork for him to receive the CPP back time was completed but that his bankruptcy had resulted in his being ineligible for back time and future CPP benefits for J.. As a consequence, he put the issue of his eligibility for the CPP benefit out of his mind.

Issues at Trial

[54] The remaining issues will be addressed in the order in which they are summarized in Ms. Litke's brief. They are as follows:

1. Entitlement to spousal support; quantum and duration if applicable.
2. Whether confirmed medical and dental coverage of Ms. M. should be considered spousal support.
3. Whether Mr. M. is required to designate Ms. M. as a beneficiary under his life insurance policy, as a guarantee that spousal support will be paid, should Mr. M. die.
4. Whether Ms. M.'s child support obligation should be reduced on account of undue hardship to her as a result of the high costs of exercising access.
5. Whether Mr. M. should be partially responsible for the Child Tax Benefit overpayment or alternatively whether this overpayment be now factored in when determining the quantum of spousal support.

6. Whether Mr. M. be required to repay the potential CPP Disabled Contributor's Child Benefit if he seeks retroactive payment to him.
7. Costs.

Spousal Support

[55] Mr. M. agrees that Ms. M. is entitled to continuing spousal support for a finite number of years, being a total of sixteen years, equating with the length of the marriage. He put forward an amount of \$300 per month as the appropriate amount to be paid for another thirteen years. He argues that this amount should be paid partly in cash to Ms. M. and partly by payment to a third party. In this case, the third party would be a provider of certain health insurance.

[56] Ms. M. argued for spousal support of an unlimited duration in the amount of \$1,000 to \$1,200 per month.

[57] The *Divorce Act*, R.S.C. 1985 s.3 (2nd Supp.) provides:

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sums and periodic sums, as the court thinks reasonable for the support of the other spouse ...

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to pay for the support of any or all children of the marriage, pending the determination of the application under subsection (1)

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

(4) In making an 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 cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[58] The *Divorce Act*, s. 17(7) outlines the same objectives of a variation order, varying a spousal support order.

[59] The two often cited cases on entitlement to spousal support are *Moge v. Moge* [1992] S.C.J. No. 107 and *Bracklow v. Bracklow* [1999] S.C.J. No. 14. The decision in *Moge, supra*, is often described as finding the basis for spousal support to be one of compensating the receiving spouse for that spouse's economic disadvantage flowing from the marriage. The *Bracklow, supra*, decision is cited as establishing the non-compensatory approach which focuses on the concept of mutual obligation and need. *Bracklow, supra*, also introduced a contractual basis for ordering spousal support. The result is that the current body of law is more of an assessment of "needs" and "means". The real debate is frequently about amount and duration of spousal support.

[60] The Supreme Court of Canada in *Bracklow* (1999), 1 S.C.R. 420 commented on how a marriage breakdown changes the presumption of mutual support that exists during marriage. In *Bracklow* Justice McLachlin, as she then was, introduced the court's judgment with the following:

I. Introduction

1. What duty does a healthy spouse owe a sick one when the marriage collapses? It is now well-settled law that spouses must compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union. But what happens when a divorce - through no consequence of sacrifices, but simply through economic hardship - leaves one former spouse self-sufficient and the other, perhaps due to the onset of a debilitating illness, incapable of self-support? Must the healthy spouse continue to support the sick spouse? Or can he or she move on, free of obligation? That is the question posed by this appeal. It is a difficult issue. It is also an important issue, given the trend in our society toward shorter marriages and successive relationships.

[61] On behalf of the court, she answered the various questions. She stated *inter alia*:

19 In analysing the respective obligations of husbands and wives, it is critical to distinguish between the roles of the spouses during marriage and the different roles that are assumed upon marriage breakdown.

21 When a marriage breaks down, however, the situation changes. The presumption of mutual support that existed during the marriage no longer applies. Such a presumption would be incompatible with the diverse post-marital scenarios that may arise in modern society and the liberty many claim to start their lives anew after marriage breakdown. This is reflected in the Divorce Act and the provincial support statutes, which require the court to determine issues of support by reference to a variety of objectives and factors.

32 Both the mutual obligation model and the independent, clean-break model represent important realities and address significant policy concerns and social values. The federal and provincial legislatures, through their respective statutes, have acknowledged both models. Neither theory alone is capable of achieving a just law of spousal support. The importance of the policy objectives served by both models is beyond dispute. It is critical to recognize and encourage the self-sufficiency and independence of each spouse. It is equally vital to recognize

that divorced people may move on to other relationships and acquire new obligations which they may not be able to meet if they are obliged to maintain full financial burdens from previous relationships. On the other hand, it is also important to recognize that sometimes the goals of actual independence are impeded by patterns of marital dependence, that too often self-sufficiency at the time of marriage termination is an impossible aspiration, and that marriage is an economic partnership that is built upon a premise (albeit rebuttable) of mutual support. The real question in such cases is whether the state should automatically bear the costs of these realities, or whether the family, including former spouses, should be asked to contribute to the need, means permitting. Some suggest it would be better if the state automatically picked up the costs of such cases: Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*, at p. 234, n. 172. However, as will be seen, Parliament and the legislatures have decreed otherwise by requiring courts to consider not only compensatory factors, but the "needs" and "means" of the parties. It is not a question of either one model or the other. It is rather a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court.

[62] I find that Mr. M.'s obligation to pay spousal support arises from a non-compensatory basis.

[63] There is evidence which I accept that following the birth of the couple's child, the Petitioner experienced post partum depression. This was followed by other mental health issues that are currently described as severe schizoaffective disorder, depressed type. The evidence does not support a conclusion that Ms. M.'s current poor mental health flows from the circumstances of the marriage directly or indirectly. There is no evidentiary basis for concluding that her current

mental health is related to the post partum depression experienced by the Petitioner. All that can be said is that one followed the other.

[64] The circumstances of this case involve the onset of a disability while married but not shown to be caused by the marriage or the circumstances of the marriage.

[65] The parties agree that the Petitioner is entitled to continued spousal support. The parties were married for sixteen years and the Petitioner is unable to work. The Respondent also agrees that it is unlikely that the Petitioner will be employed again. The Respondent proposes that spousal support continue for an additional thirteen years at a reduced level. This would result in spousal support for a total of 16 years, which represents one year for every year of marriage. As earlier noted the Petitioner is arguing for a larger monthly sum (\$1,000-\$1,200) and for an indefinite period.

Duration and Quantum of Spousal Support

[66] It is instructive to look to other cases where spousal support was ordered to be paid to a spouse who was disabled with little or no future prospects for employment. Again the factors set out in s. 15.2 of the Divorce Act supra. must be a guide for decision makers.

[67] The decision of Justice LeBlanc in *Bishop v. Bishop* [2005] N.S.J. No. 324 (NSSC) is of assistance. It was a determination of the duration and quantum of spousal support to be paid to a newly disabled wife. The wife did not work outside the home during marriage. The parties were married for twelve years. The marriage was a second one for both. They did not have children of the marriage. At the time of trial, the wife was forty-eight years of age. She lacked an income. The court ordered that she receive 35% of Mr. Bishop's entire pension entitlement for the period ending with the parties' separation. This was valued at \$384,556.18 of which Ms. Bishop would receive 35%. Had the pension been divided only for the period of cohabitation the total to be divided was significantly less i.e. \$140,239.

[68] Justice LeBlanc applied the social obligation model and the clean break model to achieve a just result. At para 68, he stated:

68. I have referred to the Advisory Spousal Support Guidelines, which suggest support of between \$1,188.00 and \$1,584.00 per month. There is no specific recommendation for the duration of such payments. In *Bracklow*, upon the matter being remitted to the trial Judge, the appellant was awarded \$400.00 per month. She was also receiving \$846.00 in disability pension. The respondent was earning \$71,000.00 per year plus benefits. The trial Judge superimposed the clean break model upon the social obligation model, given the new relationship established by the respondent (see (1999) 181 D.L.R. (4th) 522 (B.C.S.C.)). Similarly, in this case, I believe it is necessary to apply the social obligation model along with the clean break model, in order to achieve justice (see *Bracklow* (S.C.C.) at para. 32

[69] Justice LeBlanc ordered spousal support for a term of ten (10) years based on Mr. Bishop's income of about \$57,300 annually. He also held that the spousal support order would be open to variation, if any of a list of enumerated events occurred:

Para 70

I direct Mr. Bishop to pay to Ms. Bishop \$1,000 per month in spousal support, commencing August 31, 2005, for a period of 10 years, up to and including July 31, 2015. The spousal support order will be open to variation if Ms. Bishop obtains a CPP disability pension or if Mr. Bishop retires from the Armed Forces. Similarly, if Ms. Bishop becomes fit to work, Mr. Bishop will be entitled to seek a variation. Finally, if Mr. Bishop makes an assignment in bankruptcy or a proposal under the *Bankruptcy and Insolvency Act*, which has the effect of requiring Ms. Bishop to pay any of the matrimonial debts, she will be entitled to apply for a variation in spousal support to cover any amount she is required to pay. This provides Ms. Bishop with a complete indemnity with respect to the matrimonial debts. Of course, either party may apply for a variation of the support order should there be any other change in circumstances.

[70] In *Puddifant v. Puddifant* [2005] N.S.J. No. 558, the court was considering spousal support for the Petitioner, age 46. She suffered from mental illness that

rendered her unemployable. The Respondent was 42 years of age. The parties had been married twelve years. Their 16 year old son lived with the father. The Respondent's income at trial was approximately \$33,000 and the Applicant's was \$15,000, being disability income from the Canada Pension Plan and investment income of \$3,824. The father was not receiving child support .

[71] Justice Gass reduced spousal support from \$600 per month to \$300 per month. Further, at paragraph 33-35, she commented on the Supreme Court of Canada decisions in *Bracklow supra.* and *Moge supra*:

33. When the matter was sent back to the British Columbia Supreme Court on November 1, 1999, the result was an order for \$400.00 per month for five years resulting in total support paid over eight years for a seven year relationship.

34. The other leading case on the issue of spousal support under the *Divorce Act* is *Moge v. Moge* (1992) 43 R.F.L. (3d) 345 (S.C.C.) L'Heureux-Dubé, J. at p. 376:

All four of the objectives defined in the *Act* must be taken into account when ... an order for spousal support is sought to be varied. No single objective is paramount. The fact that one of the objectives, such as economic self-sufficiency, has been attained, does not necessarily dispose of the matter.

35. Likewise, where economic self-sufficiency has not been attained, that does not dispose of the matter either. In other words, the failure to attain self-sufficiency should not automatically result in the continuing obligation of the supporting spouse.

[72] The facts in *Puddifant* [2005] N.S.J. No. 558 (NSSCFD) are analogous to those herein. The court's reasoning in that case is also very persuasive. Justice Gass ordered three further years of support. This represented a total of twelve years of support for a twelve year marriage. Unlike this case, Mr. Puddifant did not seek child support from Ms. Puddifant.

[73] In *Puddifant, supra*, as on the facts herein, the payor spouse had fulfilled the role of primary care giver of the parties' child since separation. Similarly, I find that during the years leading up to the parties separation, Mr. M. was carrying a larger part of the household and childcare responsibilities coincidental with his working outside the house. I accept his evidence that he compromised his earning capacity because he also had to care for his spouse who had become mentally ill and because he had additional child care responsibilities for the same reason.

[74] Justice Gass in *Puddifant* at paragraph 38 stated:

Notwithstanding the wife's disability, I cannot conclude that his obligations to her should extend beyond the length of their marriage. I conclude this on the basis that he has shouldered sole responsibility for their son and I must balance her need with him having some "light at the end of the tunnel"

[75] In *Westhaver* [2002] N.S.J. No. 426, Justice Stewart declined to order a timeless support order in favour of a 43 year old wife. The parties were married for eleven years. There were no children. The separation of the parties occurred days before the wife suffered a brain injury.

[76] I am persuaded that imposing an obligation to provide spousal support for an indefinite period beyond the number of years of the parties' marriage would result in an imbalance between recognizing the parties mutual obligations and the independent, clean-break model. I therefore agree that the additional term of spousal support should not exceed thirteen years. Given that the Respondent accepts an obligation to provide support for an additional thirteen years, the court accepts this additional term.

[77] The court is influenced by the fact of the Petitioner's disability; the ages of the parties; the obligations assumed by the Respondent since their separation; his willingness to continue support for an additional thirteen (13) years; his current resources ; new family obligations and of course the needs of the Petitioner.

[78] An order extending the term of spousal support could, without a time limit, make the Respondent a guarantor with no prospect of breaking from his past. This may be authorized by the law in appropriate circumstances. However, this is not one of those cases.

[79] One must also consider his conduct for the years following the birth of their son, and leading up to the parties separation. I am satisfied that Mr. M. supported his wife and cared for her following the onset of her illness. He also assumed increased child care and parental responsibilities. This is what we would expect and would hope for. He did not look for a way out. Quite the contrary, his conduct was exemplary when confronted with very difficult and challenging home circumstances.

[80] After listening to his oral evidence; observing his demeanour; sensing his tone; his attitude and description of events, I am satisfied that he continues to be concerned about the Petitioner. The four (4) considerations of s.15.2(6) of the *Divorce Act* must all be considered. A failure to attain economic self sufficiency by itself does not automatically result in a continuing obligation of the supporting spouse.

[81] Orders for spousal support for an indefinite period have become the norm in longer term marriages, such as that of the M.. Review clauses are frequently inserted to permit a reassessment of the recipient's efforts to achieve self sufficiency and/or the payor's finances. A review clause is not appropriate on the facts herein, given that Ms. M. will never achieve self sufficiency or become employable.

[82] A review of the duration of the order to flow from this decision may have some appeal as a safety valve and serve to delay a decision on the issue of whether the spousal support should be of a finite duration. However, the parties agree that the Petitioner will not be employed outside her home again. The court also finds this to be the case. The Respondent wants certainty with respect to the duration of his obligation. In my view, considerations I must make mandate that he should be given certainty. Society also has a responsibility that must be balanced with that of Mr. M..

[83] There is agreement that Ms. M. will not be able to re-enter the work force or to become self sufficient. Mr. M. requests a termination date. The date he

suggests is consistent with the outside term that arises if one applies the Spousal Support Advisory Guidelines, i.e., sixteen years.

[84] The Guidelines suggest a formula for determining duration. The outside limit being one year of support for every year of marriage. The Respondent therefore, suggests an additional 13 years, which would result in spousal support payments to Ms. M. for the same length of time the parties were married. The court acknowledges that the Guidelines are advisory only. Nevertheless they are a reference point when the court must wrestle with the difficult issues of quantum and duration of spousal support.

[85] As stated, a spousal support order expiring in thirteen years will issue. The court must now consider the appropriate quantum of spousal support over this period.

[86] In *Bracklow*, the court held that the trial Judge had erred in not finding an entitlement to spousal support for the disabled former spouse. However it referred the determination of quantum of support to the trial Judge. The court was clear in

stating that having done so, it did not exclude the possibility that no further support would be required.

[87] The trial Judge in *Bracklow* did reconsider the issue of quantum and ruled that \$400 per month for a disabled spouse would be paid for five years for a total duration of eight years for a seven year relationship.

[88] The case of *Wamboldt v. Wamboldt* [2002] N.S.J. No. 171 involved the spousal support obligation of a custodial parent to the mother of the parties' two children. The mother of the children suffered from multiple sclerosis and was in receipt of Canada Pension disability benefits and wage replacement insurance. Her annual income was \$14,747.04. Mr. Wamboldt arranged the access transportation for the children. Spousal support of \$650 per month was ordered. The parties had been married for 21 years.

[89] Herein, the Respondent's income from employment will be set at \$48,000, representing earnings of \$45,055.80 and a bonus he expects to get. The Petitioner is in receipt of CP Disability Benefits (\$9,840.32) and Private Disability Insurance (\$5,543.84) totalling \$15,393.16.

[90] The respondent calculates that the Spousal Support Advisory Guidelines provide a range of spousal support of \$232.68 representing 40% of the parties net disposal income of \$3,115.76 to an upper range of \$419.63, representing 46% of the parties net disposal income. She assumes the Petitioner's monthly net disposal income is \$1,013.62 and the Respondent's \$2,102.14.

[91] The Court directs that the spousal support currently being paid (\$600 per month) should continue at that level. This will provide the Petitioner with additional annual income of \$7,200 for a total annual income of \$22,593.00.

[92] The court has decided to order an amount greater than the guidelines given the Petitioner's severe disability and in particular her obvious inability to manage her affairs. This serves to increase her need . She is also still required to provide for her son when he is visiting and to incur access expenses. Her decision to move into the building where her parents also live did increase her living and access costs. However she requires the support of her parents and they are available to assist her. It was an appropriate decision. Ms. M. also faces the requirement to repay the child tax credit and possibly the Canada Pension child

benefit. These obligations can not be avoided and direct funds away from her necessities.

Child Support and Undue Hardship

[93] Mr. M. is seeking child support based on the table amount. Ms. M. sought a reduction in the child support obligation based on an undue hardship claim. The *Divorce Act*, R.S.C. 1985 c.3 (2nd Supp.) s.15.1(1) provides for the payment of child support:

15.1(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

(3) A court making an order under subsection (1) or an interim order under subsection (2) shall do so in accordance with the applicable guidelines.

[94] Section 2 of the *Divorce Act* defines “applicable guidelines” and “Federal Child Support Guidelines” as follows:

“Applicable Guidelines” means

(a) where both spouses or former spouses are ordinarily resident in the same province at the time an application for a child support order or a variation order in respect of a child support order is made, or the amount of a child support order is to be recalculated pursuant to section 25.1, and

that province has been designated by an order made under subsection (5), the laws of the province specified in the order; and

(b) in any other case, the Federal Child Support Guidelines;

“Federal Child Support Guidelines” means:

the guidelines made under section 26.1;

[95] Section 26.1 of the *Divorce Act* reads:

26.1 The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect and, without limiting the generality of the foregoing, may make regulations:

(a) respecting the establishment and operation of a central registry of divorce proceedings in Canada; and

(b) providing for uniformity in the rules made pursuant to section 25.

[96] The Federal Child Support Guidelines, SOR/97-175 provide *inter alia*:

10(1) On either spouse’s application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

Circumstances that may cause undue hardship

(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

(b) the spouse has unusually high expenses in relation to exercising access to a child;

[97] The Petitioner argues that her child support obligations should be reduced because of her access costs. The parties live within 37-38 kilometres of each other. Her cost of exercising access are a usual cost. In my view, this cost cannot be described as an unusually high expense. Similarly the cost of attending her son's sporting events are not so frequent that the expense is unusual or not something that is outside the usual costs of being a non custodial parent. In coming to this conclusion, the court has considered her income level, not simply the absolute cost of access. The court has already considered the Respondent's transport costs when exercising its jurisdiction to award spousal support above the guideline amount.

Life Insurance

[98] Mr. M. argues that Ms. M.'s claim to be named the beneficiary of his group life insurance, through his employer ,should be denied. I agree.

[99] Mr. M. has a new family and is agreeable to continuing support of Ms. M. for thirteen years. In some respects he must be permitted to break from his

responsibilities to the Petitioner at this time. The Respondent gave evidence that the subject life insurance benefit is some security for payment of his current spouse's mortgage should something happen to him. He is ineligible for other life insurance at comparable rates. He further explained that he is not eligible to be a signatory to the mortgage because he went bankrupt several years ago. As a consequence, he is ineligible for mortgage insurance. The life insurance is some security for his partner and his son for whom he has primary care. He wants to maintain the insurance for that purpose. His position is reasonable and reflects responsibilities he has to his son and his new family. Mr. M. is a fair minded and responsible individual and his judgment on this issue reflects an appropriate balancing of his responsibilities.

Child Tax Credit and CPP Overpayment to Ms. M.

[100] In addition to an overpayment of the child tax credit to Ms. M., the parties addressed an anticipated finding that Ms. M. had also been overpaid the Canada Pension Plan (CPP), Disabled Contributor's Child's Benefit. Ms. M. should not have been receiving these benefits because J. was not living with her since January 2005. Rather, Mr. M. should have been receiving these benefits. In the case of

the Child Tax Credit, the total overpayment was \$5,624.47. The anticipated overpayment of the CPP benefit is in the range of a few thousand dollars. Ms. M. had been receiving a Disabled Contributor's Child's benefit of \$182 per month for more than two years. Ms. M. argued that these overpayments were a result of an error by both parties and Mr. M. should be partially responsible to the Government for their repayment. Mr. M. has received a retroactive lump sum payment of the Child Tax Benefit and it is expected that he will also receive a retroactive lump sum payment from CPP. It appears the retroactive payment will not be for the entire amount received by the Petitioner when the Respondent should have been getting it.

[101] Mr. M. argued that these overpayments to Ms. M. are her debt and not matrimonial debt. He also argues that it would be inequitable to order him to be responsible for the repayment of all or part of this debt. He also argued that the issue is not properly before the court on a corollary relief hearing, this being a non-matrimonial debt.

[102] The debt is the Petitioner's. The Respondent cannot and should not be held partially responsible for these over payments to the Petitioner. She received the

subject funds after the parties' separated and the repayment of the funds is a matter to be discussed by her with the appropriate government department. I am also satisfied that the Petitioner was aware that she was not entitled to receive these funds. The decision in *Gillis v. Gillis* [1995] N.S.J. No. 476 contains a helpful discussion of this issue.

Continuing Medical, Dental and Drug Insurance

[103] The parties agree that this coverage, when available to Mr. M., should be continued indefinitely for Ms. M.'s benefit, even beyond the termination date for spousal support. Mr. M. however, argues that the cost of this benefit should be considered as partial payment of his spousal support obligation as long as that obligation continues. The court agrees that Mr. M. should receive a financial credit for the cost of his employment benefit package, which is solely attributable to continuing the coverage for Ms. M.. That amount will be a third party payment deducted from the quantum of spousal support ultimately ordered. I find this amount to be ninety dollars (\$90.00) each month. I am satisfied that Mr. M. and his family receive benefits from the remaining premium.

[104] The court concludes that of the total cost to Ms. M. of continuing the benefit package, (\$90.00) is the cost of benefits is attributable solely to the Petitioner.

The court does not accept that all of the cost should be deducted. Some of the cost is mandatory and another percentage is also of benefit to Mr. M., his son, Ms. L. and her children, as a source of funds to cover uninsured services. The obligation to continue this coverage for the Petitioner shall exist only as long as it is available to the Respondent through his current or subsequent employment.

[105] The court orders the following:

1. That spousal support in favour of the Petitioner shall continue for an additional thirteen years, commencing December 1, 2007. It is \$600 per month.
2. That the spousal support shall take two forms. A payment of \$510 directly to the Petitioner is ordered. One half shall be payable on the 15th of each month and the remainder is to be paid on the 1st of each month, effective May 1, 2008.
3. Spousal support in the form of a third party payment is also ordered. It is valued at \$90 per month and is in the form of premiums paid by the Respondent to his employer for medical coverage of the Petitioner. This shall be paid as long as it is possible for the Respondent to access the coverage through his current or subsequent employer. This obligation will extend for the life of the parties. If this coverage is discontinued the direct payment to the Respondent shall increase to \$600 (subject to clause 1).
4. The Respondent is not required to name the Petitioner as the beneficiary of his life insurance.
5. The Petitioner is required to pay child support based on the Nova Scotia tables. On the basis of her income of \$15,392.16 for this purpose, that

obligation is \$128 per month. It is payable in two installments each month, i.e. on the 1st and the 15th of each month, effective May 1, 2008. The claim for undue hardship is not accepted.

6. The Respondent does not have liability for the Child Tax Benefit overpayment assessed against the Petitioner.
7. The Respondent does not have any liability for a potential claim against the Petitioner for an overpayment of the CPP Disabled Contributor's Child Benefit.

[106] The court reserves jurisdiction to hear the parties on the issue of costs or any other matter arising from this decision at the request of either party.

J.