SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: Hurley v. Hurley, 2012 NSSC 453

Date: 20121228
Docket: 1201-064972
Registry: Halifax

Between:

Jennifer Tennile Hurley

Petitioner

and

Timothy James Hurley

Respondent

Judge:	Associate Chief Justice Lawrence I. O'Neil
Date of Hearing:	December 3, 4 and 5, 2012
Oral Decision:	December 28, 2012
Written Decision:	January 28, 2013
Counsel:	M. Jane Lenehan, counsel for Ms. Hurley William Leahey, counsel for Mr. Hurley

By the Court:

Index:

Introduction

[1] This proceeding is a final divorce hearing. The Petition for Divorce was filed by the mother on November 24, 2010 and an Answer was filed by the father on March 9, 2012. The matter was heard December 3, 4 and 5, 2012. An oral decision was delivered December 28, 2012.

[2] The parties married July 4, 1998 after a two year common law relationship. They separated May 1, 2010. They have two children Jacob and Rylee, born *, 1997 and *, 1999. The Respondent, born in 1974, is the biological father of the children and has been residing in Calgary since July 2012. He will be referred to herein as the 'father' and Mr. Hurley. The Petitioner, born in 1977, is the biological mother of the children and will be referred to herein as the 'mother' and Ms. Hurley. She continues to live in Dartmouth, N.S. with the two children.

[3] This family relocated to Dartmouth in 2008 from Alberta to act as master restaurant franchisees for 'WOK Box' for the Atlantic Region. That endeavour proved unsuccessful. In 2011 the father, now separated, returned to work in Alberta. He commuted from the Halifax area. In June 2012 he discontinued this commute and established a residence in Calgary and commuted to his Northern Alberta workplace from Calgary. In September 2012 Mr. Hurley changed jobs. He now works in Calgary 8 a.m. - 4 p.m., Monday to Friday.

[4] Following failure of the 'franchise' business in 2010, the mother *inter alia* purchased a vending business in March 2011, which she continues to operate.

[5] Following the parties' separation, the parents equally shared time with the children. When the father was commuting from Alberta, he followed a two week on, two week off schedule. The children were with him when he was in Nova Scotia. Over the summer of 2012, both children spent a block of time with him in Calgary.

Issues

[6] I am satisfied a Divorce Order should issue today. The jurisdiction of the Court has been established. The grounds for the Divorce have been established - there has been a permanent breakdown in the relationship. No bars to the issuance of the Divorce Order exist.

[7] The principal issue before the Court is whether the younger child, Jacob, should be permitted to relocate to Calgary and live with his father beginning in early January 2013. He wishes to move. His sister does not want to move. The parents accept her decision but disagree on whether Jacob should relocate at this time. A parenting regime must be put in place for both, regardless.

[8] The Court must decide what child support is to be paid and if retroactive child support or arrears are owed by the father.

[9] Finally, the Court must decide on entitlement to and if required, the quantum of ongoing, and retroactive spousal support payable by either party.

Current Orders

[10] The interim order of Justice Beaton issued November 16, 2011 following a hearing. The order required the father to pay child support of $1,153 per month commencing September 1, 2011, reflecting an annual income of $115,200 (based on a salary of $126,000 less his travel expenses of $10,800). The mother's annual income was set at $25,000.

[11] The interim order further required the payment of $1,000 per month as spousal support to the mother, also commencing September 1, 2011.

[12] The order preserved the right of either party to seek a retroactive calculation of the child and spousal support obligations for the period, “between the date of filing of the Petition for Divorce on November 24, 2010 and August 31, 2011".

[13] By order issued July 12, 2012, an assessment of the son’s wishes was ordered. The resulting report of Martin Whitzman, M.Sc. forms part of the evidence as Exhibit #4.

The son’s relocation to Calgary?

[14] The decision on whether the son may relocate to live with his father requires the Court to consider an assessment of his best interests.

[15] When ruling on the appropriate parenting arrangement for the two children the court is required by s. 16(8) of the *Divorce Act* S.C. 1985, c. 3 (2nd Supp.) to consider only the best interests of the children as determined by reference to the condition, means and other circumstances of the children. By virtue of section 16(10) of the *Divorce Act*, *supra* the Court is required to provide for as much contact between the children and each parent as is consistent with the best interests of the children and the court is to specifically consider the willingness of each parent to facilitate such contact. Furthermore s. 16(9) of the same *Act* provides that the past conduct of each parent is not to be considered unless it is relevant to the ability of that parent to act as a parent.

[16] Justice Goodfellow in *Foley v. Foley* [1993] N.S.J. 347 enumerated a helpful list of considerations that frequently must be addressed when the best interests of a child must be determined depending on the facts of a particular case. They are the following:

1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);
2. Physical environment:
3. Discipline;
4. Role model;
5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight

> to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;
> 6. Religious and spiritual guidance;
> 7. Assistance of experts, such as social workers, psychologists- psychiatrists- etcetera;
> 8. Time availability of a parent for a child;
> 9. The cultural development of a child;
> 10.The physical and character development of the child by such things as participation in sports;
> 11. The emotional support to assist in a child developing self esteem and confidence;
> 12. The financial contribution to the welfare of a child;
> 13. The support of an extended family, uncles, aunts, grandparents, etcetera;
> 14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The Divorce Act s. 16(10) and s. 17(9);
> 15. The interim and long range plan for the welfare of the children.
> 16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and
> 17. Any other relevant factors.

[17] I would add “maintaining the status quo” as a consideration for the court in appropriate circumstances. The duty of the court in any custody application is to consider all of the relevant factors to determine what is in the children’s (child’s) best interests.

[18] When relocation of a child is proposed by either parent, the analysis requires a consideration of the principles enunciated by the Supreme Court of Canada beginning with *Gordon v. Goertz* [1996] S.C.J. 52:

> 49 The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, inter alia:

(a) the existing custody arrangement and relationship between the child and the custodial parent;

(b) the existing access arrangement and the relationship between the child and the access parent;

(c) the desirability of maximizing contact between the child and both parents;

(d) the views of the child;

(e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;

(f) disruption to the child of a change in custody;

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family

> and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

[19] As stated, a parenting order has been in place since November 2011. It reflects the reality of Mr. Hurley commuting to work in Alberta beginning in March 2011. That order essentially provided for shared parenting of the parties' two children. Mr. Hurley changed employment in September 2012 and stopped commuting to Nova Scotia in June 2012. These new realities represent a change in circumstances as defined by the caselaw.

[20] The Supreme Court of Canada in *Gordon v. Goertz supra* at paragraph 17 stated:

> 17 The threshold condition of a material change in circumstance satisfied, the court should consider the matter afresh without defaulting to the existing arrangement: Francis v. Francis (1972), 8 R.F.L. 209 (Sask. C.A.), at p. 217. The earlier conclusion that the custodial parent was the best person to have custody is no longer determinative, since the existence of material change presupposes that the terms of the earlier order might have been different had the change been known at the time. (Willick v. Willick, supra, at p. 688, per Sopinka J.) The judge on the variation application must consider the findings of fact made by the first judge as well as the evidence of changed circumstances (Wesson v. Wesson, supra, at p. 194) to decide what custody arrangement now accords with the best interests of the child. The threshold of material change met, it is error for the judge on a variation application simply to defer to the views of the judge who made the earlier order. The judge on the variation application must consider the matter anew, in the circumstances that presently exist.

[21] The Court acknowledges that given this is a final hearing, no change in circumstances need be shown to confer jurisdiction on it to revisit issues adjudicated at the interim hearing stage.

[22] An assessment of the child's best interests will determine the Court's ruling on the application to permit Jacob to relocate to Calgary. I am mandated to consider *inter alia* the existing custody arrangement and Jacob's relationship with both parents and his wishes.

[23] A central issue for the Court's consideration is the weight to be given to the wishes of Jacob.

[24] Herein the Court has both the report and the oral evidence of Martin Whitzman, M.Sc. as to the wishes of Jacob on the issue of his relocation to Calgary. The parents also testified as to the wishes of both children.

[25] Mr. Hurley explained that his application to have his son relocate to Calgary is motivated by his son's consistent and clearly stated desire to relocate. He explained that initially, both children wanted to relocate. However, the older child now has a boyfriend and she wishes to complete high school in Dartmouth. She is currently in grade eleven. Mr. Hurley testified that if Jacob wanted to stay in Dartmouth, he would be totally accepting of this decision.

[26] Clearly, Mr. Hurley would like his son to live with him. This is well understood by Jacob.

[27] Ms. Hurley wants Jacob to remain in Dartmouth for another eighteen months so that he and his sister may have that time together. It is accepted that upon graduation from high school, the daughter will go on to college/university and will probably not continue to live with her mother. Ms. Hurley also questions her son's maturity to make the decision to relocate.

[28] Mr. Whitzman's report was the product of a consent order, directing that Jacob's wishes on the issue of his proposed move to Calgary be determined. Mr. Whitzman interviewed both children. He testified that in his view, the son was freely expressing his wish to relocate and that his stated wish to do so, did not reflect the prospect of a reward or a disincentive communicated by either parent.

[29] The Court's determination of the child's wishes is its conclusion to make and this responsibility cannot be delegated. Mr. Whitzman's report is evidence on this point.

[30] It is for the Court to decide the weight to be attached to Jacob's opinion. That is a separate question. His wishes are not necessarily determinative of the application to relocate. His best interests are to be assessed. His wishes are one factor, albeit on these facts they are to be accorded significant weight.

[31] Mr. Whitzman's conclusion will be given significant weight on the issue of Jacob's wishes:

> Rylee and Jacob are intelligent, mature, and expressive children who were able to provide adequate and consistent responses to my questions. They denied any direct coaching and insisted that their parents were already aware of their wishes. I was unable to detect any abnormal coaching and believe that the assessment is valid. To conclude, Rylee would like to remain in Nova Scotia with her Mother while Jacob would like to reside with his Father in Calgary. The children recognize that they would be separated from each other and are willing to maintain contact through the computer or phone and visits which would allow them to spend time together.

[32] Mr. Whitzman described Jacob as a year or two more mature than his chronological age. Both parents described him as exceptional. His teacher also described Jacob as independent, hard working, mature and displaying leadership qualities. I am satisfied that Jacob is more mature than his age. He is currently 13 ½ years and I am satisfied he has the maturity of a 14 or 15 year old. He will be 14 years of age in September 2013.

[33] I am satisfied that each parent's views are known by their son. Notwithstanding, the pressures he undoubtedly feels to support a parent, Jacob is confident in communicating his desire to relocate.

[34] It is unlikely the Court would be asked to decide on his relocation if Jacob was 15 years of age. Most parents would accept the judgment of a 15 year old in these circumstances.

[35] The prospect of Jacob being eligible to attend an elite private school in Calgary emerged as a focal point of the evidence. Jacob is described by his parents as a talented hockey player. His father testified that Jacob's paternal grandmother is prepared to pay the $25-35,000 tuition of the 'Edge' private school. The Court is told the school combines academic excellence with athletic excellence.

[36] Over the summer of 2012 when the children were in Calgary, Jacob visited the 'Edge'. I am satisfied the prospect of attending this elite school is very attractive to Jacob. To be admitted to this school, Jacob would need to 'try out' for the hockey program in the Spring of 2013.

[37] At the conclusion of the evidence, Ms. Hurley modified her position on Jacob's relocation. She is open to Jacob relocating over the summer of 2013.

This change in position was conditional upon Jacob being accepted into the 'Edge' in the spring of 2013. The Court does not place significance on this opportunity in coming to its conclusion. Jacob will also be happy if he remains in Nova Scotia.

[38] Nevertheless, I am satisfied that it is in Jacob's best interests to be given the opportunity to relocate to Calgary over the summer of 2013, but not in January 2013 as requested by his father and by him.

[39] Jacob's current educational program, i.e. the grade 8 late French immersion program will be complete in June 2013. His teacher testified that Jacob is advanced in his ability to speak French and he is very good in written French but he requires some work in that area. She also described the typical progress of classes with there being a maturing of the class by March of the academic year. Jacob should be given the opportunity to achieve this level.

[40] I am satisfied that by the end of grade 8, Jacob will have the necessary basis to continue his studies in French should he wish to do so in grade 9 or even later. He has gained an impressive proficiency in French since beginning late immersion in grade 7. Becoming bilingual was obviously viewed as important by this family. Preserving this goal continues to be in Jacob's best interest. Removing him from the program at the mid year point creates a risk in this regard.

[41] The Court acknowledges the plan to have Jacob attend a grade 8 immersion program in Calgary in January through to June. The father's plan would then have him commence at the 'Edge' in September but "probably in English".

[42] Delaying the relocation until the summer therefore eliminates Jacob's need to adjust to two new schools in the same calendar year. Minimizing the unavoidable stress change can create for teenagers is important.

[43] In addition, Jacob will have a maturity level comparable to that of a 15 year old when required to move. Given all I have heard, I am satisfied that if he does not want to relocate at that time, he will decide not to and his parents will accept his decision.

[44] The physical separation of the siblings after August 1, 2013 is not desirable. However, there are ways for these siblings to remain connected using technology

such as the internet and skype. In addition, there are several opportunities over the course of the year for them to be together and in the company of a parent.

[45] They have a secure relationship. Rylee supports Jacob's desire to move. These children were raised in Alberta until 2008. They have extended family there.

[46] Jacob will have more time with his father and he values that opportunity and that will be very positive for Jacob.

[47] In most mobility cases, some relationships will be enhanced and others will not be as a result of a move. A move does not mean relationships will be lost.

[48] Given the Court's decision permitting Jacob to move, the Court has concluded after considering all of the circumstances, that Jacob's best interests are served by his being given the opportunity to move to Calgary after completing grade 8 in Dartmouth.

[49] The parties are to cooperate to ensure Jacob has the opportunity to apply/try out for 'Edge' school.

[50] Ms. Hurley is directed to not use the next six months to persuade Jacob to change his opinion from that which he currently expresses and Mr. Hurley is not to pressure Jacob to revert to his current opinion should Jacob decide not to move.

Imputed Income

[51] Given that I have ruled that Jacob will be in Mr. Hurley's primary care effective August 1, 2013, I must determine what Ms. Hurley's income will be for purposes of her child support obligation after August 1, 2013 and to determine her contribution to special expenses for the children on an ongoing and future basis. Mr. Hurley argues income should be imputed to Ms. Hurley and she should be required to pay child support on this basis.

[52] The Court's authority to impute income is codified in the Child Support Guidelines. The same considerations govern when the Court is asked to impute income for purposes of determining spousal support and contributions to special

expenses for children. However, the Court is mindful of the distinction that can be made when the Court is determining income for purposes of child and spousal support (see *Richards v. Richards*, 2012 NSCA 7).

[53] Justice Forgeron in *Marshall v. Marshall*, 2008 NSSC 11 provides a helpful summary of the state of the law on this issue. At paragraph 17-18, she wrote:

> 17 The discretionary authority found in section 19 of the Guidelines must be exercised judicially in accordance with the rules of reason and justice - not arbitrarily. There must be a rational and solid evidentiary foundation in order to impute income in keeping with the case law which has developed. The burden of proof is upon Ms. Marshall and it is proof on the balance of probabilities: Coadic v. Coadic 2005 NSSC 291 (CanLII), (2005), 237 N.S.R. (2d) 362 (SC).
>
> 18 In reviewing the factors to be considered when a party has requested imputation, the court stated at paras. 14 to 16 of Coadic:
>
> > [14] In making my determination as to the amount of income to be attributed to Mr. Coadic, I am not restricted to the actual income which he earned or earns, rather I am permitted to review Mr. Coadic's income earning capacity having regard to his age, health, education, skills and employment history.
> >
> > [15] In Saunders-Robert v. Robert, [2002] N.W.T.J. No. 9, 2002 CarswellNWT 10 (S.C.), Richard, J., stated at para. 25:
> >
> > > [25] When imputing income, it is an individual's earning capacity which must be considered, taking into account the individual's age, state of health, education, skills and employment history. In the circumstances of the respondent, in my view it would not be unreasonable to impute, at a minimum, one-half of the income that the respondent earned in 1995 and 1996, say $50,000. I note that the respondent's present income, according to his own evidence, is approximately $42,500.00."
> >
> > [16] In R.C. v. A.I., [2001] O.J. No. 1053, 2001 CarswellOnt 1143 (Sup. Ct.), Blishen, J., reviewed the principle that income is based upon the amount of income which a parent could earn if working to his/her capacity and further adopted the factors to be applied when imputing income as proposed by Martinson, J., in Hanson v. Hanson, [1999] B.C.J. No. 2532 (S.C.). Blishen, J., stated at paras. 79 to 80:
> >
> > > [79] By imputing income, the court is able to give effect to the legal obligation on all parents to earn what they have the capacity to earn in order to meet their ongoing legal obligation to support their children.

> Therefore, it is important to consider not only the actual amount of income earned by a parent, but the amount of income they could earn if working to capacity (Van Gool v. Van Gool 1998 CanLII 5650 (BC CA), (1998), 166 D.L.R. (4th) 528).
>
> [80] In Hanson v. Hanson, [1999] B.C.J. No. 2532, Madam Justice Martinson of the British Columbia Supreme Court, outlined the principles which should be considered when determining capacity to earn an income as follows:
>
> > 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para. 30).
> >
> > 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
> >
> > 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
> >
> > 4. Persistence in unremunerative employment may entitle the court to impute income.
> >
> > 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
> >
> > 6. As a general rule, a parent cannot avoid child support obligations by a self- induced reduction of income.'"

[54] Ms. Hurley's stated earned income is $1,000 (Exhibit #7). This is derived from her operation of a candy vending business she acquired in March, 2011 for $70,000.

[55] The business does not generate the revenue and profits she anticipated. She wishes to continue to operate the business in the hope that it will grow and be easier to sell, thereby permitting her to recoup some or all of her initial investment.

[56] I am satisfied that it is unreasonable for her to continue to pursue the business as her sole source of earned income. If she is to continue to pursue this business, then she must find an additional source of income. In any case, for the immediate term, I impute an earned income of $25,000 to her.

Child Support

[57] Ongoing child support (effective September 1, 2012) is to be based upon Mr. Hurley's known current annual income of $105,161 and the Alberta tables. Child support is $1,491. Effective August 1, 2013 his child support obligation will be for one child. Effective August 1, 2013 set off shall apply as per s.8 of the Child Support Guidelines. The table amount shall apply in both cases.

[58] I have already concluded that Ms. Hurley's decision to persist with the vending business is not reasonable. She has experience working with the public. She impressed as capable and intelligent. She is ambitious as evidenced by her support of and involvement in the vending machine business, the parties' real estate business and the parties' restaurant franchise business.

[59] I am satisfied that she has the potential to earn more than $25,000 per year. She must undergo a transition in her lifestyle and be given an opportunity to adjust to the parties' new reality. However, for purposes of calculating the parties' spousal and child support obligation, her earned income is set at $25,000 to July 31, 2013. Thereafter, it is set at $30,000 and she will be subject to a child support obligation to Mr. Hurley for the care of Jacob. Mr. Hurley will continue to have a child support obligation to Ms. Hurley for the care of Rylee. Ms. Hurley's child support obligation will be based on the total after earned income and spousal support.

Spousal Support

[60] The general principles governing spousal support are contained in the *Divorce Act*, *supra*.

[61] Section 15.2 (4) (a)- (c), (5) & (6) (a)- (d) of the *Divorce Act, supra*, requires the court to consider the condition, means and circumstances of each spouse and provides that a spousal support order should address four statutory objectives:

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

[62] The words of Justice McLaughlin in *Bracklow* [1999] S.C.J. No. 14 at paras. 30-31 are on point:

> (30) The mutual obligation theory of marriage and divorce, by contrast, posits marriage as a union that creates interdependencies that cannot be easily unravelled. These interdependencies in turn create expectations and obligations that the law recognizes and enforces ...

> (31) The mutual obligation view of marriage also serves certain policy ends and social values. First, it recognizes the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly. When this happens, it is not unfair to ask the partners to continue to support each other (although perhaps not indefinitely). Second, it recognizes the artificiality of assuming that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of single life, indicating the potential necessity to continue support, even after the marital "break". Finally, it places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls.

[63] Justice L'Heureux Dube in *Moge v. Moge* [1992] S.C.J. No. 107 directed that spousal support must strive to achieve some equitable sharing upon the dissolution of the marriage. At paragraph 73, she stated:

> [73] The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse .

[64] Nevertheless, in the words of Justice MacLachlin in *Bracklow supra*:

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

[65] In *Bracklow supra*, MacLachlin J. defined the concept of quantum in reference to spousal support to include both the amount and duration of the support. She stated further that the factors relevant to entitlement also have an impact on quantum. At para. 53, when addressing the significance of any agreement the parties had, she states:

> ". . . Finally, subject to judicial discretion, the parties by contract or conduct may enhance, diminish or negate the obligation of mutual support . . . "

[66] The parties developed a relationship of interdependency. I am satisfied that the entitlement of each party to pay spousal support to the other has a non compensatory basis.

[67] Ms. Hurley seeks spousal support. Mr. Hurley does not. She is entitled to spousal support.

[68] It remains to determine the quantum on an ongoing basis.

[69] As stated, following the interim hearing, Justice Beaton set spousal support at $1,000 per month and child support at $1,153 per month, reflecting salaries of $115,200 and $25,000 respectively. As stated, child support is set at $1,491 to July 31, 2013 and effective September 1, 2012.

[70] The parties had a medium length marriage. Ms. Hurley accepts the need to find full time employment and to maximize her earning capacity.

[71] Quantifying spousal support is a very inexact task. The Divorce Act at s.15.2 (supra at para. 61) provides the general principles that are to guide a Court when making this determination. The conditions, means, needs and other circumstances of each spouse, their length of cohabitation and their functions while cohabiting are factors to be considered. Both parties have filed financial information. I have considered their statements of income, expenses and property. Each testified as to their financial circumstances.

[72] The Spousal Support Guidelines 'SSAG' are of assistance in determining quantum. They are arithmetic guidelines and a reference point or check for a Court called upon to decide the appropriate level of spousal support.

[73] The parties were married for 12 years and lived together for two (2) years prior to the marriage. They had a medium length marriage. It was not a 'traditional' marriage in the sense of one party remaining at home and foregoing a career in the interests of serving the family. Both parties were available and active in the family for a significant part of their relationship. The spousal support obligation herein has a non compensatory basis.

[74] The 'SSAG' provide that the individual net disposable income (INDI) of both parties should be added together and a percentage of that total assigned to the party having the lower income. The percentage is a product of the years of marriage and ranges from 1.5 to 2 for each year of cohabitation. The percentage also reflects whether the parties have children and where the children live.

[75] Given the parties 14 year relationship, the SSAG recommend that spousal support be in the range of 1.5 - 2%; to a high of (2% x 14) = 28% of the combined INDI.

[76] The individual INDI is her/his income, minus notional child support; minus taxes and deductions plus government benefits and credits plus spousal support.

[77] The SSAG recommend that, when children are in the care of the recipient parent, that spousal support for the recipient parent result in the lower income parent having 40-46% of the combined INDI.

[78] I favour the lower side of the suggested range because Mr. Hurley will be paying most of the travel costs for the children and special expenses. Notwithstanding Mr. Hurley's mother's support of Jacob should he go to the 'Edge', I am satisfied Mr. Hurley will have substantial costs associated with Jacob's education and with his daughter's post secondary education. These expenses are reasonably anticipated.

[79] Mr. Hurley must pay child support set off in the amount of $657 ($925 - $268) beginning August 1, 2013, based on the Alberta child support table for him and the Nova Scotia table for her.

[80] I have considered the Spousal Support Advisory Guidelines. To July 31, 2013, I will use $2,090 as Ms. Hurley's gross monthly income. I set her spousal support at $900 per month effective September 1, 2012.

[81] A determination of spousal support for the period following July 31, 2013 must be made. Using Mr. Hurley's income of $105,161 and her imputed income of $30,000 and factoring in the anticipated split custody situation that will exist, the "SSAG" provide a range of $1,050 to $1,300 using the software, Childview to

do the calculations. I set the spousal support obligation at $1,050 after August 1, 2013.

Retroactive Child and Spousal Support

[82] The burden of proof upon Mr. Hurley is to offer evidence to satisfy me on a balance of probabilities (1) that the award of child support should not be made retroactive to the day the application was filed, and (2) why his child support obligation should not be reassessed based on his actual income since the order was put in place. (*Coadic v. Coadic*, [2005] N.S.J. No. 415 (SC); *Robertson v. Robertson*, [2007] N.S.J. No. 195; and *McCarthy v. Workers' Compensation Appeals Tribunal (N.S.) et al* 2001 NSCA 79 (CanLII), (2001), 193 N.S.R. (2d) 301 (C.A.) at para. 574).

[83] The Supreme Court in *D.B.S. v. S.R.G.* [2006] S.C.C. 37 addressed the issue of whether a court can make an order for retroactive child support and in what circumstances it is appropriate to do so. Three situations were described:

> 1. Awarding retroactive support where there has already been a court order for child support to be paid. (para. 61-74)
> 2. Awarding retroactive support where there has been a previous agreement between the parents. (para. 75-79)
> 3. Awarding retroactive support where there has not already been a court order or history of payment of child support. (para. 80-85)

[84] Justice Bastarache then reviewed factors that could curtail the power of judges to make retroactive awards in specific circumstances. These are:

1. Status of the child. (para. 86-90)
2. Federal jurisdiction for original orders. (para. 91-99)
3. Reasonable excuse for why support was not sought earlier. (para. 100-104)
4. Conduct of the payor parent. (para. 105-109)
5. Circumstances of the child. (para. 110-113)
6. Hardship occasioned by a retroactive award. (para. 114-116)

[85] He also commented on how the amount of a retroactive child support order is to be determined (para. 117) including the date of retroactivity and the amount or quantum.

[86] Justice Bastarache summarized the governing principles as follows:

> 131. Child support has long been recognized as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based
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> 132. In the context of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increased significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.
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> 133. In determining whether to make a retroactive award, a court will need to look at all the relevant [page 288] circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.
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> 134. Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.
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> 135. The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

[87] The situation before the court is not identical to any of the four fact situations considered by Justice Bastarache. Nevertheless, the principles enunciated and matters he directed courts to consider are a helpful guide when considering whether to order retroactive child support.

[88] The award of a retroactive maintenance award is a discretionary remedy. (Roscoe, J.A. in *Conrad v. Rafuse*, 2002 NSCA 60, para. 17-20). Judicial discretion was described by Justice Bateman in *MacIsaac v. MacIsaac*, [1996] N.S.J. No. 185 (N.S.C.A.) at para. 19 and 20. Discretionary decision making within the judicial context confers an authority to decide "according to the rules of reason and justice, not according to private opinion". There is a burden on Mr. Hurley to persuade the court that a retroactive award should not be made to the date of the filing of the application.

[89] The parties are as Ms. Hurley states (para. 98 of Exhibit #6) “both in dire financial circumstances and unable to pay our debts”. I agree with her conclusion.

[90] Ms. Hurley expects to declare personal bankruptcy and Mr. Hurley may have to do the same.

[91] I have considered the directions of the Supreme Court of Canada in *D.B.S. supra* on when retroactive support should be ordered and when arrears of child support should be cancelled. A retroactive award will occasion hardship on the children and if found to exist, would not be ordered on the facts.

[92] The order of Justice Beaton must be complied with to September 1, 2012. Thereafter child support and spousal support will be based on the parties having an income of $105,000 and $25,000 respectively and reflect primary care of the children remaining with Ms. Hurley until the end of July 2013.

[93] After July 31, 2013 the child support obligation will reflect set off and the imputed income of Ms. Hurley of $30,000 and the split custody situation anticipated to exist after that time.

[94] Reviews of spousal support orders are not typical. However, these parties will be in transition over the next year and significant changes in their circumstances will be occurring. A review will be scheduled for January 2014 at the request of either party.

[95] Ms. Hurley is required to provide a summary of efforts to increase her income prior to the review date in January 2014 with the summary being disclosed

to Mr. Hurley on or before January 1, 2014. That summary should include a program to increase her skill level should that be deemed necessary by her to increase her earning capacity.

[96] There are a number of asset and debt issues that were raised. It is the Court's impression that the parties agree on how these matters should be concluded. The court reserves jurisdiction to rule on these and related matters, as well as any other issue arising from this hearing and not addressed herein if called upon to do so by either party.

[97] The parties will proportionately share the uninsured portion of Jacob's dental care using Mr. Hurley's income of $105,161.00 and Ms. Hurley's imputed income of $25,000 to July 31, 2013 and $30,000 after August 1, 2013.

[98] The court is not ordering the sharing of Jacob's expenses related to hockey or related to his attendance or try out for the 'Edge' program of studies and athletics.

[99] The parties shall also proportionately share the travel costs for the children between Calgary and Halifax. The parties are directed to arrange three periods per year when the children may have block time together for a minimum period of one week. The summer period, Christmas and winter school break are three such obvious periods. A fourth block period is recommended but not ordered. In addition, the parties shall cooperate to establish structured communication between the children using technology such as 'skype'. This obligation for each child will exist until the child reaches the age of eighteen (18).

[100] The parties will provide financial disclosure to the other on or before July 1 of each year.

ACJ