IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Jovcic v. Jovcic, 2005NSSC183

Date:20050630
Docket: 1201-57838/SFHD-25888
Registry: Halifax

Between:

Lena Jovcic

Petitioner

v.

Slobodan Jovcic

Respondent

Judge: The Honourable Justice Leslie J. Dellapinna

Heard: June 6, 7, 8 and 15, 2005, in Halifax, Nova Scotia

Counsel: Janet Stevenson, for the Petitioner
Mark Knox, for the Respondent

By the Court:

[1] This is a divorce proceeding. The parties have been unable to agree on the division of their assets and debts

or on the issues of child and spousal support.

BACKGROUND

[2] Lena Jovcic ("the wife") and Slobadan Jovcic ("the husband") met in Croatia in August of 1983 and were married on July 28, 1984. At the time of their marriage the husband was thirty-eight years of age and the wife nineteen. They are now fifty-nine and forty respectively.

[3] Prior to their marriage the husband worked in the shipping industry for approximately twenty years. In approximately the same month as the parties' marriage the husband opened a pub in Croatia which was financed with money that he had saved during his career at sea.

[4] After the parties' marriage they lived with the wife's parents for approximately three years. During that time they had two children, Katarina who is now twenty years of age and Karlo who is eighteen. The wife was not employed outside of the home but cared for the children.

[5] According to the wife the pub was a financial success such that by July 1987 the parties had saved enough money to purchase an apartment in Split, Croatia for cash. The husband claims that the pub was not as successful as described by his wife and the money used to purchase their apartment came from a loan from his brother.

[6] In December 1992 the family immigrated to Canada. Prior to moving to Canada they sold the bar for approximately 140,000 Deutschmarks (which according to the husband was approximately equal to $140,000.00 Canadian at the time). The wife's father was left with a Power of Attorney and instructions to try to sell the parties' apartment.

[7] After arriving in Canada they first lived with the wife's sister and her husband in Dartmouth. The children were enrolled in school and the parties took English lessons in the evening.

[8] After approximately eight months they moved to their own apartment in Halifax. The wife was unable to obtain employment at that time. Although she had received training as a nurse and in cosmetology in Croatia she was not licensed to work in either field in Nova Scotia. The parties lived off their savings and concentrated on opening a business. In 1993 they opened a restaurant known as Amadeus. Amadeus was owned by a company set up by the husband of which he was the sole shareholder. The company was known as Spalato Enterprises Limited.

[9] Both parties worked long hours in the restaurant and it appears that it was moderately successful.

[10] In the same year that Amadeus was opened, the apartment in Croatia was sold. From the sale of that property the parties realized approximately 140,000 Deutschmarks.

[11] In 1995 the matrimonial home located on Pepperill Street in Halifax was purchased. To finance the purchase they used $100,000.00 from their savings (realized from the sale of the apartment) and obtained a mortgage from the Bank of Nova Scotia for a further $100,000.00. That mortgage has since been transferred to the Royal Bank of Canada.

[12] In July of 1997 the husband sold Amadeus. The net proceeds from the sale of the restaurant came to approximately $116,000.00. The husband used approximately $20,000.00 of that money to purchase a Jeep motor vehicle.
For the next three to four years the wife worked as a salesperson and stylist and also sold cosmetics and consulted for a movie production company. When she wasn't working she collected Employment Insurance benefits.

[13] After selling Amadeus the husband began a new business selling cappuccino, espresso and coffee grinding machines. That business was financed with money from the sale of Amadeus. It was not a successful enterprise. The husband testified that by 2000 the parties' savings had been depleted.

[14] By 2001 the wife was unhappy in the marriage. She decided to return to Croatia in the summer of 2001 with the children. They lived with the wife's parents. Their son was enrolled in school in Croatia but after a few months their daughter returned to Halifax. In the summer of 2002 Katarina and her father joined the wife and Karlo in Croatia and the entire family returned to Canada at the end of the summer.

[15] While in Croatia the wife advised her husband that she was unhappy. She said he promised to change how he treated her but after the family returned to Nova Scotia she saw no improvement.

[16] In September 2002 the wife began a two year diploma program in costume design at Dalhousie University which she financed in part with student loans.

[17] Because the husband's cappuccino business was not doing well she suggested to him that he open another restaurant. The husband, in partnership with a friend, opened Café Corso in downtown Halifax in March of 2003. The husband and his partner each invested approximately $40,000.00 into the restaurant. The husband's $40,000.00 investment was borrowed from his partner so in effect his partner provided all of the working capital. This restaurant has not been successful. According to the financial statements, in 2003 it produced a net income of $2,139.08 without either of the partners drawing a salary. In 2004 the restaurant's net income was only $520.18. Again neither of the partners drew a salary.

[18] The parties' marriage continued to deteriorate. After an argument which resulted in a physical altercation on June 15, 2003 the parties separated.

[19] The wife continues to live in the matrimonial home which is listed for sale. The husband lives in a modest apartment.

[20] At the present time the wife is employed at Sears in Halifax where she works approximately 37.5 hours a week. She is paid $9.50 an hour plus a 3% commission on any beauty product that she sells.

[21] The husband continues to work in Café Corso but is not drawing a salary. He and his partner have been attempting to sell the restaurant for over a year. So far they have received no offers.

[22] Karlo continues to live with his mother and is attending high school. Katerina is a full-time student at McGill University.

THE DIVORCE

[23] There has been a breakdown in the parties' marriage. I am satisfied that there is no possibility of a reconciliation. The divorce is granted.

ISSUES

[24] The issues are as follows:

1. The division of assets and debts between the parties.
2. Child support.
3. Spousal support.
4. Costs.

[25] **DISCUSSION**

DIVISION OF ASSETS AND DEBTS:

The relevant legislation is found in the *Matrimonial Property Act* N.S.N.S. 1989, c.275.

[26] The following are the various assets and debts which the parties submit are to be divided between them:

1. The matrimonial home.
2. Furniture, appliances and other effects located in the matrimonial home.
3. A 1983 Volkswagen Golf motor vehicle and furniture which the parties left in Croatia when they moved to Canada in 1992.
4. Approximately $3,000.00 in cash which the husband says was in the matrimonial home on the day he left.
5. A Jeep motor vehicle.

6. A Royal Bank mortgage which secures the matrimonial home.
7. A Canadian Imperial Bank of Commerce VISA account in the name of the wife.
8. A Royal Bank VISA account in the name of the wife.
9. A Scotiabank line of credit in the name of the husband.
10. A Scotiabank joint line of credit.
11. The wife's student loans.
12. Property taxes.
13. A debt the husband says is owed to his brother.

Assets:

The Matrimonial Home:

[27] The parties agree that the Pepperill Street property is a matrimonial asset. At the commencement of the trial the house was listed for $404,000.00, which listing expired on June 10, 2005. The mortgage securing the property had a balance owing of approximately $55,800.00 as of May 30, 2005, excluding penalties. The parties agree that the home is to be sold with the mortgage paid from the sale proceeds. Beyond that there is little agreement on what debts are to be paid and how the remaining proceeds should be divided between them.

[28] The wife has asked the Court to give her the sole authority over the sale of the house including the choice of agent and lawyer, the asking price, authority to respond on behalf of both parties to any offers, etc.. Such an order is not necessary. Since the parties listed the house they have, for the most part, been able to agree on the price and changes to that listing price from time to time. The wife is in the house and therefore is able to show the property to potential buyers at her convenience and without interference by the husband. I have been given no reason to believe that Mr. Jovcic will not cooperate with the sale of the property. If the parties are unable to agree on the listing price, on whether to accept an offer, on terms and conditions relating to an offer or counter-offer or any other issue arising out of the sale of the property, the court

retains jurisdiction to address any ongoing disputes upon application by either party.

The household contents:

[29] With respect to the contents of the matrimonial home the parties agreed, during their testimony, that the children's furniture would be retained for and by the children and not treated as matrimonial assets. They also agreed that the major appliances would be sold along with the house and that any remaining furniture and other household effects (with the exception of reasonable personal effects) will be divided between them *in specie* without the need for further court intervention.

The 1983 Golf and furniture left in Crotia:

[30] Prior to the commencement of the trial it was the husband's position that a 1983 Volkswagen Golf motor vehicle as well as items of furniture left behind in Croatia were matrimonial assets and therefore subject to division.

[31] When the parties left Croatia in December 1992 the Golf motor vehicle and various items of furniture that the parties were not able to take with them were distributed among family members. Since then some of the furniture has been donated to charity. During the husband' s direct examination he acknowledged that given the passage of time and the age of the various items he was prepared to agree that those assets would remain with whichever family member now has them.

[32] It is clear that the parties abandoned those assets when they came to Canada. The car is no longer registered in the name of either the husband or the wife. It is approximately twenty-two years of age, if it exists. There is evidence that it stopped working a couple of years ago. The other items, if they exist, are

thirteen or more years old. Had the parties considered that they still owned any of these items they had many opportunities during their frequent trips back to Croatia to retrieve them. I find that these items are no longer matrimonial assets and in any event would have no value today.

Cash in Matrimonial Home:

[33] The husband testified that on the date of separation he left approximately $3,000.00 in cash in the matrimonial home. Although the wife acknowledged that in the past the parties had kept significant sums of money in the house she denied that there was any money to be found after the parties separated.

[34] Other than the husband's testimony that the cash existed, there is no other evidence to convince me that there was any significant sum of money in the house and I am not prepared to assume that there was.

The Jeep:

[35] On the date of separation the only motor vehicle in the position of either party was a Jeep driven by the husband. The Jeep is registered in the name of Spalato Enterprises Limited. It is the wife's position that the Jeep was used for family purposes and therefore should be considered a matrimonial asset. The husband takes the position that whereas the Jeep was owned by Spalato Enterprises Limited it is not a matrimonial asset subject to division.

[36] Section 4(4) of the *Matrimonial Property Act* provides:

> "Where property owned by a corporation would, if it were owned by a spouse, be a matrimonial asset, then shares in the corporation owned by the spouse having a

> market value equal to the value of the benefit the spouse has in respect of that property are matrimonial assets."

[37] In McNulty v. McNulty (1990), 94 N.S.R. (2d) 387 (T.D.) Davison, J. stated at paragraphs 20 to 23:

> [20]..."This section is indicative of the intention of the legislature to prohibit assets being retained by a corporation for the purpose of thwarting the objectives of the Act. It is easy to see the evil that would be encouraged if courts simply labelled assets which were connected with a business as "business assets" without a more careful analysis of the use to which the assets are put or held...."
>
> [21]"Section 4(4) of the Act permits the court to pierce the corporate veil (see Bregman v. Bregman (1978), 21 O.R.(2d) 722, at 733, affirmed (1980), 104 D.L.R.(3d) 703 (C.A.)) and permits a closer inquiry as to the purpose for which the shares are held...."
>
> [22]"There will be circumstances where a party will adduce evidence to establish a valuation of the business in a closely held corporation with a view to showing that some of the assets are redundant and should be ignored for the purpose of valuation of the business. It may be the corporate structure is being used to hide these assets which, in reality, would be considered matrimonial assets...."
>
> [23]"...What portion of the asset would be considered "redundant" in making a valuation of the business? What is the extent of working capital required to sustain work in progress? There may be good business reasons for the company to retain the asset. In my view, these are matters which should be the subject of evidence before the court. The court cannot engage in speculation in matrimonial matters any more than it can in other proceedings. If it is alleged an asset belonging to a corporation is a matrimonial asset, the onus is on he who makes that assertion."

[38] When Spalato Enterprises was first incorporated its primary purpose was to own and operate Amadeus. At that time the husband had a van which was used for both business and personal purposes. When Amadeus was sold the van was traded in and, using the trade-in value and

funds realized from the sale of Amadeus, the Jeep was purchased. From that point forward Spalato Enterprises Limited was not engaged in any business. The husband said that he continued to pay the annual registration fee to keep Spalato in good standing solely for the purpose of keeping the Jeep registered in the company's name. The Jeep however was not used for the purpose of conducting a business owned or operated by Spalato. In fact, according to the husband, the Jeep was rarely used. There was some evidence that the Jeep was used occasionally by the husband in the operation of his cappuccino machine business but there is no indication that it is required in the operation of Café Corso.

[39] For the most part the Jeep has been used for personal purposes and not in association with any business. I am satisfied that if the Jeep was owned by either the husband or the wife it would be considered a matrimonial asset.

[40] It is the wife's position that the Jeep had a value as of the date of separation of between $8,000.00 to $10,000.00. During his summation the Respondent's counsel argued for a lesser amount referring to the husband's evidence that the Jeep is now in need of significant engine repairs.

[41] When dealing with depreciating assets such as motor vehicles, it is the value as of the date of separation that is generally accepted *(O'Hara v. O'Hara* (1991), 104 N.S.R. (2d) 426 (T.D.) and *Simmons v. Simmons* (2002), 196 N.S.R. (2d) 140 (S.C., Family Division)).

[42] As is too often the case neither party obtained an appraisal of the motor vehicle. Both simply gave their own opinion as to what the vehicle is worth. Neither is qualified to offer such an opinion. In support of the wife's figure her counsel included in her exhibit book a page from a website which purports to suggest the average trade-in and retail values of a 1997 Jeep Grand Cherokee. The value varies depending on the condition of the vehicle. There is no way of

telling from viewing the documentation provided from that website whether the figures are in Canadian or American funds. There are sites of similar names both in Canada and the United States. There is no way of knowing from looking at the document provided as of what date the figures shown were obtained. Counsel wrote on the document that the values were as of 2005. The figures shown suggest an average retail value of $7,050.00 and from that the wife and her counsel speculated that the Jeep had a value of $9,000.00 as of the date of separation. Not surprisingly the husband suggested a lower figure.

[43] While the court appreciates that particularly in family law efforts should be made to minimize costs, the "evidence" that has been presented regarding the Jeep's value is of little use. The court is left having to guess at its value.

[44] It is well known that the value of a vehicle depends not just on its make, model and year of production but also on the number of kilometres it has been driven, its mechanical condition, general state of repair and overall appearance. With reluctance I accept the wife's estimate not because I have confidence in its accuracy but because as little as the wife has offered by way of evidence of the Jeep's value, the husband has offered even less.

[45] Given that Spalato owns no other assets and to my knowledge has no debt, I have fixed the value of the shares in the company as of the date of separation at $9,000.00 and, pursuant to s.4(4) of the *Matrimonial Property Act,* I find the shares of Spalato to be a matrimonial asset. The husband will retain the shares in the company but the value of the shares will be taken into account in the division of the matrimonial assets.

Debts:

[46] There are numerous debts and with the

exception of the mortgage almost no agreement between the parties as to how these debts are to be treated.

[47] A definition for "matrimonial debt" is not to be found in the *Matrimonial Property Act* but there is no shortage of cases defining the term. Campbell, J. in *Larue v. Larue* (2001), 195 N.S.R. (2d) 336 (S.C. Family Divison) referred to the decision of Williams, J. in *Grant v. Grant* (2001), 192 N.S.R. (2d) 302 (S.C. Family Division) and summarized the definition of matrimonial debt as follows:

> ..."I agree with Justice Williams' summary in Grant, supra, of the judge made definition of "matrimonial debt" which includes but is not limited to debt incurred for the benefit of the family unit, during the marriage, for ordinary household family matters reasonably incurred and, if incurred after separation, necessary for basic living expenses or to preserve matrimonial assets. The debt must be capable of legal enforcement. To that definition I would add the obvious comment that debts which are incurred for the purpose of acquiring a non-matrimonial asset or for non-family purposes would not be matrimonial in nature. (Paragraph 40)..."

[48] The onus is on the person claiming a debt to be "matrimonial" of establishing that the debt is capable of enforcement. (*Rossiter-Forrest v. Forrest* (1994), 129 N.S.R. (2d) 130 (S.C.T.D.)). In other words, the debt must be shown to be a "legal obligation to pay". (*Walker v. Walker* (1989), 92 N.S.R. (2d) 127 (S.C.T.D.)).

[49] Although assets are presumed to be matrimonial until proven otherwise, the opposite is the case with debts. The party who seeks to have a debt classified as "matrimonial" carries the burden of proof (see *Abbott v. Abbott*, [2002] N.S.J. No. 420).

[50] Once a debt is identified as "matrimonial" the presumption of an equal division found in s.12 that applies to matrimonial assets also applies to matrimonial debts (see *Larue v. Larue,* supra and *Selbstaedt v. Selbstaedt*, 2004 CarswellNS 511). As

with assets, there may be good reason for dividing matrimonial debts unequally pursuant to s.13 of the Act if the court is satisfied that an equal division would be unfair or unconscionable.

The Royal Bank Mortgage:

[51] As previously stated, the parties agree that the mortgage is a matrimonial debt and will be paid from the gross sale proceeds realized from the sale of the matrimonial home.

Canadian Imperial Bank of Commerce VISA:

[52] There is a VISA account in the name of the wife. Both parties had cards to the account and both made use of those cards. As of the date of the parties' separation (June 15, 2003) there was $5,071.32 owing on that account, including a pro rata portion of the interest charged on the July 2003 invoice. Shortly after the parties' separation the wife cancelled the husband's card.

[53] Of the balance owing on the date of separation it was the wife's position that a portion of the expenses should be solely the responsibility of the husband because, according to her, they related to his businesses. Many of those expenses were for gas for his vehicle. There is a certain inconsistency to the wife's argument in that she also said that the Jeep was a matrimonial asset. Having determined that the Jeep was used primarily for personal purposes as opposed to business purposes it would seem logical to assume that the majority of fuel charges and other expenses incurred in relation to that vehicle were "matrimonial". Counsel for the husband did however concede that approximately one half of the gasoline purchases charged to this account during the period October 2002 to May 2003 did relate to the husband's business activities.

[54] The husband also made use of this account to

make purchases in relation to his cappuccino business and later in relation to Café Corso. Those expenses were:

1. Home Depot (Jan.7, 2003) $ 182.41
2. Les Entreprises Tzanet (Jan.18, 2003) 418.97
3. Gian Rocco Creations Inc. (Jan.17,2003) 528.95
4. Terra Café et The Ltee. (Jan.17,2003) 39.66
5. Metropolis (Jan.18, 2003) 34.50
6. Restaurant Emazona (Jan.20,2003) 38.00
7. Kent Building Supplies (Jan.24,2003) 290.78
8. Kent Building Supplies (Jan.25,2003) 286.27
9. Admissions - applications Montreal (Jan.25,2003) 60.00
10. Registry of Joint Stocks - Halifax (Jan.23,2003) 50.00
11. Home Depot (Jan.29,2003) 401.59
12. Home Depot (Jan.29,2003) 28.75
13. Home Depot (Feb.17,2003) 177.51
14. Piercey's Supplies (Feb.17,2003) 78.46
15. Home Depot (Feb.21,2003) 141.65
16. WalMart (Feb.21,2003) 23.33
17. Pier 1 Imports (Feb.22,2003) 25.30
18. MTT Mobility (Feb.28,2003) 564.21
19. Gleneagle Gourmet Bakery (Mar. 1,2003) 77.80

20. Nova Scotia Liquor Commission (Mar.5,2003)
185.28
21. Nova Scotia Liquor Commission (Mar.8,2003)
229.37
22. Nova Scotia Liquor Commission (Mar.14,2003)
71.84
23. Atlantic Countertop (Mar.14,2003)
460.00
24. Nova Scotia Liquor Commission (Mar.15,2003)
401.24
25. Gleneagle Gourmet Bakery (Mar.14,2003)
104.75
26. Nova Scotia Liquor Commission (Mar.22,2003)
114.01
27. The Greenery (April 3,2003)
52.84

_____

TOTAL
$5,067.47

[55] In addition to using the credit card for non-matrimonial purposes the husband also made payments on this account using his own line of credit at ScotiaBank. Those payments were as follows:

January 13, 2003 $1,128.96
February 10, 2003
2,000.00
March 12, 2003 5,209.44
April 10, 2003 4,494.00
May 12, 2003
960.00

_____

TOTAL
$13,792.40

[56] With the exception of the purchases made by the husband in relation to his business activities, I am satisfied that the remainder of the charges are

legitimately "matrimonial". Therefore, the outstanding balance of this account as of the date of separation in the sum of $5,071.32 shall be treated as a matrimonial debt. From his share of the net sale proceeds the husband will, however, repay to the wife the sum of $607.10 representing one half of his gasoline purchases and the sum of $5,067.47 for his business purchases charged to this account. That portion of the husband' s own line of credit that was used to pay down the wife's VISA card account will be treated as a matrimonial debt.

[57] The wife also asked the court to consider the post-separation charges to her VISA account as matrimonial debt because, using the wording of her counsel's Brief, the amounts were "reasonably incurred" and "necessary for the basic living expenses of the family" and "necessary to preserve the main matrimonial asset, the home". A review of the charges to this account after the date of separation shows that significant charges were incurred for the purchase of airline tickets, cell phone bills, and other unidentifiable expenses. The evidence does not convince me that the post-separation charges were necessary living expenses, or necessary to maintain the home or even reasonably incurred. I therefore decline to include those charges among the matrimonial debts.

Royal Bank VISA:

[58] The wife has a VISA account at the Royal Bank of Canada. The court has been given statements in relation to this account from June 16, 2004 to March 16, 2005. With the exception of interest the only charges to this account were made prior to the June 2004 statement. The outstanding balance of the account as of June 2004 (one year after the date of separation) was $803.45. The balance as of March, 2005 was $644.50.

[59] The wife testified that the only use she has made of this account was to make payments on her CIBC VISA account but there is no independent evidence of

that.

[60] I am not satisfied that the wife has established how this account has been used and therefore I am not prepared to presume that it is matrimonial.

ScotiaBank Line of Credit - (#45** *** *** 027)

[61] The ScotiaBank line of credit in the husband's name was originally opened to be used in the operation of Spalato Enterprises Limited. The monthly statements are in the name of the husband and the name on the cheques for this account is "Spalato Enterprises". Except to the extent that this account was used to pay down the wife's CIBC VISA account (to which I have referred above), there is no evidence that this account was used for the benefit of the family or for any other reason should be classified as a matrimonial debt.

[62] The Bank of Nova Scotia has entered Judgement against Spalato Enterprises Limited and the husband in the sum of $18,947.00. Therefore, $13,792.40 of the outstanding balance shall be considered a matrimonial (i.e. the total of the payments on the wife's VISA) debt and the remaining $5,154.60 is non-matrimonial in nature and will be solely the responsibility of the husband.

ScotiaBank Joint Line of Credit - (#45** *** *** 203)

[63] In the joint names of the parties is another line of credit with ScotiaBank which account was opened in or about 1997. According to the statements that have been presented, the balance owing on this account as of December 24, 2002 was nil. However beginning in late December of 2002 and continuing to and including June of 2003 a number of cash advances were drawn from this account. The cash advances were withdrawn by the husband and not the wife. According to the wife the withdrawals were made without her knowledge or consent. She says she thought the account was inactive. It is her belief that the husband used the cash advances to

finance Café Corso. He claimed the money was used to pay for family living expenses because he and his wife had insufficient income to meet the family's needs. The wife acknowledged that it was at least possible that the money was used for family purposes.

[64] Subsequent to the parties' separation the husband and wife defaulted on this account and the Bank of Nova Scotia entered Judgement against them in May of 2004 in the sum of $23,417.61.

[65] With the exception of one cash withdrawal, I accept that this account was used for family purposes. The funds required to finance the family's living expenses had to come from somewhere. They had no savings and the wife did not earn enough to pay all the household expenses. It is worth noting that the withdrawals by the husband ceased in June 2003, the month of the parties' separation.

[66] There was one cash withdrawal on January 22, 2003 which appears to have been used to make a payment against the husband 's line of credit. With the exception of that withdrawal (in the sum of $2,001.97) I consider the remainder of the account to be matrimonial.

Wife's Student Loans:

[67] The wife's studies at Dalhousie University in 2002 to 2004 were financed in large part by way of student loans. The outstanding balance of her loans comes to $20,661.00 of which $9,951.00 was borrowed prior to the date of separation and the remaining $10,710.00 borrowed subsequent to the parties' separation. The wife says the total amount of her loans constitute a matrimonial debt. She says the post-separation portion of this debt should be considered as matrimonial because the parties "contemplated" the wife completing her course of studies. The husband's position is that only that portion of the debt which was incurred prior to their separation should be considered as matrimonial.

[68] I have no difficulty concluding that the portion of the debt that was incurred prior to separation is a matrimonial debt (see *Schaller v. Schaller* [1993] N.S.J. No. 128 (N.S.C.A.)). How the post-separation portion should be treated is less clear. The wife entered her two year program prior to the date of separation with the consent of the husband and it was intended at that time that she would complete the two year course of studies and that her costs were to be financed by way of student loans. However, the loan for her second year was signed solely by the wife and was signed after the date of separation. As impractical as it may have been at the time, the wife could have withdrawn from the program and not incurred the debt.

[69] I am not prepared to concluded that the post-separation portion of this debt is matrimonial in the circumstances of this case but will address this debt again under the heading of "Child and Spousal" support below.

Property Taxes:

[70] In 2003 the Spring interim tax bill in relation to the matrimonial home was paid shortly before the parties ' separation. The remainder of the 2003 tax bill was paid in October, 2003. The taxes for 2004 and 2005 (as well as some interest) totalling $5,416.21 remains outstanding. The wife asked that this amount be considered "matrimonial" and paid from the house proceeds prior to the net proceeds being divided.

[71] Had the parties both been living in the matrimonial home I would classify this debt as matrimonial. However, since June 15, 2003 the wife has had the sole use and benefit of the home and the husband has had to find accommodation elsewhere. Therefore the wife will be responsible for this debt. No doubt the taxes will have to be paid from the gross sale proceeds at the time of closing, however the wife shall reimburse the husband for the municipal taxes from her share of the proceeds (by paying him one-half

of the tax bill paid from the proceeds).

Debt to the Husband's Brother:

[72] The husband asked the court to include among the matrimonial debts a loan which he alleges is owed to his brother in the sum of 120,000.00 Deutschmarks. He says that he borrowed money from his brother in 1987 to finance the purchase of an apartment for the family in Croatia. It is his evidence that prior to the purchase of the apartment he met with his brother Sinisa at their mother's home and his brother gave him cash because cheques were not customary in Croatia at the time.

[73] It is the wife's position that no such loan ever existed. It was her evidence that from the operation of the pub they were able to save sufficient funds to purchase the apartment. She acknowledged that before the apartment was bought her husband did tell her that he had some concern that their savings would fall short of the purchase price and that he might have to approach his mother for some money. But when she later asked him if he did borrow from his mother he told her that it was none of her business. When the pub was sold she again asked him if any money was owed to his mother and she received much the same response. She claims that she knew nothing of any money borrowed from her brother-in-law.

[74] The husband was not able to produce an original loan agreements with his brother. He claims that it is the custom in Croatia for the lawyers to keep the original contracts in their files and not release them to the parties. To prove the existence of a contract he presented a photocopy of a document entitled "Agreement on Loan" which contained two signatures. He identified one as his own and the other to be his brother's. Their signatures were not witnessed. The agreement was typed and in Croatian. He also provided an English translation. Attached to the English translation is a certificate of a notary who confirmed that the husband, in his presence, "recognized the

signature on [the] agreement as his own". The wife believes that the loan agreement produced by the husband is fraudulent.

[75] The husband's brother did not testify. The husband said that his brother is elderly and unable to travel to Canada. He also said that he and his lawyer investigated the possibility of having his brother testify by way of a video-link but the costs were prohibitive.

[76] In 1993 the parties were finally able to sell the apartment. They travelled to Rome and from there the wife travelled to Croatia to retrieve the money. She then smuggled the money out of the country. The sale produced more than enough money to repay the husband's brother. However the brother was not paid. The husband said that he was upset with his wife because she failed to repay his brother at the time, yet, the husband made no other arrangements to repay his brother. This is in spite of the fact that almost yearly the parties returned to Croatia for visits.

[77] The husband never made any payments to his brother. There is no evidence that his brother ever made any demands for payment. On many occasions since the parties arrived in Canada they had sufficient funds to repay Sinisa, if indeed the money was owed to him.

[78] I am not satisfied that a loan agreement exists between the husband and his brother. If a loan document does exist, I have not been satisfied that it cannot be produced. I am also not satisfied that the document that has been presented constitutes a certified copy of an original agreement signed in 1987. I am therefore not prepared to admit it into evidence.

[79] I do not believe that there is any debt owing by the husband to his brother. I do not believe that any money changed hands between the husband and his brother but even if it did, I do not believe that Sinisa expects the husband to repay the money nor do I believe that the husband ever intends to pay any money

to his brother. I believe the wife's evidence that she was not told of any such debt until after the commencement of these divorce proceedings.

Other:

[80] The wife wants the court to order the husband to reimburse to her one half of the mortgage payments that she has paid since the date of separation and one half of a house repair bill in the sum of $690.00 that she incurred in September 2003 as a result of damage to the home caused by a hurricane.

[81] For the same reason that the husband should not be expected to pay the municipal taxes that accrued since the date of separation her request for reimbursement of half the mortgage payments is denied. However the damage caused by the hurricane was a unusual expense that had nothing to do with ordinary use of the property. The husband shall pay the wife one half of that bill i.e. $345.00.

Distribution Between the Husband and the Wife (Summary):

[82] In summary, the parties will cooperate with each other in order to sell the matrimonial home as soon as is reasonably possible. From the gross sale proceeds will be paid the real estate fees, legal fees, disbursements and applicable H.S.T.. The outstanding balance of the mortgage (including penalties if any) shall also be paid. Any arrears of mortgage payments will be the responsibility of the wife. Subject to the adjustments referred to below, the outstanding municipal taxes will also be paid from the sale proceeds as will the ScotiaBank joint line of credit and the husband's ScotiaBank line of credit.

[83] I have considered whether an unequal division of assets would be appropriate under s.13. Neither party has said that they are seeking an unequal division. In any case, I am not satisfied that an

unequal division would be unfair or unconscionable. Therefore the net sale proceeds shall be divided between the parties such that the matrimonial assets and debts are divided equally - subject to the aforementioned adjustments.

[84] The following schedule may be used as a guide in dividing those proceeds:

Proceeds from the sale of the matrimonial home (est.) $400,000.00
Less: Real estate fees including HST (est.) (27,600.00)
Legal fees and disbursements (est.) (1,000.00)
Mortgage (Including penalties, if any, but excluding arrears) (est.) (56,000.00)
Outstanding property taxes (5,416.00)
ScotiaBank Joint Line of Credit (23,417.61)
Husband's ScotiaBank Line of Credit (18,947.00)

Net proceeds $267,619.39

ASSET/DEBT	**HUSBAND**	**WIFE**
Matrimonial		
House contents	in specie	in specie
Spalato Shares (Jeep)		$ 9,000.00
CIBC VISA ($ 5,071.32)		

Subtotal	$ 9,000.00
	($ 5,071.32)
Net Sale Proceeds	126,774.03
	140,845.36
Total Matrimonial Assets after Division	**$135,774.03**
	$135,774.04

Adjustments

[85] From his share of the sale proceeds the husband will pay to the wife the sum of $607.10 representing one half of the gas purchases charged to her VISA account and $5,067.47 as compensation for the other business expenses charged to her VISA account. He will also pay to her $1,001.00 being reimbursement for the business expense charged to the joint line of credit, $2,577.30 for the non-matrimonial charges to his line of credit and $345.00 for his half of the hurricane repair bill.

[86] The wife in turn will pay to the husband an amount equal to one half of the municipal taxes estimated at this time to be $2,708.00 (one half of $5,416.00). By offsetting the wife ’s payments against the husband’s payments, there would be a net adjusting payment by the husband to the wife of $6,889.87 (depending on the total amount of municipal taxes paid on the closing date).

CHILD AND SPOUSAL SUPPORT:

The wife is seeking an order for both child support and spousal support. She seeks to have the court impute income to the husband and order him to pay both child and spousal support on a retroactive as well as prospective basis.

[87] In March of 2004 the wife made an application

for interim child support which was dismissed. At that time too she asked the court to impute income. Her application was denied. Now, approximately one year after that application, the wife is seeking an order retroactive to the date of the dismissal of the interim application and is requesting the same relief that was denied by the chambers judge.

[88] In the wife's brief it is argued:

> "In light of the significant time period Mr. Jovcic has had to make his business profitable, it is appropriate for the Court to impute income to Mr. Jovcic for the purpose of retroactive child support to March 4, 2004 [the date of the hearing of the interim application] and for the purpose of future child support."
>
> ...
>
> "Mr. Jovcic has continued to follow a career path that has allowed him to escape entirely his obligation to financially support his children."
>
> ....
>
> "Mr. Jovcic has the proven ability to earn income and we submit that he is intentionally under employed within the meaning of s.19 [of the guidelines]."

[89] The legislative authority for child support and spousal support orders is found in ss. 15.1 and 15.2 of the *Divorce Act*. Section 15.3(1) states that where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.

[90] In making a child support order the court is to do so in accordance with the applicable child support guidelines.

[91] I am not prepared to make an order on a retroactive basis. The chambers judge declined the wife's application approximately one year ago and there is no indication that relevant information was withheld from the court at that time. An order for child or

spousal support retroactive to the date of the interim hearing would amount to a reversal of the chambers judge's decision.

[92] With respect to prospective child support, the husband's income falls below the minimum amount required before a table amount can be ordered under s.3. His income appears to be reported accurately. He has been able to survive and even provide money and other items for the children periodically by eating in his own restaurant, using money realized from the sale of refundable bottles generated by the restaurant and by borrowing against his line of credit and from friends.

[93] Having determined that no table amount is payable under s.3, would it be appropriate in the circumstances of this case to impute income to the husband?

[94] Section 19 of the Guidelines provides the court with the authority to impute income "as it considers appropriate". Section 19(1) includes a number of circumstances in which the court may consider imputing income. The list is not exhaustive. Of those circumstances that have been innumerate, they seem to fall into one of three general categories:

1. The payor is intentionally under-employed or unemployed or is failing to reasonably utilize assets to produce income;
2. The payor is diverting income, understating income or receives income that for various reasons is treated favourably for tax purposes; or
3. The payor has failed to disclose income.

[95] Except for a very modest amount of income that could be imputed to the husband for the meals that he eats at Café Corso or the cash that he receives from the restaurant's recyclables - which would not result in enough income to warrant a table amount of child support - none of the above circumstances apply in this case. Café Corso is still only a little over two years

old. The husband began this business with the encouragement of the wife. It appears that he and his partner have been working hard to make it prosper. Largely due to circumstances over which they have little control (including significant competition in the area of their restaurant) they have not been able to produce a significant profit.

[96] There was every reason to believe that the husband could have been successful at this business. He has been successful in the past with similar ventures. It is unfair and inaccurate to say that he continues to "follow a career path that has allowed him to escape entirely his obligation to financially support his children".

[97] He and his partner have been attempting to sell the restaurant. They have received no offers. It is not surprising that they have not been inundated with offers given the low profitability of the restaurant. It would be premature in my view to hold that the husband is intentionally under-employed. He works very hard but he just doesn’t earn any money.

[98] To his credit the husband has made enquiries regarding the possibility of other employment although one wonders how he could work elsewhere and still keep the restaurant going. If the restaurant was to close its doors the probability of the husband and his partner selling the restaurant as a going concern would be extremely low.

[99] The husband is fifty-nine years of age with some health issues. In spite of his work experience one would expect his employment prospects to be limited.

[100] The purpose of s.19 of the Guidelines is to ensure that payors do not escape their obligation to contribute to the support of their child or children by failing to generate a reasonable level of income taking into account their ability, experience, opportunities and child care responsibilities, by understating the

true value of their income, or by failing to disclose their income. It is not intended to be the catch-all clause of the guidelines to trap every potential payor who has somehow slipped through the other provisions of the Guidelines without being required to pay any child support. The Guidelines themselves contemplate the possibility that a spouse will not pay child support. I refer to the oral decision of Campbell, J. in *Keefe v. Randall*, 2005 NSSC 164 at paragraphs 17, 27 and 28:

> [17] It is my view that the requests for orders which impute income are far too frequent. I think this comes from a failure to fully appreciate the operation of the Child Support Guidelines system.
>
> ...
>
> [27] I take the view that the court does not merely impute income because a parent is not meeting his moral and statutory duty to support his child. Rather, it is mandatory that the court should order no maintenance when the income is below the threshold of the table amount, unless the imputing factors, either enumerated or unenumerated from s.19 can be proven. I take it that the onus would be on the party alleging that that should be done to prove it and in this case, I have concluded that that has not been proven.
>
> [28] There is, in my opinion, not only no authority to impute income based on moral obligation, there is also no logic to doing so because the inevitable result is immediate arrears that will represent an unnecessary intrusion in the payor's opportunity to re-establish himself once employment is found.

[101] Section 11 of the Guidelines provides for the various "forms" of child support payments. Child support can be paid periodically, in a lump sum or in a lump sum and by periodic payments. The form of payment has nothing to do with the calculation of the child support. If a payor spouse is deemed to have the ability to pay child support (either because he/she has the income or income is imputed) such child support can be ordered to be paid periodically and/or by way of lump sum. The lump sum form of child support would ordinarily be used to collect arrears or if there was

some reason to believe that the collection of prospective support may be problematic. Lump sum child support payments should not be used as a means of redistributing assets.

[102] Having already determined that the husband's obligation to pay child support under the Guidelines is nil, I am not prepared to order a lump sum.

[103] Similarly, I am not prepared to order periodic spousal support payments, either retroactive or prospective because the husband does not have the means to pay such support. I am however prepared and do order him to pay lump sum support to the wife in the sum of $5,355.00 being one half of the student loan incurred by the wife subsequent to the parties' separation. The wife's student loan is a specific and immediate need. (See *Hemming v. Hemming* (1983), 58 N.S.R. (2d) 65 (N.S.S.C., A.D.)). It is a debt that was incurred for the purpose of retraining the wife which is expected to benefit not just the wife but also the children and perhaps, indirectly, the husband. (See also *Mosher v. Mosher* 1995 CarswellNS 11 and *Moore v. Moore* (1987), 77 N.S.R. (2d) 267 (N.S.S.C., A.D.).

COSTS

[104] If the parties are unable to agree I am prepared to hear them on the issue of costs.

[105] Counsel for the wife will prepare the necessary orders.

J.