SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: MacLean v. MacLean, 2009 NSSC 216

Date: 20090708
Docket: 1201-062187 (SFHD-055668)
Registry: Halifax

Between:

Alexa Danielle MacLean

Applicant

v.

Gordon Murray MacLean

Respondent

Judge:	The Honourable Justice Beryl A. MacDonald
Heard:	March 5 & May 8, 2009 in Halifax, Nova Scotia
Counsel:	William Leahey, for the applicant Richard Bureau, for the respondent

By the Court:

[1] This is a Divorce proceeding commenced by the Wife and the Husband as co-petitioners on November 1, 2007. The parties were unable to conclude a Divorce based upon consent and the Wife is now requesting:

- sole custody of the two children of the marriage with specific access as outlined in her submissions;
- enforcement of a Separation Agreement signed by the parties;
- division of debt;
- retroactive and ongoing child support, table and section 7;
- retroactive and ongoing spousal support.

[2] The Husband is seeking:

- greater access with the children than the Wife is willing to provide;
- a declaration setting aside the Separation Agreement;
- division of matrimonial property and debt;
- relief from any retroactive support claims.

PARENTING PLAN

[3] The parties have two children. When they separated the oldest was six and the youngest not quite two years of age. The Husband has only seen these children once, possibly twice since he left for Alberta. He now wishes to take them to Alberta for "block access". Given that the children hardly know their father, and he has done little to keep in touch with them, this is a totally unrealistic proposition and not in their best interest. He will first need to become reacquainted with them and he should seek advice from a child psychologist to understand why this is necessary and how it should be pursued. His reintroduction into their lives must occur in Nova Scotia. He has family here. As the children become comfortable in his care, I see no reason why he should not be able to take the children to his parent's home. The Wife does not want the Husband's mother to have access with the children. I have no application before me that would permit a specific order granting access to the paternal grandparents. However, I have no evidence to order, should the Husband work out appropriate terms of

access, that he should not take the children to his parent's home. Dislike between the Wife and the Husband's mother, without more, is an insufficient reason upon which to base such an order.

[4] Because the Husband has not placed a realistic plan of access before this court, the most that can be ordered is that he is to have reasonable access at reasonable times upon providing a plan of access to the Wife that includes:

- a detailed plan of reintroduction with the children;
- details of the residence or residences in which access will be exercised in Nova Scotia;
- after reintroduction has occurred, details of the housing available for the children should he intend to take them to his place of residence outside Nova Scotia;
- details of the travel plan to and from the Husband's residence including flight arrangements which shall include his accompaniment of the children unless other arrangements are agreed upon by the Wife;

[5] The Husband shall be entitled to telephone access provided he has given the Wife a reasonable schedule listing when he will call to chat with the children, for however long he can engage them.

[6] Because the Husband has not been an active participant in the lives of his children since he moved to Alberta and because he may yet choose not to be involved in their lives, joint custody may be meaningless. Such an order would suggest these parents have been consulting with one another on a regular basis about the needs of their children. They have not. Given their geographic distance and the Husband's work schedule joint consultation may be difficult. The Husband did not provide any plan describing how a joint custodial arrangement could work under these circumstances.

[7] The Wife shall have sole custody of the children, but she shall send the Husband regular written information about their educational, and social progress and she shall report on their health, including the oldest son's progress with counselling.

SEPARATION AGREEMENT

[8] In *Miglin v. Miglin*, 2003 SCC 24 (S.C.C.) and *Rick v. Bandsema*, 2009 SCC 10 (S.C.C.), the Supreme Court of Canada has provided direction about the principles to apply when considering whether to set aside a separation agreement. The first issue to be examined is the validity of the agreement itself. To do so the court must consider a number of factors such as:

> (1) the capacity or mental competence of the parties;
>
> (2) whether there has been complete disclosure of material information;
>
> (3) whether the parties have been provided with independent legal or other independent advice and if so whether the party receiving the advice suffered from any particular vulnerability that might negate the usefulness of that advice;
>
> (4) whether each party understood the agreement and its effect;
>
> (5) whether the agreement meets the objectives of the legislation with which it purports to deal; (in this case the spousal support provisions of the *Divorce Act* and the requirements of the *Matrimonial Property Act*);
>
> (6) whether the terms of the contract were unclear or uncertain;
>
> (7) whether a party signed the contract under duress or undue influence or was a vulnerable party under other influence or stress that may lead an individual to sign a document against his or her interest;
>
> (8) whether the agreement was signed under mistake or as a result of fraud or misrepresentation of a material fact.

[9] Justice Warner in *Day v. Day* 2006 NSSC 111 (S.C.N.S.), adopted the *Miglin* " Stage Two" analysis provided by McLeod and Mamo in Chapter 5, *Annual Review of Family Law 2004*, at page 437:

> The thrust of the decision appeared to be that courts should respect reasonable settlements fairly negotiated unless there had been a substantial change in circumstances beyond the contemplation of the parties that

> undermined the foundations of the agreement, so that the settlement no longer reflected the parties' intention or the support objectives of finality and certainty, as well as those set out in the Act. It seemed clear that the Court intended that there be a very narrow range of circumstances that would justify intervention. At paragraph 92 [sic 91], Bastarache and Arbour JJ. noted that parties are deemed to have considered that their personal circumstances might change in various ways, including employment and health, so that anyone who wants to keep these options open should expressly so provide.

[10] Justice Warner did note that the application of the Stage Two analysis to the property division provisions of a separation agreement is problematic. He said:

> 42 The application of the Stage Two analysis to matrimonial property is problematic. Section 29 of the *Nova Scotia Matrimonial Property Act* authorizes the court to vary a separation agreement that is unconscionable, unduly harsh to one party, or fraudulent. My reading of *Hartshorne v. Hartshorne*, 2004 SCC 22 (S.C.C.), is that, if an agreement is fair at the time of the separation or execution of the agreement, it should not later be interfered with . . .

[11] Mr. McLean will bear the evidentiary burden of establishing on a balance of probabilities that:

> (1) the agreement is invalid due to the circumstances of its negotiation and execution or it was not in substantial compliance with the objectives and factors governing spousal support pursuant to the divorce act or;
>
> (2) there has been a significant departure from the range of reasonable outcomes anticipated by the parties since the negotiation and execution of the separation agreement that now places that agreement outside of substantial compliance with the objectives of the support provisions of the divorce act.

[12] The first requirement speaks to circumstances as they existed at the time the separation agreement was negotiated and signed. The second requirement analyzes changes that have occurred since the agreement was signed that would justify interfering with the terms of that agreement.

[13] In discussing the first requirement, Justice Abella in *Rick v. Brandsema*, 2009 SCC 10 stated:

> 1. This Court has frequently recognized that negotiations following the disintegration of a spousal relationship take place in a uniquely difficult context. The reality of this singularly emotional negotiating environment means that special care must be taken to ensure that, to the extent possible, the assets of the former relationship are distributed through negotiations that are free from informational and psychological exploitation....
>
> 40 There is no doubt that separation agreements are negotiated between spouses on the fault line of one of the most emotionally charged junctures of their relationship -- when it unravels. The majority in *Miglin* concluded that because of the uniqueness of this negotiating environment, bargains entered into between spouses on marriage breakdown are not, and should not be seen to be, subject to the same rules as those applicable to commercial contracts negotiated between two parties of equal strength:
>
> > The test should ultimately recognize the particular ways in which separation agreements generally and spousal support arrangements specifically are vulnerable to a risk of inequitable sharing at the time of negotiation and in the future.
> >
> > Negotiations in the family law context of separation or divorce are conducted in a unique environment ... [at] a time of intense personal and emotional turmoil, in which one or both of the parties may be particularly vulnerable [paras. 73-74].

[14] The Husband and the Wife have a somewhat different versions of the facts important to this decision. Which version do I accept? To conduct this inquiry requires an assessment of credibility of each of the witnesses. In assessing credibility I have considered the comments of O'Halloran, J.A., speaking on behalf of the British Columbia Court of Appeal, in *Faryna v. Chorny*, 1951 CarswellBC 133:

> 10 The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his (the witness) story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the

> probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[15] I have also considered the direction that appears consistently in decisions before our courts requiring a review of the internal consistency of the evidence, the logic and common sense of the testimony in terms of the circumstances described and the consistency of the evidence as measured against prior statements and against the contrary evidence and the exhibits filed. Having done so, where the evidence of the parties is contradictory, I accept the information provided by the Husband over that of the Wife. Factors contributing to this decision are:

- Her understatement of the financial and other contributions made by the husband to the family after he moved to Alberta. While these were later corrected this essentially occurred because of the actions of her counsel and I am satisfied that she herself, because she handled the family finances, knew or should have known the exact amount of contributions made and this should not have become an issue at trial;

- The Wife gave contradictory evidence about the amount of the "loan" from her mother and there was no indication in her bank accounts of her alleged $80.00 per month payment to her mother to reduce this "loan".

- Her attitude of entitlement to the majority of money earned by the Husband with no effort to become employed herself nor reduce her living expenses.

[16] The circumstances surrounding the signing of the Separation Agreement were chaotic. There are several changes on the face of the document, changes to the date, changes to the date of separation and to the amount of support to be paid.

[17] The Wife sent this Agreement to the Husband in Alberta on or about September 13, 2007. She had already signed the Agreement and her signature was witnessed. In Alberta the Husband changed the support amounts and his initials were placed on these changes. He acknowledged his signature and the initials to later changes to the document before a witness on or about September 18, 2007. At the time he signed the document he had no legal advice. He knew nothing in detail

about the parties' debt situation. It is true that he could have sought legal advice and requested financial information. However, he knew his Wife was anxious to settle matters. His marriage was over and he was subject to periodic dislocations in his workplace. The employment he had expected to be available was not and although he later did find a position this complicated his search for housing and his ability to support himself and his family. His was not keeping in touch with his children and realistically may not be able to do so given their ages and the financial consequences of supporting two residences. The Wife took everything in hand as she had during the marriage and he went along. He signed the agreement without understanding its meaning and effect.

[18] The Wife had prepared the Separation Agreement copying provisions from an agreement a family member had signed after a relationship breakdown. A person with paralegal training had also provided her with some assistance. However, the wife did not understand everything she had drafted and signed.

[19] The child support provisions of the Agreement do not separate child support from spousal support, they are combined. The Agreement states:

> " The Husband shall pay to the Wife for the maintenance of the Children, and spousal support the amount of $ ---- (several amounts were inserted and changed) each month (net of taxes)."

[20] The final inserted amount for support appears to be $3,250.00.

[21] When the Husband was in Nova Scotia in November 2007, the parties made the final change to the support provisions of the Agreement. These were not witnessed. However, neither the Husband nor the Wife deny making this change requiring the Husband to pay the Wife $3,250.00 per month for combined child and spousal support which was to be net of taxes.

[22] I am satisfied neither party understood what net of taxes meant nor how such a clause was to be applied.

[23] While the Husband was in Nova Scotia in November 2007, he did co-operate to consent to the completion of the Divorce and issuing of a Corollary Relief Judgment which had the Separation Agreement attached. However, he knew nothing more about the meaning and effect of the agreement then than he did

in the past. He did as the Wife requested and he did not seek any legal advice until the Corollary Relief Judgment was rejected and the Divorce was not granted because of the inappropriate provisions for child support and the ambiguity of the support provisions.

[24] Paragraph 13 of the Separation Agreement is also ambiguous. It states:

> "This Agreement adequately and completely provides for the present and future needs of the children" .

[25] Given that this clause appears immediately after the clause requiring the Husband to transfer the deed to the matrimonial home into the sole name of the wife, did this clause mean no variation to the agreed upon child support would be requested by either party in the future? If so, courts would not enforce this provision but did the parties know this? The Agreement purports to be a "final settlement of their respective rights to and in property owned jointly and/or separately by them," but in fact it only deals with the matrimonial home, the husband's pension and R.R.S.P.. Nothing is said about the debt obligations of the parties.

[26] The Husband testified he believed by signing over the house and paying the support amount, the Wife would pay the parties debts. The Wife disputes this, but I believe this is what the Husband understood to be the effect of this agreement. It is clear that the Husband wanted to provide a home for his children, but I do not accept that he was prepared to do so and still be expected to pay his portion of debt. That was to be paid out of his equity in the home and support.

[27] I accept this was his fundamental understanding of the effect of the agreement. Otherwise he was leaving an eight-year marriage, in which he had supplied the majority of the funds for support and asset acquisition, paying more in support than he may be legally required to pay, with no equity from the matrimonial home and a continuing obligation for one-half the marital debt.

[28] I am not satisfied he understood the agreement to have this effect. There is nothing in the parties circumstances that would justify an unequal division in favor of the Wife pursuant to section 13 of the *Matrimonial Property Act*.

[29] The Wife's counsel argues that the Agreement should be upheld, at least in respect to the property division because the Husband could have sought legal counsel if he wanted and he had opportunity to do so. His willingness to go along with the Wife, his reckless discard of his own interest, his geographic distance, his lack of knowledge about his legal and financial circumstances, were not vulnerabilities that should relieve him from the terms of the Agreement. I disagree, but in any event vulnerability is only one factor that may result in the setting aside of an agreement.

[30] I have found that all the circumstances surrounding the negotiation and execution of this agreement were fundamentally flawed and necessitate a finding that the Agreement is invalid and must be set aside.

CHILD SUPPORT

[31] The submissions of the parties relating to the value of assets and debts are complicated by a number of issues including lack of recent valuations and calculation of debt that the Wife has incurred since separation that may not be matrimonial debt. Nevertheless I must do the best I can with what I have.

[32] Although the house is now listed for sale, it has not yet sold and it is possible it may not be sold. The best evidence of value I have is the amount for which it is presently listed, which is $217,900.00, against which there is a mortgage of $124,000 and a betterment charge of $ 6,010.00. This results in equity of $87,890.00 less disposition costs.

[33] If the disposition costs to be assigned are not agreed upon, I retain the jurisdiction to set the amount to establish the equity that shall be shared by the parties.

[34] If the Wife cannot finance the purchase of the Husband's equity it will need to be paid from the sale of the home, or in some other fashion acceptable to the parties. If the Husband sets this amount off against his spousal support obligation he should be mindful of any consequence this may have upon potential tax relief. Of course, the Husband also has an obligation to pay his one-half of the marital debt consisting of the Scotia Bank Loan and the Scotia Bank Visa. The amount owing on the Loan is $22,431.46. The debt on the Scotia Bank Visa was approximately $2,000.00 when the parties separated and is $2,600.00 now.

[35] With the money provided by the Husband in 2007 the Visa debt could have been paid by the Wife had she reduced her expenses. Many of her present expenditures remain unreasonable given her financial position and she has used the Visa card for many expenses that should not be his responsibility.

[36] I assign $500.00 of the Visa debt to the Husband. Therefore, his share of the marital debt is $11,465.50, less the one-half of his equity in the 1999 Saturn sold by the Wife from which she received $1,900. The Husband therefore owes $10,515.50 on marital debt.

[37] To obtain a release of his name and the name of the Wife on this debt they will have to co-ordinate the payment, likely at the time the home is sold, or if it is not to be sold, through some other mechanism.

[38] A payment by the Husband to the Wife to be applied to this debt will not release his name on the debt unless she can pay her portion as well. I leave it to the parties how best to deal with this issue and I retain jurisdiction to direct the terms of payment should that become necessary.

TABLE AMOUNT

[39] The Wife is seeking ongoing and retroactive table guideline child support. The income earned by the Husband during the relevant years was:

2007	$70,617
2008	$82,272
2009	$67,800

[40] In 2007 the Husband's monthly table guideline child support obligation was $1,021.00 per month, a total of $12,252.00 for the year. The Husband in fact provided $42,322.00 to the Wife to maintain the household. He has satisfied his child support obligation for 2007.

[41] In 2008 the Husband did send money to the Wife although it was insufficient to support his family. On July 30, 2008, an Interim Order was granted that

required him to pay table guideline child support of $851.00 per month based upon an annual income of $60,000. He was also ordered to pay spousal support in the amount of $1,149.00 per month. In total for the year 2008 he paid $11,810.00 to the wife.

[42] It has now been determined that his actual total annual income for 2008 was $82,272.00 upon which he should have paid a yearly total of $14,340.00 for table guideline child support. If all money paid to the wife for 2008 and his WCB cheque she received in 2009 is credited towards child support, he would now owe $2,045.61 for that year. I find there is no reason to relieve him of that obligation.

[43] The Husband's present employment will not pay him as much yearly as his previous employment. However the work is regular, consistent and not as physically grueling. He projects his 2009 income to be $67,800. This employment requires him to travel to a work camp where he remains for two weeks. He then has a week off after which he returns to the camp. I draw no adverse conclusions from the Husband's change in employment. The Wife's counsel suggested I should impute income to the Husband because he has no expenses while living at the work camp. However, he must maintain a home while he is at that camp and his only financial benefit from this arrangement may be in food and transportation expense. Any reduction in his living expenses will give him greater capacity to pay spousal support. I consider it inappropriate to impute income under these circumstances. No additional income is imputed to the Husband.

[44] Beginning January 1, 2009 the Husband's child support payment, based upon his annual income of $67,800, is $981.00 per month payable on the 1st day of every month.

SECTION 7 EXPENSES

[45] The Wife is seeking section 7 expenses. For those expenses that relate to the children's recreational expenses, she has provided no evidence that these are necessary and the cost extraordinary as required by section 7. I dismiss this claim.

[46] I also dismiss the wife's claim for section 7 child care expenses. She is not working, nor is she attending any educational program to provide her with an opportunity to re-enter the work force. She chooses to spend four hours a day, five days a week at her partner's business known as the "Ultimate Athlete Factory".

She has her own business card, but it is unclear what "work" she does at the gym for her partner. The gym has been open for approximately one year, but she is not "trained" to give any programs. Under these circumstances none of her child care expense is to permit her to work or to become employable.

[47] The parties' oldest child has not adjusted well to the disappearance of his father from his life. The Wife has appropriately sought out counseling. This expense is necessary and reasonable. Some or all of this expense may be payable from the Husband's medical plan. Any portion of this expense not paid by his plan shall be paid by the Husband. Because this expense may change based upon the number of hours of counseling recommended, one amount easily collected by the Maintenance Enforcement program, cannot be ordered. However, if the Wife has a number of receipts for which she has not received reimbursement, after delivering copies to the Husband, she can pursue an order in this court against the Husband, including costs, which then can be enforced through the Maintenance Enforcement Program. Hopefully the Husband will pay the amounts as required without delay. He is to enroll and maintain the children on any medical plan available through his employment.

SPOUSAL SUPPORT

[48] The Wife is seeking ongoing and retroactive spousal support. The objectives to consider when examining a request for spousal support pursuant to the *Divorce Act* are found in s. 15.2(6):

> An order made under subsection (1)or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or it's breakdown;
>
> (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> © relieve any economic hardship of the former spouses arising from the breakdown of the marriage;

> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time."

[49] The *Divorce Act* also requires a court:

> 15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including:
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> © any order, agreement or arrangement relating to support of either spouse.

[50] The Supreme Court of Canada in *Moge v. Moge* (1992), 43 R.F.L. 345 (S.C.C.) and in *Bracklow v. Bracklow* [1999] 1 SCR 420 confirmed that all four objectives set out in 15.2 (6) are to be considered in every case. No one objective has paramountcy. If any one objective is relevant upon the facts a spouse is entitled to receive support.

[51] In *Bracklow v. Bracklow, supra*, the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support:

> 1 Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.
>
> 2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.
>
> 3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other.

[52] These rationales take into account both the factors set out in s. 15.2 (4) and the objectives set out in s. 15.2 (6). The Supreme Court did recognize that many claims have elements of two or more of the stated rationales. It confirmed that analysis of all of the objectives and factors is required. Pigeonholing was to be avoided.

[53] In this decision I will not comment on the contractual objective because it is not a factor in the case before me given that I have rejected the validity of the Separation Agreement.

[54] McLachlan, J. in *Bracklow, supra*, indicated that the basis for a spouse's support entitlement also affects the form, duration, and amount of any support awarded.

[55] Examples of circumstances that may lead to a decision that a spouse is entitled to compensatory support are:

a) a spouse's education, career development or earning potential have been impeded as a result of the marriage because, for example:

- a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;

- a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;

- a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons.

b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.

[56] Non-compensatory support incorporates an analysis based upon need and ability to pay. If spouses have lived fully integrated lives, so that the marriage creates a pattern of dependence, the higher-income spouse is to be considered to have assumed financial responsibility for the lower-income spouse. In such cases a court may award support to reflect the pattern of dependence created by the marriage and to prevent hardship arising from marriage breakdown. L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra,* at p. 390:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage,

> this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin (1991), supra*, and *Linton v. Linton, supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. *As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson,* "*Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)*", supra, at pp. 174-75). (emphasis added)

[57] Once it is decided that a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse. In considering the condition, means, needs and other circumstances of each spouse one may examine the division of matrimonial property and consider the extent to which that division has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage and its breakdown and any continuing need the spouse may have for support arising from other factors and other objectives set forth in s. 15(2). (*Tedham v. Tedham* 2005 CarswellBC 2346 (B.C.C.A.).

[58] Generally a non-compensatory claim in a short to mid-length marriage is satisfied when a spouse becomes self-supporting and, in such a case, neither the payor spouse's greater income nor the inability of a recipient spouse to replicate a previous lifestyle, is a factor entitling a spouse to continuing support. When spouses have not had a lengthy relationship and the only effect of the relationship has been that a spouse has enjoyed a better lifestyle than he or she could afford alone, the duration of support will likely be for a period required to ease the recipient spouse's transition to economic independence. Self-sufficiency, however, is a relative concept. It constitutes something more than an ability to meet basic living expenses. It incorporates an ability to provide a reasonable standard of living from earned and other income exclusive of spousal support.

[59] These parties had an eight-year marriage. The wife has certification as a cosmetologist, but she did not continue to work in this field after her first child was born. She did not give up or forgo a promising career as a result of her marriage. However, her child rearing responsibilities have resulted in her absence from the workplace.

[60] Every case involving a parent who has withdrawn from the workforce to raise a child may invoke a claim for compensatory support. Many argue against this because conditions in families have changed since the analysis in *Moge, supra* and *Bracklow, supra*. It is now very common for both parents to work even though young children are present in the home. In fact, it often is essential that both parents work. Having children is often seen as a choice women have rather than a social norm to which they must subscribe. It is not an accepted norm today that children require a stay at home parent in order to thrive and prosper. If one parent wants the other to work, but the other believes the children require that he or she stay at home it can create tension. What is a parent in this situation to do? He or she cannot force the other to work. Unlike previous generations when each parent had a defined role in the marriage that was accepted this is not the case today. However today's parents must recognize that, irrespective of their personal preferences or the circumstances from which dependency evolved, if there are children and one parent has stayed at home, the other parent will be required to assist by paying spousal support until the compensatory and non-compensatory claim of the stay at home parent has been satisfied or until some other factor intervenes justifying termination of spousal support.

[61] In addition to her compensatory claim arising from her child rearing responsibilities, the Wife alleges she financially supported the Husband's education. The Wife did receive an inheritance from her father's estate. There was some contradiction in the evidence she provided in her affidavit and her testimony on the stand about when she received this inheritance. She does suggest she used some of it to finance the Husband's education and to pay family bills. Whatever happened to it, I am satisfied she does not have any of this inheritance remaining. I am also satisfied that she has not provided sufficient information to permit a finding increasing her compensatory support because of this alleged provision of financial assistance towards the Husband's education.

[62] In August 2006, the Husband left Nova Scotia for Alberta hoping to earn more money to support his family. As was the case when the parties were living together, the Wife looked after the finances. His pay would be deposited into their joint account and they both would use this account to support their household needs. Unfortunately there was not enough money for both to live on although the Wife should and could have reduced many of her expenditures. However, the

Husband did not act responsibility when he failed to provide appropriate financial support by January 2008.

[63] The Husband requested income to be imputed to the Wife because:

- she should be receiving income for the services provided to her present partner at the business he is developing;

- she should be employed and receiving at least minimum wage;

- her purchases of beauty products suggests she likely is working "under the table" as a cosmetologist.

[64] While I agree that the Wife must move towards self-support, the parties' youngest child is not yet in school and to be employed she likely will need child care. Were she employed she would have a valid section 7 claim for contribution to the cost of child care. This could reduce any financial benefit to the Husband of an imputation of income to the Wife.

[65] This issue is further complicated by the fact the Wife is now pregnant as a result of her relationship with her present partner. This will impact her employability. Living with a new partner does not necessarily result in a finding that a spouse is not entitled to spousal support, though it may eventually lead to that result. The more important consideration is the financial contribution made (or that should be made) by the new partner towards the support of the other and, in particular, contribution towards household expenditures of benefit to both parties. The Wife's present partner should be equally sharing these household expenses and I have taken this into consideration when I have assessed the quantum of her "need" for spousal support.

[66] The evidence before me does not support the conclusion that the Wife is receiving income from her new partner or that he is in a position to pay her a wage for the work she has performed, whatever that may be. Perhaps she is merely at the gym to pass the time. He was not subpoenaed as a witness. Similarly the evidence does not support the conclusion that the Wife is "working under the table". I will not impute income to the Wife at this time.

[67] The Wife has a limited compensatory claim to support. Her most significant claim is for non-compensatory "needs" based support. In 2007 the Husband's monthly table guideline child support obligation was $1,021.00 per month, a total of $12,252.00 for the year. The Husband in fact provided $42,322.00 to the wife to maintain the household. If the difference between his child support obligation and what he paid is termed spousal support, he paid this support in the amount of $2,506.00 per month. The spousal support guidelines would not suggest support at this level however the Husband expected the wife to pay his portion of joint debt obligations from this money. To do an exact accounting to recreate the financial circumstances is not possible, but I am satisfied that no retroactive spousal support should be ordered for 2007.

[68] In 2008 the Husband had stopped paying regular support to the Wife. She suffered financial hardship and resorted to liquidating R.R.S.P's and the children's savings. I cannot fault her for this, she needed money. While the Husband may have had no direct joint interest in the children's savings, he had an interest in the R.R.S.P's and he did consent to their liquidation to support the family. I credit the money received from the R.R.S.P. against his spousal support obligation. Counsel for the Husband suggests the Wife had limited financial need for spousal support. I disagree. Her need is not taken away because she received money from her family, from the children's savings, or from child tax benefits. However, it is true the Husband did not have sufficient income to completely support her need, nor does he now.

[69] One problem I have in assessing need and ability to pay is the lack of knowledge about the Husband's present expenses and the contribution toward common living expenses made by his present partner. He could have supplied this information and did not. As a result, the range of spousal support I have chosen was without the analysis of a comparison of expenses to net disposable income for each of the parties. I have examined the Spousal Support Guidelines for assistance under these circumstances. There are of course limitations to the use of these guidelines and in this case some of those limitations are:

- I have no information about tax deductions that might be available to these parties outside the norm;

- The computer program I have used is based upon the latest known rates for 2009 income tax, CPP, E.I., child tax benefit, etcetera, and I

do not have the ability to adjust for other years when these rates may have been different;

- The guidelines suggest support be set at a time shortly after separation with questionable use after for variations due to changes in income. In Ontario there is some debate whether a spouse should have any entitlement to post separation changes in income. This is not a debate yet entertained in Nova Scotia.

[70] Upon an annual income of $83,272, the range of spousal support suggested by the Guidelines is from $1,220.00 to $1,619.00 per month. This was the Husband's income in 2008. It appears that the Wife's present partner began living with her in late 2008. I have determined that the Husband's obligation for 2008 is $1,400.00 per month for a yearly total of $16,800.00. From this I deduct his one half interest in the $2,600.00 received from the R.R.S.P.. The balance of $15,500 is due and owing from the Husband to the Wife. There is no reason to relieve him from payment of this amount. This would leave him with a yearly net disposable income after payment of child support, spousal support, income tax, C.P.P. and E.I. of approximately $34,700.00 from which to support himself. I consider this to be adequate. Unfortunately, he will now need to pay this amount out of less income than he had in the past. I will make comment on how he can meet these obligations later in this decision. However, the Husband should obtain tax advice to ensure he is able to receive the tax relief due to him as a result of this and other spousal support obligations. So often those who must pay spousal support wait until they have filed their tax return to receive the benefit of the tax deduction. Because of this they pay higher income tax per pay than is necessary. The deduction can be reflected in each pay throughout the year if the proper documents are filed with Revenue Canada.

[71] In 2009 the Husband's income has reduced to $67,800. If this was his income at the time of separation the Spousal Support Guidelines suggest a range of support from $917.00 to 1,220.00 per month. Taking into account the Wife's reasonable living expenses, the contribution that should be made by her present partner, the contribution to living expense that should be made by the Husband's present partner, and the tax deductibility of spousal support, the Husband is to pay the wife spousal support in the amount of $1,000.00 per month commencing January 1, 2009. This payment combined with child support will leave him with a

yearly amount of approximately $30,000 to support himself after payment of income tax, C.P.P. and E.I.

[72] The spousal support payment will be subject to a review, which should be held before me, on or before June 31, 2011. The reason why I have made the payment subject to review is because if the Wife continues living with her partner, not pursuing any employment opportunities or programs to fit her for employment, the Husband would be required to continue to pay support in the present amount without any right to have this reconsidered because there would be no change in circumstances.

[73] The purpose of the review is to examine what the wife has done to eventually become self-supporting and the likely date by which she might be expected to become employed. At the review the court may establish a termination date, impute income to the wife and adjust quantum.

[74] On or before March 31, 2011, the parties are to schedule a pre-trial conference to report whether a hearing on the review will be required and to discuss filing requirements.

[75] As a result of my decision the Husband must immediately begin paying the Wife for child and spousal support, the monthly amount of $1,0981.00. Because of the decision I have made, his account will be in arrears. The exact amount of those arrears will need to be calculated by the Maintenance Enforcement Program because it has credits that must be applied to the overall amount owing. The Husband may be able to find the resources to pay these arrears in a lump sum payment, but if not he is to pay an additional $100.00 per month toward any child support arrears and $200.00 per month toward any spousal support arrears. Should he experience an increase or decrease in income his payment toward these arrears will need to be arranged in whatever amount the Maintenance Enforcement Program requires of him based on that new income amount. All amounts for support are to be paid through the Maintenance Enforcement Program and the parties are each to exchange his and her income tax return on or before June 30 in each year.

[76] Subject to a request to make submissions if the parties have exchanged offers that should be considered in making a cost award, I would not award costs in this matter. There has been divided success.

[77] If there were exchanged offers that must be considered, written submissions are to be provided to this court by the Wife, with a copy sent to the Husband, within 10 working days from the date this decision is received by the parties' counsel. The Husband's submissions are to be filed with this court and copied to the wife within five working days from his receipt of the Wife's submissions. If the Husband has raised an issue in his submissions not considered in the Wife's submissions she may file and copy to the husband a further submission addressing those issues within two working days of receiving the Husband's submissions.

J.