IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: ***Bood v. McGunnigle*** **2004 NSSF 87**

Date: 20041004
Docket: 1201-51272
Registry: Halifax

Between:

Timothy William Bood

Applicant

v.

Amanda Jean McGunnigle

Respondent

Judge: The Honourable Justice Moira C. Legere-Sers
Heard: June 29, 2004, in Halifax, Nova Scotia Final Written Submissions:
Applicant - September 10, 2004
Respondent - September 1, 2004

Counsel: Michael I. King, for the Applicant
Sally B. Faught, for the Respondent

By the Court:

[1] This is an application to vary the Corollary Relief Judgement dated November 30, 1998. On August 29,2003 Dr. Bood made this application seeking to terminate his current spousal support obligation.

[2] On February 16, 2004, the Respondent, Amanda Jean McGunnigle made a cross-application to vary the Corollary Relief Judgement. She seeks a continuation of spousal support, an increase in the amount of child support, retroactive child support and costs.

[3] There are two children of the marriage: Sarah, born […], 1984 and Rachel, born […], 1988. Sarah is currently 20 and attending university and Rachel is 16. Both live at home with the Respondent.

[4] There is no contest as to the payment of child support. Dr. Bood understands that currently he will be paying the extraordinary educational costs.

[5] The issues to be resolved include determining annual salary, late disclosure, whether to terminate spousal support, retroactive child support and costs.

Historical Information

[6] Timothy Bood, born on […], 1957 and Amanda McGunnigle, born on […], 1957, married on July 18, 1981. They entered into a marriage contract on December 21, 1994 prior to a reconciliation. Their final separation occurred on April 1, 1995.

[7] They had been living together for 14 years. Each of them were 37 years old at separation. They appeared before the Court for their divorce hearing when they were 40 years of age.

[8] The Divorce hearing took place on the 23rd and 24th of February, 1998. A divorce was granted by decision dated July 28, 1998. At the time Sarah was 13 and Rachel 8 years old.

[9] The court considered the validity of the marriage contract. The contract

dictated that:

> The Applicant was to pay the Respondent for the support of herself and the children, on the first day of the month following the separation and continuing thereafter on each and every month, an amount equal to one-twelfth or annually one-half of his total annual income.
>
> Income was determined to be the income in respect of the immediate preceding taxation year including net professional income and/or gross income prior to any calculation of taxable income.
>
> In any event, the Applicant was to pay the Respondent no less than $3,333.33 per month to be adjusted upward or downward on an anniversary date of the agreement in accordance with the increase or decrease of the Consumer Price Index.

[10] Dr. Bood testified at his divorce hearing that he worked approximately 90 hours a week trying to pay support, in compliance with the contract. He worked full time at the Nova Scotia Hospital, part time at the Dartmouth General Hospital and engaged in some private practice. At the time of trial he had fallen behind in his support payments and his entire Nova Scotia Hospital salary was being garnished.

[11] The marriage contract governed from 1995 to early 1998. Between the date of separation and divorce, the Applicant made efforts to live by the agreement. At the divorce hearing the Respondent believed Dr. Bood was in arrears in the amount of $49,910.45 as of February 1998.

[12] At the time of the divorce the Respondent did not work outside the home and was studying part time at Dalhousie University.

[13] The Learned Trial Judge found that the issues in the contract that were outside the scope of the *Matrimonial Property Act* were void. He addressed the

issues of custody, access, child support and spousal support.

[14] The Court did not void the entire contract. Given the respective economic positions of the parties at the time of separation and considering the fact that the Respondent had custody of the children, the Learned Trial Judge found that the terms of the contract respecting the division of property were not unduly harsh and, although unequal in favour of the Respondent wife, he found that the contract was not unconscionable.

> The Applicant was required to execute and deliver to the Respondent a Quit Claim Deed in favour of the Respondent in respect of the matrimonial home releasing any claim he had.
>
> The Respondent was to absorb the sole responsibility for the mortgage indebtedness.
>
> The Respondent became the sole owner of all household furnishings and effects except for the Applicant's personal effects.
>
> The Respondent became the sole owner of the motor vehicle and was solely responsible for the indebtedness.

[15] The Court acknowledged that the Applicant had an opportunity to obtain independent legal advice and did not do so. The contract did not provide for an equalization payment to Dr. Bood. Dr. Bood argued for one at trial. He did not receive this relief.

[16] The circumstances surrounding the contract were reviewed in that decision and need not be repeated here other than to indicate that in voiding the contract after reviewing the law the Court noted:

> ... the law should not encourage contracts that make separation more profitable than

> marriage.

[17] The Learned Trial Judge concluded:

> Where I have been required to characterize the spousal support terms in the agreement I would have found them to be 'unduly harsh'.

Corollary Relief

[18] Custody of the children was granted to the Respondent with Dr. Bood having reasonable access on reasonable notice.

[19] Dr. Bood was to pay child support in accordance with his income. It was agreed his income from all sources at the time was $140,000 per annum. He was to pay $1,682 to Ms. McGunnigle for the benefit of the two children.

[20] Regarding spousal support, the Learned Trial Judge also found as follows:

> Ms. McGunnigle has not worked full-time since the marriage in 1981. She has been a full-time parent since the birth of the children. Section 15.2(7)(d) advises that I should, insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
>
> ***The respondent has described an educational program that she intends to follow that will put her in the workplace by the year 2002. I find her proposal to be reasonable.*** In the meantime, she chooses to be home with her daughters and she should be able to have that choice. The children will benefit from this decision.
>
> . . . I will order spousal support in the amount of $1,820.00 so that the totality will be $3,500.00 per month.

[21] The contractual award had been tax deductible. The award resulting from the Divorce proceedings had obvious split tax consequences.

[22] In every award of spousal and child support it is critical to account for the significant tax consequences of a child support order (ie., tax free to the payee B not tax deductible by the payor). It is helpful to the Court and to the parties to understand the consequences of the award to either party; for example, how the award will affect their net disposable income.

[23] The varied award of support made pursuant to the *Child Support Guidelines,* grossed up and considered with the spousal support dollars approaches 42 percent of the Respondent's income.

[24] The award of 50 percent was considered onerous by the Learned Trial Judge. While the varied award relieved the burden to some extent, it ought to be seen as a significant obligation.

[25] The comment that the Respondent ought to have the choice to remain at home with the children I take to be obiter. It is not an issue of right or wrong, better or best parenting methodology. This statement is a statement of values and may not be reflective of the parties' historical choices or fiscal reality.

[26] Determining economic self sufficiency as is possible or practical requires as a component, a factual determination based on each particular marriage. The particulars of this situation must be reviewed in the context of the parties' marriage and subsequent events.

[27] The choice to stay at home with the children must be assessed in light of the global view of the parties' marriage. Such a factual determination must come from

an assessment of the couple’s historical choices and be reassessed in light of the statute, cases that define the meaning of self sufficiency and the consequences of the breakdown of the marriage on the couple’s ability to support their children and become self sufficient, if that is possible.

[28] Decisions made at the commencement of marriage must certainly be reassessed at divorce to ensure the interests of the children and the needs of the parents are addressed globally. It may be that what was once considered appropriate within the context of their marriage may not be practicable when marriage dissolves.

[29] A brief view of the history indicates that, while Dr. Bood and Ms. McGunnigle had the ability to earn more during the early stages of their marriage, both parties engaged in what might be called (for lack of a better word) missionary work. Both participated in this worthy pursuit. The Respondent provided evidence in her pre-trial submissions respecting the evidence at the Divorce proceeding.

> The parties spent the years of their marriage in developing countries doing volunteer work and even when in Canada did extensive volunteer work with refugee families. During this time they accumulated very little worldly wealth. Only after the separation did the Petitioner have employment that paid well. **(Pretrial memo, Item 6)**
>
> The parties marriage was one of 14 years with the Respondent being the primary caretaker to the parties’ two children as well as being an active participant in the parties’ agreed-upon volunteer activities both in Canada and in third world countries. **(Item 7)**

[30] The Applicant continues at his own cost to dedicate one month of his time and skills to a developing country.

Self Sufficiency

[31] The Respondent was qualified in the area of food services and nutrition working after her graduation in Quebec CEGEP in 1977. This was her chosen profession prior and during marriage.

[32] Her current educational pursuit constitutes a career change which may be enhanced by her employment history but differs from her then current skills and education. It was a new pursuit.

[33] The separation brought critical changes to both parties. The Applicant began to seek local employment wherever possible to abide by the contract, now voided. The Respondent commenced a different career requiring an undergraduate degree. Both embarked on a new way of living and supporting their children.

Educational Strategy

[34] At the time of the Divorce hearing the Respondent was in the first year of a three-year, 15-credit program. She provided evidence at trial confirming her anticipated date of completion as **the spring of 2002.**

[35] It was noted by counsel for Ms. McGunnigle that she had made her intention clear to the Court to take only three credits per year rather than five credits, in order to meet her parenting responsibilities and financial managing. She had, however, taken a spring semester course each year in addition to the regular fall and winter semesters to move herself forward.

[36] The Respondent confirms that she did not complete her educational

program in the spring of 2002 as she had proposed at the time of the trial.

[37] The Respondent performed well and progressed through her undergraduate program making the dean's list.

[38] In the third year of her program she was approached by the advisor to the International Development Studies Program to do a combined honor's degree in International Development Studies and social anthropology. This was a 20-credit, four-year program. In considering whether to take this program, she was aware that her projected graduation date would be **July, 2003.**

[39] In this combined honor's program her grade point average was 3.9 out of 4.2, an excellent result.

[40] The Respondent approached the Applicant when she sought the first extension of spousal support to complete her combined program. By letter dated October, 2001 Dr. Bood's counsel advised the Respondent's counsel that Dr. Bood would agree to the extension until the spring of 2003; a year beyond the date the Respondent was to have completed the educational program proposed at trial and referred to in the decision.

[41] In the same letter the Applicant's counsel put the Respondent's counsel on notice that they would be making an application to terminate spousal support in the spring of 2003, whether or not she had completed the program outlined at the divorce hearing. Counsel for the Applicant <u>encouraged</u> the Respondent to seek employment <u>at least</u> during the summer months, suggesting that he should receive a credit for any income she earned.

[42] The Respondent advised by letter dated November 20,2001 the following:

> Ms. McGunnigle does not agree to Dr. Bood's proposal that he receive a reduction in his obligation during the months of April through August, 2002. It is her intention to spend the summer of 2002 in Montreal with one or both of the parties' daughters as she has done in previous years."

[43] In February, 2003 she was again approached by her professor and by the Chair of the International Development Studies Program and encouraged to apply for the master's degree program in International Development Studies.

[44] She indicates in her evidence that she made some attempts at finding jobs while she studied, prior to February, 2003, including applying for a few jobs through the Department of National Defence.

[45] During her last year of her undergraduate program she attended employment oriented seminars presented by the federal government to the honor and master degree students, advising as to what criteria the government was looking for and what to expect by way of salaries and benefits.

[46] After attending two of these seminars in 2003, the Respondent decided that she would have better prospects at employment if she obtained a master's degree. She applied and was accepted and believes she can complete her masters in one calendar year. She notes that the workload is heavy and most master students require two years.

[47] As of the date of her affidavit of February 16, 2004, she advised that she

would complete **her first year in April, 2004** and proceeded to put her proposal for her research paper together.

[48] It is her intent to begin her research work in September, 2004 and upon the completion of her research, write her thesis. She anticipates that she will complete her thesis and receive her master's degree **by no later than October, 2005.**

[49] The Respondent believes that she needs the continuing financial support of the Applicant in order to become economically self sufficient. She anticipates finding employment once she completes her master's degree.

[50] In addition, the Respondent indicates she needs spousal support to continue to maintain the home. She has spent approximately $33,925 on upkeep and updating of the home in which the two children reside. A significant sum of money has been spent on fixing the former matrimonial home. The scant evidence I have on the additional expenses relate to lifestyle choices rather than mandatory maintenance.

[51] The Respondent advised the Court he pays for the support of another child, Matisse William Bood-Pepin, born […], 2002, $899.67 per month. He advises that the amount of payment is before the Court and he anticipates the amount will change.

Income Picture

[52] *The Respondent's income*

2000: Income $28,994 $42,000 support of which $21,840 is taxable
$7,154.RRSP
Tax Paid: $3,086.(mi.$257)

2001: Income $30,540 $42,000 support of which $21,840 is taxable
$7,916.37 RRSP
Tax Paid: $2,906.10(mi.242)

2002: Income $23,646 $42,000 support of which $21,840 is taxable
$431.80 interest
$1375(other)
Tax Paid $1,431.13(mi.119.25)

[53] Her pre-scholarship monthly income for 2003 was $3,927 of which $1,818 is spousal support. Her post scholarship income is $5,385 inclusive of spousal support.

[54] Her tuition is $2,000 per term. Her grant must cover her books, research and travel costs. Her tuition costs and the books, et cetera, are included in her statement. I have not adjusted that amount. She receives $2,749 as a teaching assistant and her scholarship in the master's program for 12 months commencing September 11, 2003 is $17,500.

The Applicant's Income

[55] Subsequent to the 1997 taxation year the Applicant's income increased.

He undertook many other employment opportunities in order to meet the maintenance requirements fixed by the Learned Trial Judge.

[56] He accepts that he is the major financial contributor to the two children and he agrees to pay for all of the children's basic university education, tuition, residence, et cetera.

[57] From 1998 forward Dr. Bood has earned the following:

1998	At Divorce in July, 1998 his income was determined to be $140,000. (His income tax return shows $150,949)
1999	$193,220
2000	$177,885
2001	$175.001
2002	$201,867
2003	$223,863

Fixing the 2004 Projected income

[58] I have reviewed the material supporting the Applicant's proposal regarding his projected income for 2004. He has also not been timely in the provision of his financial information. He has had every opportunity to be thorough in this regard and he has had counsel and an accountant to assist him.

[59] The most credible and reliable evidence I have as to his income are his tax returns. The average salary over the last three years is **$200,243.** He argues/projects a lower amount. He has consistently been in error.

[60] Should that be different in 2004, he will file yearly his new income and an adjustment can be made prospectively. The costs of accessing the financial statements should they not be produced in future on time and voluntarily, will be his.

[61] Dr. Bood works on a contract basis and receives his income as an employee. He will bear the burden of proving his projected downturn in income at the end of the year when the total figures can be verified.

Changes in circumstances

[62] Sarah commenced attending Acadia University in September, 2002. Dr. Bood paid the expenses and sought a reduction in the child support award paid directly to the mother as the child would be attending a university away from home. I understand this has changed.

In addition, Dr. Bood was expecting a child of another relationship, due in August, 2002. If guideline amount is imposed on the same salary, his monthly support obligation without a contribution to section 7 expenses is $1,492.

Child Support

[63] The adjusted child support on this income is $2,357.

[64] I note that the parties agreed to apply the child support guidelines to the two children notwithstanding the oldest is in University. This need not have been the

case. This bound the Court to the application of the guideline amount when other options exists for a child attending university. In addition, there was little evidence of the child's contribution to her own education.

[65] The Respondent has provided a pre and post scholarship income statement filed October 29, 2003. I have considered how this will affect her income pre and post scholarship with and without spousal support.

[66] In reviewing her income statement, her household needs with two children can be addressed without much change with $675 to $700 trimmed from her budget. Adjusting her budget by $675 would result in maximum monthly expenses of $3,492 (pre-scholarship).

[67] While the Respondent remains unemployed, Dr. Bood understands he will pay for 100 percent of the extraordinary educational costs. At this time this includes $500 per month towards tuition and educational costs.

[68] Once employed appropriately, Ms. McGunnigle will contribute her proportionate share.

Factors of note:

[69] The Applicant will lose the tax deduction associated with the termination of spousal support and experience an increase in non tax deductible child support of $2,357 (tax free income to the payee).

[70] Historically, Dr. Bood accepted he would be responsible for 100 percent of all extraordinary expenses and post secondary expenses without contribution from the Respondent while she is unemployed. He will be adding to his child support payment of $2,357 **at least** $500 a month for tuition and education costs.

[71] The extra expenses he has traditionally funded are many and are not defined well enough to place a definite figure in his budget. They will obviously have to be trimmed to meet his ability to contribute.

[72] As a result of the Respondent's lifestyle choices and educational pursuits, the Respondent is postponing the time when she will be called upon to absorb a percentage of section 7 expenses. By delaying reentry into the employment market, it will take longer to move towards maximizing her income potential. The financial consequences of this decision have a direct effect on the children and both the payee and the payor.

[73] The evidence confirmed that Ms. McGunnigle did not intend to obtain gainful employment to assist in her support during the summer of 2004. She repeated the historical trip to Montreal to visit relatives, vacation, and indicated she may do some compulsory reading for her thesis but would not be seeking employment outside the home.

[74] With greater efforts at employment, the Respondent can meet her monthly expenses.

Spousal Support

The Law

[75] The factors to be considered in the making of a spousal support order are set out in s. 15.2(4) of the *Divorce Act.*

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

(c) any order, agreement or arrangement relating to support of either spouse.

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

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or breakdown;

(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

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

[76] The Honourable Chief Justice considered these factors in both the division of property and the spousal support award. He addressed the economic advantage or disadvantage to the spouses in apportioning the financial consequences arising from the care of the children. In addition to an award of spousal support based on the circumstances of the marriage, he endorsed the strategy for self sufficiency submitted by the Respondent and her counsel and endorsed an unequal division of

assets such as they were.

[77] When dealing with a variation application, the Court refers itself to section 17(1)(a) of the *Divorce Act*. Section 17(4) confirms the considerations for the Court with respect to a child support order and section 17(4.1) with respect to a spousal support order.

[78] The threshold test as discussed in *Willick v. Willick,*[1994] 3 S.C.R. 670, at 688 indicates as follows:

> In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

[79] It is not for this Court to consider anew the questions of entitlement, and to address the need, if any, to compensate Ms. McGunnigle by way of a compensatory award. Those issues were addressed by the Court at the initial Divorce hearing.

[80] There has been a change of circumstances. Dr. Bood's income has increased. The oldest child is in university. Dr. Bood has a dependant child now two years old and is in the midst of proceedings to address his responsibility towards this child.

[81] More importantly, the Learned Trial Judge addressed the issues of support entitlement and need and specifically endorsed a strategy for self sufficiency *advanced by the Respondent.*

[82] Ms. McGunnigle is now advancing a course of continued studies not within the contemplation of the Learned Trial Judge or the Respondent at the time of Divorce. The original award did not contemplate the extension let alone the current proposal for her to complete her masters degree.

[83] In considering section 15.2 (6)(a) in the original proceeding and retrospectively, the Court took into account the economic advantage and disadvantage to the former spouses arising from the marriage breakdown.

[84] In the division of property and in the assessment of the need for spousal support and the strategy proposed by the Respondent herself, an award was made to recognize the considerations impacting on her ability to attain self sufficiency.

[85] The Applicant has contributed substantially by way of child support payments. In addition, he has contributed towards the spousal and child support from the date of separation to the date of the trial (from 1995 to 1998) in a manner subsequently found to be so onerous that the Court voided the agreement.

[86] The Applicant has not been criticized for and indeed has indicated he is prepared to be the sole source of support for the children as they pursue their post secondary education.

[87] Lately, he has introduced a notion requesting a contribution by the children to their own support and cannot be faulted for introducing fiscal realities.

[88] On those occasions that the Respondent has contributed financially, it is

clearly from a supplementary perspective. Notably, the Applicant does not have dental coverage.

[89] The commentary above is not meant to diminish in any way the emotional support provided by the mother and it is not intended to comment or diminish the support provided by the father. The observations and conclusions relate to financial contribution.

[90] As a result of the requirement to pay spousal support, the Applicant has absorbed the financial cost of the Respondent's education and continues to do so past the date anticipated by the original court decision. Ms. McGunnigle has already, because of the passage of time, completed the first year of her master's degree. The original plan was to be complete by 2002. The extension would bring it to 2003. It is now 2004 and her proposal contemplates 2005. As well a substantial portion of the children's education is paid for by the Applicant.

[91] The decision focused on putting the Respondent in a position where she is relieved from the financial hardship that would occur to her as a result of the marriage. She is capable, youthful, with great promise in the field of her endeavors.

[92] It is her responsibility insofar as is practical to promote her own economic self sufficiency within a reasonable period of time. The reasonable period of time identified by the Court originally was to allow her to pursue, in a less than arduous fashion, the completion of her degree in university in a field of study different from her original pursuit.

[93] The lifestyle choice of both parents prior to the separation was to focus

their energies on a voluntary basis and to reduce the level of their income as a result of their voluntary activities. There is no suggestion that this was not a joint decision.

[94] There is no evidence to support a conclusion that the only option open to the Respondent, should she wish to pursue her education beyond what was originally anticipated, is mandatory spousal support. She has received a voluntary extension by Dr. Bood to go beyond what was originally contemplated when she asked that she be able to pursue a combined honor's program.

[95] There is further no evidence to suggest that her job prospects are better with a master's degree. While it is certainly an enhancement, I cannot conclude it is a necessary enhancement nor can I conclude it is not achievable through the Respondent's own efforts at employment. Indeed, it is entirely reasonable to conclude one could work while completing the thesis.

[96] The pursuit of an educational strategy developed to assist the recipient of spousal support to achieve self sufficiency ought to be accomplished with timely diligence insofar as practicable.

[97] There is no suggestion that the Respondent cannot work at this time and, in fact, has made a lifestyle decision not to supplement her income while she pursues her studies.

[98] She has also indicated that she did not have any intention of seeking gainful employment during the summers or to change significantly her historical perspective on her summer obligations. Her summers are spent relatively carefree

at her parents' summer home and visiting relatives. In a sense, her financial position is in part due to her own lifestyle decisions. This appears to be somewhat of a luxury, given there are two households to support and there is no attempt to find supplementary employment.

[99] The age of the parties at marriage and at separation, the various abilities of the parties, including the ability of the Respondent to become self sufficient is to be promoted.

[100] It is not the Court's role to enable or support economic dependence in the absence of factors which prove economic dependence. The Respondent here was 23 at the time of marriage, 37 at the time of separation, and was in receipt of spousal and child support from separation forward through to the trial in 1998. At that time the factors in support of a spousal support award were considered as well as the appropriate promotion of self sufficiency.

[101] In this particular circumstance, the Respondent being 37 at separation and 40 at divorce had embarked on a course of study that would most certainly propel her to self sufficiency. The design of the course was not onerous and, in the meantime, she was in receipt consistently of child support payments in addition to her spousal support payments to sustain her while she pursued the completion of her degree.

[102] It has not been proven that the continuation of the spousal support at this time is necessary in order for the Respondent to pursue self sufficiency.

[103] It is time for the Respondent to use the education that she has received for

the purposes of obtaining full time employment. There is no evidence that allows me to conclude she is not now employable.

[104] Among other considerations, I have considered the income of both parties, the necessary expenditures, the change in child support obligations, the obligation to support a child of another relationship, the efforts of the Applicant in maintaining employment, the perspective of the Respondent towards employment.

[105] I have also considered in this circumstance that the oldest child is attending university, the full base amount is being paid, and Dr. Bood is currently assuming full responsibility for her extraordinary educational costs.

[106] There is no legal requirement that promotes a finding that self-sufficiency is reached when you achieve your maximum educational potential.

[107] This is a situation where there is strong argument for a termination of spousal support on the issue of self sufficiency.

[108] If I am in error in terminating the spousal support award for the above reasons I have also considered the impact of the adjusted child support award for two children together with the additional child support for his third child.

[109] Cumulatively, payment of child support for the three children when there are two households (aside from the payor's) is an onerous award of support. If these three children lived in the same household the base amount alone would be $3,048 monthly. If guidelines are strictly followed with the children living in two

different households, the total is $3,849 without tuition and extras including access costs.

[110] To continue spousal support in these circumstances would be a hardship creating an unreasonable demand on Dr. Bood. He has demonstrated a solid work ethic. He is certainly not underemployed.

[111] The award allowed by the Court at the time of the Divorce required him to pay $3,500 monthly. Of this, $1,682 was not tax deductible. The award approached approximately 42 percent of his gross salary.

[112] This support award is less that the 50 percent in the agreement (determined to be unduly harsh) but when tuition and extras are added along with access costs it moves much closer to the onerous percentage in the original contract, found to be unduly harsh.

[113] I have considered as well the disposable income he will have to honour his commitments, pay his household expenses and maintain his professional standing. This will bring finality to the spousal award and there is a foreseeable reduction in child support as the children complete their educational pursuits and become financially able to withdraw from support and dependance.

Financial Disclosure/ Retroactive Awards

[114] *Marinangeli v. Marinangeli*, 2003 Carswell Ont, 2691, 38 R.F.L. (5th) 307 (Ont. C.A.), infers an obligation on the part of the payor to advise of a change in financial circumstances that would affect spousal or child support.

[115] While there may be a difference of opinion and authority on the broad directive adopted in *Marinangeli*, in this case Dr. Bood was obliged by court order (para. 7) to disclose his returns annually.

[116] There were numerous requests for disclosure of financial information. Dr. Bood has not been timely in the provision of his financial documentation.

[117] The first request for the Respondent's income tax returns occurred on April 10, 2002. His counsel, on April 18, 2002, requested copies of Ms. McGunnigle's income tax returns.

Incomplete and untimely disclosure

[118] There are various submissions by Dr. Bood wherein he attempts to project his 2004 income to be less than $200,000 for 2004. His previous attempts to estimate his income have been incorrect. He has consistently underestimated his income. He has filed incomplete information even through he has the benefit of his accountant and lawyer.

[119] Counsel for the Respondent suggests he is attempting to mislead the Court. I am not convinced of that. I do conclude he is not as aware as he should be of his financial information, has not been timely in filing the required disclosure, has been inaccurate in his estimates fairly consistently. His method of response has been careless and sloppy.

[120] Historically, however, he entered into a now void marriage contract to his

detriment committing to pay an unreasonable amount of support. He is more generous to his children than he can afford, creating unreasonable expectations. He and the Respondent chose a lifestyle that resulted in few assets. He received few assets other than his personal effects at divorce. He continues to give generously of his money to his children and his time to charity.

[121] He will, however, bear the consequences of his lack of timely and reliable financial disclosure. The most reliable estimate of his income, considering all the fluctuations, is the average of the last three years.

Retroactive Relief (Child Support)

[122] Ms. McGunnigle seeks retroactive relief, given the fact that Dr. Bood did not disclose returns as ordered in the Corollary Relief Judgment and did not respond in a timely manner to their requests for disclosure. Based on his actual income reflected in his returns, she seeks a retroactive award of $31,375 depicting the amount payable had she had annual reviews based on his change in circumstances. Ms. McGunnigle also provides calculations respecting the adjustment to section 7 expenses.

[123] Dr. Bood provided, essentially, uncontested evidence depicting that he paid additional amounts since 1995 for both children including tuition, sportsplex membership, yoga, dance, banjo, driver's education, piano, horse riding, allowances, a trip to Europe and another school trip, as well as numerous vacation trips together. Some of these expenses are required spending and many would not qualify as legitimate section 7 expenses.

[124] Dr. Bood seeks a retroactive variation terminating spousal support from the spring of 2003. I could not effect this without considering a retroactive variation of child support based on his changing income.

[125] The factors I have considered in declining a retroactive award of child support include the following;

1. I find no intention to mislead although I do find Dr. Bood was careless and sloppy in the disclosure process. I infer on the evidence,

contrary to his representations, an annual salary of $200,243, accepting as the most reliable statement of his income his income tax returns rather than accept his representations concerning the decline in his future income potential.

[126] If I underestimate his income, a correction can be made at the end of the 2004 calendar year for the next year. In any event, based on the current figures, Dr. Bood is paying out an award of child support for all three children that approaches an onerous percentage of his gross income. He is not and will not be living an excessive lifestyle with these and other expenditures.

2. Dr. Bood has contributed generously to special expenses on a continuous basis at a level that would not necessarily be required by statute or court order. The children have not suffered economic hardship nor has Ms. McGunnigle.

3. Dr. Bood contributed after separation at a level found subsequently to

be onerous. There is not a historic pattern of underpayment.

4. Dr. Bood volunteered to pay spousal support beyond the contemplated date when the Court originally thought the Respondent would be employed.

5. The expenditures made by Ms. McGunnigle alleges she had to encroach on her capital to effect approximately $33,000 worth of repairs on her home. I have insufficient evidence to satisfy me that these repairs were essential to ordinary maintenance. The need to encroach on her capital does not result from a lack of spousal or child support payments.

6. The retroactive award in this circumstance would result in a significant windfall made to address his failure to disclose and not to redress unanswered need on the part of the children.

[127] I decline to award retroactive child support. The current support as it relates to children and spouse will commence October 1, 2004 and continue monthly thereafter.

[128] Counsel wish to speak to **costs**. If counsel wish to present a written proposal, the Applicant will file within one week of the receipt of this decision allowing the Respondent one week to reply. If oral presentations are counsels' wish they may set one-half hour for submissions.

Counsel for the Applicant shall draft the order.

J.