Date: 20020411
Docket: Prothonotary's No. 1207-001918

IN THE SUPREME COURT OF NOVA SCOTIA
(Cite as: Cook v. Cook, 2002 NSSC 124)

BETWEEN:

DIANE J. COOK

PETITIONER

- and -

MICHAEL W. COOK

RESPONDENT

DECISION

Heard Before:	The Honourable Justice J. E. Scanlan
Place Heard:	Truro, Nova Scotia
Dates Heard:	April 8, 9 & 11, 2002
Decision Date:	April 11, 2002 (Orally)
Written Release of Decision:	May 6, 2002

Counsel:		
	Ms. B. Lynn Reierson Reierson Schurman 6129 North Street Halifax NS B3K 1P2 Solicitor for the Petitioner	Ms. Julia Cornish Sealy Cornish O'Neill 200-56 Portland Street Dartmouth NS B2Y 1H2 Solicitor for the Respondent

SCANLAN, J.

The Divorce

[1] I start by noting the parties were married on September 5, 1970 and separated on November 24, 1999. I indicated during the proceedings that I was satisfied there was no possibility of reconciliation. I am satisfied that all jurisdictional matters have been proven and the grounds have been proven. It is appropriate that a divorce judgment should be granted. I am prepared to so order and sign a divorce judgment.

Corollary Issues

[2] In relation to the corollary issues, the division of the matrimonial property and assets has largely been resolved by way of agreement. That includes the most difficult issues surrounding the definition and division of business assets. I do again commend counsel in relation to the efforts they made in that regard. I am sure it saved both their clients a lot of money and a lot of emotional stress.

[3] The main unresolved issue is spousal support. Specifically, Mrs. Cook is asking that there be spousal support paid for an indefinite period and counsel

on her behalf has suggested a figure of $9,000.00 per month. Dr. Cook takes the position that there should be no spousal maintenance paid.

[4] At present there is an interim consent order which requires the payment of $6,000.00 per month, that interim order was dated September, 2000. Prior to that there was an informal arrangement whereby amounts, so near as I can calculate, nearly equivalent to that $6,000.00 were paid. I say "near" the $6,000.00 recognizing that it is difficult to precisely calculate what was paid as between the parties after the separation and prior to the order of September, 2000. The payment was in part paid by Dr. Cook to Mrs. Cook through a continuation of a salary, a severance allowance as they described it, through his professional company. That continued after Mrs. Cook was no longer working for or performing any services for the company. Dr. Cook also paid money to Mrs. Cook through his direct or indirect payment of household expenses.

Background

[5] I now turn to the background of the parties and circumstances of the marriage. Mrs. Cook was around 21 years old when the parties married. She had been enrolled in an undergraduate degree program in Halifax. It was decided by her and not objected to by Dr. Cook that she would not continue with her undergraduate studies, working towards a degree. She instead entered a teaching certificate program. Mrs. Cook explained this by saying that she really did not enjoy school. She thought that if she went into the teaching certificate program she would be qualified for and able to get a job as a teacher. That was a preferred option for her instead of staying in the undergraduate degree program for several more years. Dr. Cook did not object to her decision to enter the teaching certificate program.

[6] Eventually Mrs. Cook did receive a T3 certificate. That was just around the time the parties were married. Mrs. Cook never did teach in a classroom. It came as a surprise to her and to Dr. Cook that, even though the government was at that time encouraging people to enroll in the teacher certificate program, there were no jobs available at the end of the course. This was the case even though the government was spending money and paying the tuition costs. Mrs. Cook had relatively little work experience outside of the home. I recognize that maintaining a home and raising three children is a

full-time job in many respects but it is not outside the home. Her work prior to the marriage included the retail sector at Sears and at a grocery store either part-time or full-time. During the marriage she worked as a library assistant. Her position was basically the lowest ranking in the library system. She did not have a librarian degree. That work continued only for a year or so and ended when the couple started a family.

[7] There were three children born of the relationship. The evidence before me would suggest that at this time there are probably no "children of the marriage" as defined by the **Divorce Act**. The possible exception would be the youngest child Adam who would be stretching the limits of the definition of "child of the marriage" given that he has a child of his own and is working towards his masters program. He still depends to a large extent on his father at least and to a lesser extent on his mother to maintain both he and his child (Dr. and Mrs. Cook's grandchild) as he completes the masters program.

[8] I have referred to the work that was done outside of the home early on. In recent years Mrs. Cook began working, in name at least, for Dr. Cook's professional company. I understand she did some of the bookkeeping, accounting, helped with the relocating of files and filled in when permanent

staff were not there or when Dr. Cook had to do office work outside of his normal office routine. Mrs. Cook did participate to a certain extent in that type of medical office environment. There is a question however as to how much of that was real work and how much of that was served only as income splitting opportunity. I am not at all being critical in that regard, I am simply saying that it is not as though Mrs. Cook went out and was employed full-time in an independent medical office as a medical assistant or medical secretary. Her work in Dr. Cook's office does not prepare her to now work as a medical secretary in another office.

[9] In addition to the work in Dr. Cook's office, Mrs. Cook has been elected and re-elected as a councillor in the Town of Truro. She earns some income through that position. I understand the rate is around $6,700.00 per year plus a reimbursement of about half that amount in expenses for which she does not have to account. Considering the hours that I understand she puts into that work, it has a very low hourly rate of remuneration.

[10] The youngest child of the relationship is about 24 years old, the oldest is 29. Except for the first few months of their lives they were all relatively healthy and robust. They were involved in and excelled in sports, as is evidenced by the fact they all participated at the junior national level swim

teams. During the first few months of each of the children's lives they each had a congenital hip problem which required extra effort, work, time and concentration on Mrs. Cook's behalf. That problem for each child was resolved in a matter of weeks or months. Basically I would say these children have not been any greater or any less burden than most children in the world today.

[11] Mrs. Cook throughout the years has been a very involved parent in terms of her volunteer work at the school helping children. I understand that continues even to this day. She was a block parent organizer and a block parent person. She coached and organized swim team activities and participated at a very high level in all of those programs. I am sure that was an advantage for the children.

[12] That volunteer work also to a limited degree has helped prepare Mrs. Cook, if she so chooses, to enter the work force. I am satisfied Mrs. Cook has the ability and the resources to earn an income so as to make a substantial contribution to her own livelihood. When I say that, I recognize Mrs. Cook has not been an active participate involved in pursuing a career over the many years of the marriage. The many years that she remained out of the work force has left her in a position where she is not advanced in

establishing a career. Training or retraining which she may have sought has been forgone because of choices and contributions she made in relation to child and home care responsibilities to which Dr. Cook acquiesced. I do not in any way underestimate Mrs. Cook's contribution or her sacrifice in terms of her career.

[13] I am satisfied that Mrs. Cook has chosen in more recent years not to re-enter the work force. That is a conscious choice she has made. Dr. Cook did not discourage her, in fact he encouraged her to consider resuming her career as the children got older. There are many, many parents who raise children and both parties to the marriage participate in active careers. As I have indicated, I am satisfied it is as much by choice as it is by circumstance that Mrs. Cook has not become involved in pursuing a career. I would indicate, she does and did have the financial resources and flexibility to resume her chosen career or embark upon a new career had she so wished. Mrs. Cook is obviously very intelligent and possesses the skills to do something to contribute substantially to her own support. Her abilities are evidenced by her work with council, work in Dr. Cook's medical office and the fact that she was, many years ago capable of obtaining a teaching certificate.

[14] I am not satisfied that Mrs. Cook is all that motivated at this time to train for, or to look for work, or to develop a business that would see her contribute to her own support. Those are all options that are available to her. She is a very intelligent, capable person. As I have indicated Mrs. Cook's days are now filled with low paid councillor related, unpaid volunteer work and marathon bridge which she enjoys. A lot of people in the world do not have the luxury of choosing not to pursue careers or trying to support themselves. That's her choice and she is very fortunate that she can, at this point in time, afford a very comfortable lifestyle whether she works or not. I would point out, however, that there is a specific obligation under the **Divorce Act** which require that Mrs. Cook strive to attain self-sufficiency or at least contribute to her own support. Although I mention the objective of self sufficiency at this juncture counsel, I am cognizant of the comments of the Supreme Court of Canada in **Moge v. Moge** [1992], 3 SCR 813. In accordance with the **Moge** decision I note that the "means and needs" test is no longer the exclusive criterion for support. All the objectives and criteria defined in ss. 15.2(4) and (6) of the **Act** must be taken into account when spousal support is claimed. No single objective is paramount. In accordance with the provisions of sections 15.2 (4) and (6)

the support order must take into account the particular dynamics of the marriage and the parties. I do not over emphasize self sufficiency as one objective in spousal support, I simply suggest it is an appropriate consideration when the Court considers all the factors and objectives I must consider pursuant to the relevant portions of the **Divorce Act**.

[15] I would point out the evidence suggests that Mrs. Cook is a person who enjoys good physical and mental health and there is nothing health wise that would prohibit her from participating in the work force. I recognize it may take some time for Mrs. Cook to prepare herself to re-enter the work force and it would not be appropriate for the Court to say as of today Mrs. Cook you should be in the work force earning an income. I do point out to Mrs. Cook that this is an objective she must strive for. Life is not over at 53. A lot of people do continue contributing to their own upkeep and support after they are 53 years old.

[16] I would note as well that in addition to the income earning capacity Mrs. Cook has, I am satisfied she has substantial capital available to her to produce investment income. The Court must strike a balance in deciding how much of that investment income should be attributed to current living expenses and how much can be reinvested to build capital. Given the

relatively large capital base which Mrs. Cook takes from this marriage as a result of the division of assets that asset position cannot be ignored in this case. The income earning capacity based on capital is but one circumstances that results from the marriage, the roles assumed by the parties and the impact upon Mrs. Cook as a result of the breakdown of the marriage. I again point out that it would be inappropriate to place an inordinate amount of emphasis on that factor but it simply cannot be ignored in this case.

[17] I have referred already to the fact that during the marriage Mrs. Cook was a stay at home mom with three busy children and to the fact they are no longer children of the marriage as defined within the **Divorce Act**. Their ages are 24, 26 and 29. Mrs. Cook, in her evidence, characterized herself as being the primary caregiver throughout the marriage. I do not disagree with that for a moment. She carried the lions share of the child care responsibilities. I would not, however, suggest that Dr. Cook did not participate in the children's lives. As Mrs. Cook said during the trial when the discipline problems became serious and there was a need for an assertive hand within the family she turned to Dr. Cook. Dr. Cook also talked of coming home and relieving the babysitter, sending her home because Mrs. Cook would be

out, in the early years at least, participating in marathon bridge tournaments. He was also there some evenings and weekends.

[18] Although on-call 24 hours a day, seven days a week throughout most of his career Dr. Cook no doubt had some time off and would have been home on many occasions when not called out. That is not to suggest he was there as much as some parents who work at other jobs which are not so demanding or a job with a little more certainty in terms of work schedule. Dr. Cook talked as well of taking his son on a fishing trip. He talked of numerous family vacations with the entire family. He talked of being home on weekends and cooking on a fairly regular basis. He said he enjoyed cooking, describing himself as a creative cook. The cooking is further evidence of his participation and involvement with the family. As I have indicated it is simply not a situation where he was never there. He was not there as much as he would have liked but he was there some.

[19] The bottom line is the family seemed to have established priorities that both parties were satisfied with. Mrs. Cook does not appear to have complained about her workload or the role that she played in relation to being the primary person responsible for and participating in raising the children, nor did she complain about the lifestyle the long hours of work by

Dr. Cook afforded to the family. The entire family enjoyed that lifestyle. They had trips, numerous cars for mom, dad and each of the children, a nice house, university educations and almost unlimited access to elite swim programs. The family had many, many things that few people in this community could ever have expected. As I have indicated there does not appear to have been any complaints from either side as regards the roles that they assumed. As busy as Mrs. Cook may have been, Dr. Cook was just a busy and made at least an equal contribution to this marriage. It was just the tasks assumed by the parties that were different.

[20] I note, as well, that in terms of time required and effort as regards raising the children there was some relief for Mrs. Cook. This family could and did afford the help of some domestic servants who were not full time, but certainly it would have been enough to relieve Mrs. Cook of some of the work that others might have to do.

[21] I note as well in terms of responsibilities around the home that Dr. Cook, according to the evidence of both Mrs. Cook and Dr. Cook, did house repairs and he enjoyed gardening. All of these things were simply a matter of a division of the work load and responsibility as between the parties.

[22] Mrs. Cook said she enjoyed the volunteer work she did. She enjoyed working with children, she enjoyed her participating in the swim teams and everything else she did. Dr. Cook said he enjoyed his work for the most part. I suppose like any other job, whether it is a stay at home mom or a surgeon, there are good days and bad days and good parts and bad parts. That is the way it was, nobody complained about the roles they assumed in this marriage.

[23] I turn to the background of Dr. Cook if I can just for a moment. Dr. Cook received his BCS and married when still in medical school. It was during the first year or second year of medical school when Mrs. Cook stopped working as their first child was born. The family, from that time on, basically lived on what Dr. Cook could earn through his part time work , summer jobs, his wages he received as a resident and substantial loans he had to take out as he was going through medical school. During that period Mrs. Cook's main contribution to Dr. Cook's education and career was through providing the child and home care that was required while Dr. Cook went to medical school and pursued his career as a surgeon. There is no question Dr. Cook's medical career has afforded a handsome income to

this family relative to many others. I will return to the issue of his level of income in this decision later.

[24] The standard of living of the family is reflected in the fact they have, and have had for a long time, a mortgage free home which, according to the agreement of the parties, is worth approximately $200,000.00. They have had several cars and still do have several cars both for Mrs. Cook and Dr. Cook. Throughout the years as the children became old enough to drive, the children have been provided with cars on an ongoing replacement basis. In terms of where the parties find themselves now, all of those cars they choose to buy for the children have impacted the parties and what they have left to divide at this point in time. That is a choice which both parties indicated they made and I understand they wish to continue to make in terms of giving to their children.

[25] I want to make one point in relation to any decisions the parties make in terms of continuing to give substantial gifts or assistance to their children. If as individuals these parties choose to use their resources to give to the children, I am not considering that as a burden which should be funded by the other party. These are no longer children of the marriage and one might even ask as to whether or not it is wise to keep giving to these children at the

level that you have traditionally given to them. So far it appears to have done little to foster independence. If you so choose to continue giving understand you must do it within the means that you each can afford. If Dr. Cook is excessive, he has to understand that at the end of the day it will be his estate that is impacted. If Mrs. Cook chooses to be excessive then it will be her estate that is impacted. The Court will only, in terms of budgetary allowances, take into account what is a reasonable allocation for gifts. So far that has included cars, rent and substantial monthly allowances. Once it gets beyond reasonable and it has, it is really not a budgetary allocation, it is a matter of discretion for each of the parties above and beyond that which I am going to force the other side to pay directly or indirectly.

[26] In relation to Dr. Cook it is my understanding that he has enjoyed a relatively healthy life, both mentally and physically, but that he is getting tired. He is 52 years old. Call it burn out, call it depression, call it what you want, he sees sometime in the near or medium term, a requirement to slow down. He is also noticing some arthritis in his dominant hand used in surgery. This, or other unforeseen circumstances, may indeed force him into early retirement. Even the emotional pressures of surgery and life in

general may well force him out of the operating room. The bottom line is it is obvious he cannot go on forever at the pace he has maintained throughout his working life and that he now continues to maintain.

[27] When the parties were together it was anticipated he would not have to work until he dropped. I am not about to impose a burden upon him which will require him to work until he drops. A comfortable retirement at a reasonable time is something which he has worked long enough and hard enough to enjoy. Surely he must be allowed to start arranging his affairs in contemplation of either a forced or a voluntary slow down or retirement. I am satisfied the obligation I impose upon him should not make that an impossible objective.

[28] As I have earlier noted, on the facts of this case, I cannot decide the issue for spousal support without reference to the division of matrimonial property. In that regard I refer to the case of **Miller v. Miller** (1996) 22 R.F.L. 4th 103 Sask. Queens Bench. In **Miller** Wimmer J. referred to the comments of Maurice J. in **Ritchie v. Ritchie** (1994), Sask. R. 197 (Q.B.) 208 where he summarized the rationale underlying spousal support orders referencing the **Moge** decision saying at paragraph 28:

He held that when applying these principles, a Court must take into account the sharing of matrimonial property when considering the economic advantage or disadvantage arising from the marriage or its breakdown.

[29] Matrimonial property, the assets available to each of the parties is relevant to the issue of spousal support. It relates to the issue of the impact of the roles assumed by the parties during the marriage and the relative consequences of the marriage and the marriage breakdown.

[30] This couple's assets included Dr. Cook's professional operating company, substantial RRSP's, cars, real property, furniture, jewellery, investment portfolios and a holding company set up mainly for the benefit of the children in terms of providing rent free accommodations. Mrs. Cook's investment portfolio was and is substantial. Her portfolio and assets were almost exclusively derived from the profits of the marriage. Only a small portion was derived from a personal injury settlement. The division of matrimonial assets which has been agreed to between the parties sees Mrs. Cook with assets which, by agreement, is acknowledged to exceed $1,050,000.00.

[31] Dr. Cook's assets are worth about $1,625.000.00 which includes about $515,000.00 in MC Surgical, his professional operating company. There is one potentially large liability for Dr. Cook and it relates to an investment made during the marriage. I am satisfied this investment was made by the

parties. One would normally assume that because they both stood to gain that they should both stand to lose, but Dr. Cook has agreed to assume liability alone in relation to that investment. Mrs. Cook was aware of the investment, the nature of the investment and indeed went to the bank and co-signed on a line of credit to facilitate that investment. That liability at this point in time remains as a contingent liability but it could well run into several hundred thousand dollars. It could deplete a substantial portion of Dr. Cook's assets. For the purpose of case at hand I can only assume this contingent liability will not materialize. The bottom line is, in relation to matrimonial property and assets the parties still have remaining in their respective names after division, neither of these parties is impoverished relative to the community at large. They are both very comfortable.

[32] I would also comment on the $1,600,000.00 in assets that Dr. Cook retains. I already referred to the fact that approximately $515,000.00 is in his professional operating company, M.C. Surgical. At least a portion of that asset value assumes the character of a true business asset as opposed to a matrimonial asset. While I do not find it necessary here to go into a detailed analysis of the distinction between personal and matrimonial asset, I am satisfied the Court must be alive to the fact there is a difference. Some

portion in the privately held company can be said to be simply retained earnings held by the limited company for Dr. Cook to be reinvested at a preferred tax rate to be paid out later in the sense that it could be characterized as personal. A portion of that asset however no doubt relates to legitimate requirements from a business perspective, which facilitates continued operation of Dr. Cook's medical practice from which he continues to earn a living and pay maintenance. As I have said, because of agreements between the parties on division of assets, I do not have to put too fine a point on this issue but I am reminded of the point when I look at the relative asset position of the parties at this time.

[33] This is not a case where at the end of a long term marriage, Mrs. Cook finds herself impoverished because she sacrificed her career for family or where Dr. Cook alone was enriched as a result of her efforts. Certainly while Mrs. Cook did not pursue her career as a teacher, I am satisfied she is not worse off in terms of her capital at this time than she would have been without the marriage. I suspect there are few teachers who have worked for 30 years and enjoyed the lifestyle this family enjoyed, who at the end of 30 years find themselves with in excess of a $1,000,000.00 in assets. That is where Mrs. Cook finds herself. Where she does stand to lose is in the fact that

she is not able to continue with her career because, in a sense that career as a teacher is lost. I again refer to the fact that when Mrs. Cook obtained her teaching certificate there were no teaching positions available but it is quite unlikely she could use that 30 year old certificate to re-enter the teaching profession without any experience in the classroom in the intervening years.

[34] As I indicated earlier, Mrs. Cook, through counsel, suggests that $9,000.00 per month in maintenance is appropriate. Dr. Cook suggests there should be no spousal maintenance.

[35] I consider, in determining appropriate maintenance, what Mrs. Cook's needs are. In relation to the assets that I referred to Mrs. Cook has substantial liquid assets to draw upon. These include stocks and bonds and GIC's well in excess of $500,000.00. That is to say nothing of the RRSP's which are quite liquid as well. There of course would be tax consequences if the RRSP's were cashed. The liquid assets can afford a very handsome income themselves.

[36] I also looked at Mrs. Cook's budget which she presented to the Court. I understand and take into account the fact the Court does consider the lifestyle to which she has become accustomed throughout the marriage. Even taking earlier lifestyle into consideration the budget is excessive. It is

based partly on continuing to live in a five bedroom house which is more suited to raising a family than it is to an empty nest. If Mrs. Cook chooses to continue to live in that size of a house, that is her choice. It is not something which the Court will say is necessarily a good choice. I do not immediately or automatically transfer the burden of her staying in that type of house to Dr. Cook because, as I say, it is to a degree a choice she makes. There are very suitable and comfortable accommodations that can be acquired more reasonably yet still suitable to the lifestyle she has become accustomed to.

[37] There is a food bill which is created, again largely as a result of Mrs. Cook's choice to eat almost all meals in restaurants and not at home. Mrs. Cook was a mother of three who cooked for a family. She made meals for them yet now eats almost all meals in restaurants. That is a choice Mrs. Cook makes, it is not a reasonable choice and I will not transfer the consequence of that unreasonable decision on to an ex-spouse. That is not to say that people do not and cannot budget to allow for some trips to the restaurant. Once it requires each and every meal to be eaten in a restaurant, it is no longer reasonable in my mind. Mrs. Cook is a healthy person who

has, fortunately for her, the resources to eat out each and every day, but it is not a reasonable budget amount.

[38] Another budget amount includes a housekeeper in a house occupied by one person. It is not a big expense but I ask is it necessary? I again keep in mind the fact she may well be accustomed to that and it is a lifestyle issue.

[39] Mrs. Cook's budget also includes $120.00 per month to support a dog. There is also a very generous budget allocation for gifts for her children. Once those things go beyond what is reasonable, I do not transfer the obligation to her spouse.

[40] Mrs. Cook's budget also includes $1,000.00 for savings. Given the capital assets she has, she can contribute to her future and her savings and security if she chooses. I do not automatically impose upon Dr. Cook the requirement to contribute all of those things claimed by Mrs. Cook.

[41] Her budget also includes $ 700.00 a month to repay a $42,000.00 loan to Mrs. Cook's mother re: legal fees and accounting fees related to the divorce proceedings. Counsel I simply suggest that it is not appropriate that I deal with that budgetary item in the same category as the others. The issue of costs on the divorce is to be dealt with separately. The Court will determine how much of the costs Dr. Cook or Mrs. Cook should bear. It

should not be included as a budgetary amount as that would result in double dipping if I also awarded it as a cost item. If Mrs. Cook does not recover it as costs when I get to that part of the hearing then I should not indirectly make Dr. Cook pay something which may be ruled not payable at the cost portion of these proceedings.

[42] There is also the question, as raised by Ms. Cornish on behalf of Dr. Cook, as to whether or not this is indeed a real loan and whether or not it would be repaid. She referred to the extremely comfortable financial situation that Mrs. Cook's parents are in, saying that it is not likely Mrs. Cook would be required to repay that money. I simply say, that is between Mrs. Cook and her mother. There is not enough evidence before me to make that determination one way or another.

[43] I am not going to go through and say exactly how much of Mrs. Cook's budget should be allocated to the things I have already mentioned. It will be for Mrs. Cook to make choices in terms of budget expenditures. I simply point out that when all items are considered cumulatively, the proposed budget appears to be excessive. I say this even taking into account the lifestyle the parties enjoyed during the marriage. Mrs. Cook should be more conservative in terms of her budget. The proposed budgets leave a lot of

room for adjustment so as to make the expenses reasonable. If there are to be extravagances Mrs. Cook wishes to enjoy, they can be afford from her own assets. I will not require Dr. Cook to pay them.

[44] There is evidence which would indicate that throughout the marriage the budgetary requirements for this family may not have been as substantial as now claimed by Mrs. Cook alone. I reference, for example, the fact that for some time Dr. Cook provided Mrs. Cook with a $2,000.00 per month operating allowance from which she was to operate the home budget. He paid only the extra ordinary expenses beyond that. I have some difficulty based on the limited evidence in determining exactly what the $2,000.00 figure included. It is not clear what was categorized as extraordinary and what was normal. The $2,000.00 per month figure suggests the spending was somewhat more conservative than is now proposed for Mrs. Cook alone let alone what was required for a family of five.

[45] As I noted earlier, I am satisfied that in addition to a more reasonable budget, Mrs. Cook can indeed contribute in a more substantial way through work. She could do less volunteer work. Paid work might not be as fulfilling but it will be more filling. Serving on Town Council might be very interesting work, and valuable in terms of the community service, but

it has a very low rate of pay. The evidence suggested that most other councillors have full-time jobs and still do their council work in a very meaningful and effective way. It will be for Mrs. Cook to decide if she can afford to continue working just as a councillor. She does not have to be a councillor. She can do other things if she so chooses. I am not going to automatically transfer that reduced income onto Dr. Cook.

[46] This case is not driven by need in the sense we normally see. As I have indicated, Mrs. Cook will survive in a very comfortable lifestyle without any spousal maintenance whatsoever. If she gets maintenance it simply means that she can afford a bit more comfort. This case, by the same token, is not driven by the issue of a limited ability to pay. Dr. Cook can afford substantial maintenance on a monthly or annual basis based on the income he currently earns. He could still live comfortably.

[47] Dr. Cook has repeatedly filed income tax returns showing a taxable income between $180,000.00 and $ 200,000.00. His real income is much greater than that but it does not show up in his personal tax returns as taxable income. That is because much of his real income is earned through, and retained by, his professional operating company. Ms. Reierson suggests his professional income may be as high as or higher than $450,000.00 per year

if the Court were to include the monies retained by his professional operating company. I am satisfied Dr. Cook's income is substantial and it is well in excess of the amounts showing in his tax return. I am not so convinced, even after considering the expert report, that all of the earnings and retained earnings in the operating company should be attributed as straight income. I say this keeping in mind that, based on his evidence, I am satisfied he wants that professional operating company to have the flexibility to retain earnings and capital so as to give him (or the company) the ability to make business choices appropriate to him and to his continued ability to earn income. I refer for example to the possibly of his acquiring real property to operate his clinic in a place other than where it is operated now. This may require a substantial capital investment. From a business perspective and indeed from Mrs. Cook's perspective, it may be wise to make him as comfortable as he can be so he can keep earning an income to pay some maintenance. Some of that money is a legitimate business requirement and it is not really income. Again, it is not necessary to put too fine a point on the issue of Dr. Cook's income; he has the ability to pay. The issue is what is a reasonable amount to be paid?

[48] I refer to section 15 of the **Divorce** Act. The parties agree the Court has the authority to order spousal support. The question is what is reasonable? As noted earlier the **Divorce Act**, section 15(4), sets out a number of factors I must consider when establishing the maintenance amount. I take into account and balance all of those factors and the objectives.

[49] Subsection 15(7) sets out the objectives of spousal support. This Court should recognize any economic advantages or disadvantages to the spouses arising from the marriage or its break-down. I have already referred to the very substantial wealth or assets that these parties have, each of them. That is an advantage that each of them enjoys as a result of the marriage. I have already referred to Mrs. Cook not having pursued her career as being a consequence of the division of child care responsibilities. In many ways Mrs. Cook assisted Dr. Cook with his career by assuming family responsibilities yet because of the marriage break down does not share directly in his daily earnings. She has not advanced her own career to the stage where it might well have been had she continued in the job market. She may not have continued as a teacher given her job prospects as she may well have chosen another career and be much further along in relation to that career.

[50] I also note again subsection 15.2(b)(d) and consider that the Court:

> (d) insofar as practicable promote the economic self-sufficiency of each spouse within a reasonable period of time.

I have already referred to the fact that I am satisfied that Mrs. Cook can contribute more substantially than what she has to date. By the same token I acknowledge she cannot instantaneously start or resume her lost career. She will need time to realize her full income earning potential.

[51] Clearly counsel it would be inappropriate for me to over emphasize any one of the objectives and ignore the others. Determination of spousal support in a case such as this is a balancing act. The Court has to ask itself, considering all of those factors and all of those objectives, what is fair, what is reasonable?

[52] Recently in the Supreme Court of Canada in **Bracklow v Bracklow** (1999), 44 RFL (4th) 1 SCC**,** identified three models of support for support orders. The compensatory model, the non-compensatory model and the contractual. The situation in the present case is somewhat different than it was in **Bracklow** where the wife had contributed as much or more than the husband during the marriage but became disabled as a result of health

problems that existed prior to the marriage. The Court in **Bracklow** held that the wife was entitled to support after four years of marriage and referred the matter back to the trial court for determination as to the amount.

[53] It would be inappropriate to start with a presumption that a marriage establishes a general presumption of post-marital support. A marriage is not a contract of support for life. However, in a situation as exists here, where the parties have integrated lives and there has been a pattern of income dependancy, whereby the higher income earner has provided for the spouses support during the marriage, then that income earner will normally be expected to contribute to the income of the dependant spouse upon dissolution of the marriage. The level of support must reflect the level of dependance and lifestyle as established during the marriage. This does not mean an equal division of income nor indefinite support. Compensation is an appropriate basis for awarding spousal support in some cases but, even in the absence of a compensatory or contractual foundation, the **Divorce Act** permits non-compensatory support. The present case has elements of both compensatory and non-compensatory models. **Bracklow** offers little guidance as to the appropriate amount of support, making it clear that there is a wide discretion in the trial courts to ascertain appropriate support levels.

[54] This was a 30 year marriage. Dr. Cook has a career and earnings potential to which Mrs. Cook, through the responsibilities she assumed throughout this marriage, contributed in a real way. I use Ms. Reierson's words, because I think they are appropriate when she says, "Mrs. Cook has something of a proprietary interest in his career" because of her long contribution. As I have said Mrs. Cook and the entire family has already benefited substantially from her contribution and the rewards that his career have afforded to them. She comes away from the marriage with in excess of $1,000,000.00 in assets that she probably would not have, had she pursued her teaching career.

[55] I return again to the fact there is some uncertainty as regards Dr. Cook's ability to continue as a surgeon. He is getting older and he feels the stress. When the parties were together, as I said, they did not contemplate Dr. Cook working until he drops or until he was forced out of the operating room. In a sense this can be addressed by setting maintenance at a level which allows him to retire comfortably at a reasonable age if he so chooses. I must not set spousal support at a level which deprives him of the ability to hedge against the possibility of forced early retirement or indeed voluntary retirement. He too has a large proprietary interest in his career. His

proprietary interest should not be forfeited because of his support obligation. It is he who must face the stress and responsibility of literally putting peoples lives in his hands each day that he goes to work. For that responsibility he too must be well rewarded.

[56] At one point during submissions Ms. Reierson went so far as to suggest that if this case were heard in Ontario it would be as simple as determining what Dr. Cook's income was and dividing it in one-half paying 50% of his income as spousal support. I am not necessarily convinced that would be the case in Ontario. I am however satisfied, based on my reading of the **Divorce Act** and cases here in Nova Scotia, that it would simply be wrong in law to make such an order here in Nova Scotia. During submission Ms. Reierson properly conceded a 50-50 split would not be in accordance with her reading of the **Divorce Act** or the case law in Nova Scotia.

[57] Counsel for Mrs. Cook spent a lot of time on Dr. Cook's budget and questioning his travel expenses, food, cars and housing expenses. I deal first with the travel expenses. They do not appear to be extravagant in relation to his resources. More importantly, the vast majority of his travel expenses relate to continuing education which I assume he must or should pursue in order to allow him to stay in the operating room. That is a direct

benefit to Mrs. Cook on an ongoing basis insofar as it enables him to continue paying maintenance. In reference to food, cars and housing expenses, I would say the same as I have said to Mrs. Cook, if there are any budgetary excesses they will be Dr. Cook's problem. If the expenses are unreasonable I am not going to transfer those expenses to Mrs. Cook any more than I transfer her excesses to him.

[58] I am satisfied there should be ongoing maintenance into the foreseeable future. I set the maintenance at the rate of $3,000.00 per month, beginning May 1st, 2002. Should Dr. Cook be forced or indeed choose to substantially reduce or suspend his surgical practice and that results in a substantial reduction of income, I would expect that maintenance would be reviewed at that point in time. I keep in mind that even without maintenance Mrs. Cook can live quite comfortably.

[59] Counsel in view of the decision that I have made I do not have to address the issue of retro-active payments as requested by Ms. Reierson on behalf of Mrs. Cook. The change in maintenance will begin, as I said, May 1st.

[60] I would point out as well counsel that even though, pursuant to the agreement on division of matrimonial property, Dr. Cook assumed liability for the Westminer account, if that liability is much in excess of $300,000.00

which was referenced at different points, then I would expect the issue of spousal support would also be reviewed immediately. That is because a very large liability may impact the issue of affordability and his ability to fund a reasonable retirement as well. I would hope it will never get to that point. It is certainly something the Court foresees as being a possible downside with tragic consequences to Dr. Cook if it gets too far out of hand. I understand from his evidence, he simply cannot opt out of the class action which he is now a party to. He may be pulled along with others should they decide to continue with that action. For the time being maintenance is based on current circumstances with any large liability related to Westminer.

[61] I conclude by saying if either of these parties is concerned with the fact they may or may not be able to afford a comfortable retirement then they should reassess how much their children really need at this point in time and how much they can spend on things like dogs, restaurants, cars and vacations and their overall needs and spending habits.

[62] Finally there was the issue of life insurance raised by counsel. I am satisfied that so long as the maintenance is payable at the current rates Dr. Cook should maintain at least $100,000.000 in life insurance payable to the benefit of Mrs. Cook. That would provide for a reasonable adjustment time should

something happen to him. I set it at $100,000.00 keeping in mind that if they were together and he died the income earning ability would end then as well. I simply picked a reasonable amount in light of the life insurance available to Dr. Cook and what I considered as Mrs. Cook's reasonable needs.

[63] I understand counsel will be inserting a clause in the Corollary Relief Judgment they have agreed to in relation to the medical insurance premiums and coverage that Dr. Cook has and may be able to continue for Mrs. Cook. They have agreed on the wording I understand. I understand Dr. Cook to have agreed to continue with that medical insurance coverage so long as Mrs. Cook is still eligible.

[64] Counsel have asked that I reserve on the issue of costs.

J.