SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *McLearn v. McLearn*, 2024 NSSC 36

Date: 20240221
Docket: SFH1201-073908
Registry: Halifax

Between:

Angela McLearn

Petitioner

v.

David McLearn

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Daniel W. Ingersoll
Heard:	December 1, 2023, in Halifax, Nova Scotia
Written Release:	February 21, 2024
Summary:	Divorce granted. Petitioner awarded historic and prospective spousal support. SSAG not used because Petitioner not working and lives expense free with her current partner. Income imputed to Petitioner who has chosen not to work. Respondent awarded historic child support. Matrimonial property divided. Inherited property deemed to be classified as matrimonial property to extent used by family.
Key Words:	Child Support, Table Amount, Imputing Income, Retroactive Support, Spousal Support, Self-Sufficiency, Compensatory Support, Non-Compensatory Support, Spousal Support

Advisory Guidelines, Matrimonial Property, Equal Division, Classification of Assets, Excluded Asset, Valuation, Divorce, Corollary Relief

Legislation: *Divorce Act,* R.S.C. 1985 (2nd Supp.), c.3
Matrimonial Property Act, R.S.N.S. 1989, c. 275
Pension Benefits Act, R.S.N.S. 1989, c. 340

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Counsel:	Angela McLearn, self-represented Jacob Greenslade, counsel for the Respondent

By the Court:

1 Introduction

[1] Angela McLearn and David McLearn separated in 2016 after a twenty-two-year marriage. During the marriage Ms. McLearn primarily stayed at home raising the parties' four children while Mr. McLearn worked as a horticulturist.

[2] Ms. McLearn left the family home in 2018. The children, two of whom were under the age of majority, did not relocate with Ms. McLearn.

[3] The parties seek resolution of the following issues:

a. Should the divorce be granted?

b. Should Ms. McLearn be ordered to pay historic child support?

c. Should Mr. McLearn be ordered to pay historic and prospective spousal support?

d. What matrimonial assets and debts did the parties own when they separated and how should those assets and debts be divided?

[4] I will address each issue separately.

2 Should the divorce be granted?

[5] The parties were married in Nova Scotia on August 13,1994, and separated on January 1, 2016 (the "Separation Date"). The Petition for Divorce was filed on January 14, 2022. An Answer was filed on February 3, 2022, and served on February 10, 2022. The Petition, the Answer, the Affidavit of Service of the Answer, and a copy of the long form marriage certificate were tendered as exhibits. The original long form marriage certificate was filed with the court on December 6, 2023.

[6] The parties have not reconciled, and I am satisfied that there is no possibility of reconciliation. The parties have both lived in Nova Scotia continuously since 1994. I am satisfied that the jurisdictional requirements for the granting of a divorce have been met, and there is proof of permanent marriage breakdown. There is no bar to divorce such as collusion, condonation, or connivance.

[7] I grant the divorce.

3 Should Ms. McLearn be ordered to pay historic child support?

[8] The parties separated on January 1, 2016, but continued to live separately in the matrimonial home until May of 2018 when Ms. McLearn moved out. She did not return. None of the parties' four children moved with Ms. McLearn.

[9] Mr. McLearn says that Ms. McLearn should be ordered to pay $7,559 in historic child support in respect of both the parties' two younger children, James, and Tammy, for the period May 1, 2018, to February 1, 2020, and in respect of James from February 1, 2020, to April 1, 2020.

[10] Mr. McLearn says Ms. McLearn was underemployed between May 1, 2018, and April 1, 2020, and that I should impute annual income of $24,000 to her during this period.

[11] Ms. McLearn says that she should not be ordered to pay child support for three reasons; her income during this period was only $17,131; she purchased groceries from time to time for the family before she moved out of the matrimonial home in May of 2018; and her daughter, Tammy, spent a lot of time at Mr. McLearn's sister's home, eventually lived there exclusively and not at all with Mr. McLearn.

[12] To determine whether Ms. McLearn should be ordered to pay historic child support, and if so the amount of that support for the period May 1, 2018, to April 1, 2020, I will address the following questions:

a. Is Ms. McLearn obliged to pay child support for Tammy during this period?

b. Is Ms. McLearn obliged to pay child support for James during this period?

c. Should income be imputed to Ms. McLearn and if so in what amount?

d. What amount of child support, if any, should Ms. McLearn be ordered to pay?

3.1 Is Ms. McLearn obliged to pay child support for Tammy during this period?

[13] Tammy was fifteen when Ms. McLearn moved out on May 1, 2018.

[14] Ms. McLearn says that she should not pay child support for Tammy for the period of May 1, 2018, to February 1, 2020, because Tammy spent an increasing amount of time at Mr. McLearn's sister's home and was living there nearly exclusively by the time she finished high school.

[15] Mr. McLearn says Tammy remained a child of the marriage between May 1, 2018, and February 1, 2020, and that although Tammy's time at the matrimonial home was inconsistent, she did come and go from the matrimonial home, and he continued to support her financially. Mr. McLearn said he gave his sister money while Tammy lived with her and provided for Tammy when she was in his home.

He says that Ms. McLearn did not support the children financially during this period.

[16] The *Federal Child Support Guidelines* require that the table amount of child support be paid in respect of a child under the age of majority:

> 3(1) Unless otherwise provided under these *Guidelines*, the amount of a child support order for children under the age of majority is
>
> (a) the amount set out in the applicable table, according to the number of children under the age of majority to which the order relates and the income of the spouse against whom the order is sought; and
>
> (b) the amount, if any, determined under Section 7.

[17] It is not necessary that a child live with a parent to be entitled to child support; *Murnaghan v. Lutz*, 2014, NSSC 3, paragraph 42. A child support order can be made in favour of one parent even though the child lives with neither parent: *Murnaghan v. Lutz, supra*, paragraph 37. A parent who wishes to avoid paying child support must have a lawful excuse to not pay support; (*Murnaghan v. Lutz, supra* paragraph 9). The fact that a child does not live with either parent on a full-time basis does not constitute a lawful excuse to not pay child support.

[18] I do not accept Ms. McLearn's position that she should not pay child support for Tammy because Tammy did not spend all of her time at her father’s home. I find Tammy came and went from her father’s home and that he supported

her financially whether she was at his home or his sister's. Tammy did not spend any time with Ms. McLearn and Ms. McLearn did not provide any financial support for or to Tammy. Ms. McLearn has not identified a valid reason she should not pay child support for Tammy.

[19] Regardless of where Tammy lived between May 1, 2018, and February 1, 2020, Ms. McLearn had an obligation to provide for her.

3.2 Is Ms. McLearn obliged to pay child support for James during this period?

[20] James was seventeen in May of 2018.

[21] Mr. McLearn also seeks child support in respect of James from May 1, 2018, to April 1, 2020.

[22] James started working at Walmart, earning minimum wage in 2019. He continues to work there and continues to reside with his father. James remained under the age of majority until March of 2020. I am satisfied that although he started working, earning minimum wage in 2019, James remained in his father's home and a child of the marriage between May 1, 2018, and April 1, 2020.

[23] Ms. McLearn had an obligation to provide for James between May 1, 2018, and April 1, 2020.

3.3 Should income be imputed to Ms. McLearn and, if so, in what amount?

[24] Mr. McLearn says that I should impute minimum wage income to Ms. McLearn between May 1, 2018, and April 1, 2020.

[25] Ms. McLearn says that I should not impute income to her.

[26] The Supreme Court of Canada in *DBS v. SRG*, 2 SRC 231, confirmed that parents have an obligation to support their children in a way that is commensurate with their income. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income; *Smith v. Helppi*, 2011 NSCA 375.

[27] Parents who are healthy and able to work are under a duty to seek employment; 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"; *Smith v. Helppi*, *supra*.

[28] In determining a parent’s child support obligation, I am not restricted to considering only the parent’s actual income earned, I may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors; *Smith v. Helppi*, *supra*. The *Federal Child Support Guidelines* permit me to impute income to a

parent if I am satisfied that the parent is under employed. Subsection 19(1) of the *Guidelines* stipulates that if I impute income, I am to impute an amount that I consider appropriate in the circumstances.

[29] In *Smith v. Helppi, supra* the Nova Scotia Court of Appeal accepted that 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.

[30] Mr. McLearn bears the onus to establish evidentiary basis for such a finding (*Coadic v. Coadic* 2005 NSSC 291 at paragraph 12).

[31] If Mr. McLearn presents the evidentiary basis suggesting that a *prima facie* case for imputation of income exists, the onus shifts to Ms. McLearn to defend the income position she is taking (*Horbas v. Horbas* 2020 MBCA 34).

[32] Ms. McLearn was forty-six when the parties separated in 2016.

[33] The evidence establishes that Ms. McLearn had little income in the two years after separation while she lived in the matrimonial home. Ms. McLearn

earned $1,808 in 2016 and although she started working at McDonalds sometime in 2017, her income that year was $2,872. Ms. McLearn's 2018 Notice of Assessment was not introduced into evidence.

[34] Ms. McLearn says that she worked at McDonalds for ten months and while employed there she earned $17,131. I was not told how many hours a week Ms. McLearn worked at McDonalds, her hourly rate of pay, whether she could have worked more hours, when she commenced employment or when and why it ended.

[35] Ms. McLearn's partner, Lyndel Munroe, gave evidence that Ms. McLearn developed "Carpel Tunnel" while at McDonalds, but no medical evidence was offered to establish that Ms. McLearn was partially or fully disabled from working during the period May 1, 2018, to April 1, 2020, or thereafter.

[36] Ms. McLearn testified that she was diagnosed with Obsessive Compulsive Disorder (which she referred to as OCD). Mr. Munroe's evidence indicates that Ms. McLearn had a "nervous breakdown" sometime prior to May 1, 2018. I do not have any particulars regarding these diagnoses and, in particular, whether they inhibited Ms. McLearn's capacity to work. I note that both diagnoses predated Ms. McLearn's work with McDonalds.

[37] Ms. McLearn acknowledged on cross examination that she was not working at the time of the trial. She testified that she does not work because her partner's home is big and that there is lots do there. She says that the bus stop is a mile way, making travel to work difficult. Ms. McLearn's partner, Mr. Munroe, says he provides for her, and she does not owe him anything for the food, shelter, and other necessities he provides.

[38] In her closing submission Ms. McLearn admitted that she could have been working but that it would have been hard getting back and forth. She says that all she could do was what she had been doing, which was heavy work. She says she does not work a cash register and cannot be an office worker which takes out a lot of jobs.

[39] The evidence establishes that Ms. McLearn has not worked since her employment with McDonalds ended sometime in 2018. She has not looked for work. She admits that she could have worked. She has not offered an acceptable reason for not working. She did not provide me with any medical evidence to explain why she is not working.

[40] I find that Ms. McLearn's lack of education, training and job experience limits the range of jobs for which she is qualified. I find that Ms. McLearn could

have worked in some capacity on a full-time basis during the period of May 1, 2018, to April 1, 2020, and chose not to. I find that Ms. McLearn was unemployed and underemployed during the period.

[41] I find it is appropriate to impute income to Ms. McLearn.

[42] Mr. McLearn asks that I impute income to Ms. McLearn based on full time minimum wage hours from May 1, 2018, to April 1, 2020. Ms. McLearn worked at McDonalds during this period and may have earned more than minimum wage. I do not know how much Ms. McLean was paid per hour, how many hours a week she worked or when this position ended.

[43] I find that attributing full time minimum wage employment to Ms. McLearn as of May 1, 2018, is appropriate in the absence of details about her employment with McDonalds.

[44] Minimum wage in Nova Scotia was $10.85 per hour between April 1, 2017, and March 30, 2018; $11.00 per hour between April 1, 2018, and March 30, 2019; $11.55 between April 1, 2019, and March 30, 2020; and $12.55 between April 1, 2020, and March 30, 2021. I impute to Ms. McLearn an annual salary of $22,646 for 2018, $23,738 for 2019 and $25,584 for 2020.

3.4 What amount of child support, if any, should Ms. McLearn be ordered to pay?

[45] I must determine what amount of child support Ms. McLearn should have paid between May 1, 2018, and April 1, 2020. I note that although Tammy remained under the age of majority until March of 2022, Mr. McLearn does not seek child support in respect of Tammy from Ms. McLearn for the period after February 1, 2020; Mr. McLearn seeks child support in respect of James from May 1, 2018, to April 1, 2020.

[46] I find, based on her imputed income, Ms. McLearn ought to have paid child support of $2,568 in respect of Tammy and James between May 1, 2018, and December 31, 2018; child support of $4,068 in respect of both children in 2019; and child support of $371 in respect of both children in January of 2020; and child support of $396 in respect of James for February and March of 2020. These child support obligations total $7,403.

[47] Ms. McLearn said that she should not be ordered to pay child support because she bought groceries before she left the matrimonial home on May 1, 2018. The fact that Ms. McLearn may have purchased groceries for her family before she left the matrimonial home is irrelevant to the quantification of her chid support obligations after she left the matrimonial home.

[48] Ms. McLearn is ordered to pay historic child support of $7,403 to Mr. McLearn out of the net sale proceeds of the matrimonial home.

4 Should Mr. McLearn be ordered to pay historic and prospective spousal support?

[49] Ms. McLearn seeks historic and prospective spousal support.

[50] Mr. McLearn does not deny Ms. McLearn may be entitled to spousal support. He says that he will have no ability to pay spousal support once the matrimonial home is sold and he starts renting an apartment. He also says that Ms. McLearn re-partnered immediately after leaving the matrimonial home on May 1, 2018.

[51] Section 15.2(1) of the *Divorce Act* grants me the authority to make a spousal support award. In making an order for spousal support, I must consider each spouse's condition, means, needs and other circumstances including the length of the spouse's cohabitation, each spouse's functions during cohabitation and any order, agreement, or arrangements about either spouses support. *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp) (hereafter the "*Divorce Act*") Subsection 15.2 (4).

[52] The objectives of an order for spousal support are set out in Subsections 15.2 (6) of the *Divorce Act*:

> **Objectives of spousal support order**
>
> (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 its 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.

[53] As Justice Forgeron observed in *Paulin v. Pennel*, 2022 NSSC 297, the Supreme Court of Canada in *Bracklow v. Bracklow*, [1999] 1 SCR 420, confirmed that entitlement to spousal support is grounded in one, or more, of the following three principles:

> Compensatory support to address economic advantages and disadvantages flowing from the marriage, or the roles adopted during the marriage.
>
> Non-compensatory support to address the disparity between the needs and means of the parties and arising from the marriage breakdown.
>
> Contractual spousal support, either expressed or implied.

4.1 Is Ms. McLearn entitled to spousal support on a compensatory basis?

[54] Ms. McLearn was twenty-four when the parties married. During her twenty-two-year marriage Ms. McLearn stayed at home and raised the parties' children working intermittently. She was financially dependent on Mr. McLearn during the marriage. When the marriage ended Ms. McLearn did not have a career, had not

gained job skills or experience, had not maximized her earning potential, or achieved financial independence.

[55] Justice Fichaud in *MacDonald v MacDonald*, 2017 NSCA 34, confirmed that assuming primary responsibilities for child rearing and its corresponding negative effect on that parent's career trajectory can constitute a basis for compensatory spousal support. At paragraph 20 Justice Fichaud said:

> In *Moge*, Justice L'Heureux-Dubé repeatedly said, and cited authority saying that spousal support may compensate the primary care-giving spouse for a resulting retardation of career advancement. For instance:
>
> > The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage. [pp. 867-68]

[56] Justice Jesudason in *Gates v Gates*, 2016 NSSC 49, considered the circumstances in which an order for compensatory spousal support would be appropriate:

> Examples of circumstances that may lead to an award of compensatory support could include, but are not limited to, where a spouse's education, career development or earning potential have been impeded as a result of the marriage, or the spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development (*Shurson v. Shurson*, 2008 NSSC 264, para. 13).
>
> …..

> When considering entitlement to compensatory support, 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. A 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 (*Moge*, para. 84).

[57] Ms. McLearn is entitled to spousal support on a compensatory basis.

4.2 Is Ms. McLearn entitled to spousal support on a non-compensatory basis?

[58] When their marriage ended Mr. McLearn had a good paying long-term position with the Halifax Regional Municipality and Ms. McLearn was not working. Given her lack of employment, Ms. McLearn was not able to maintain her pre-separation lifestyle when the parties separated.

[59] Justice L'Heureux-Dubé described the rationale underlying spousal support in *Moge v Moge*, [1992] 3 SCR 81, at paragraph 84:

> **84** 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. 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. (citations omitted)

[60] Justice Cromwell in *Fisher v. Fisher* 2001 NSCA 18, confirmed at paragraph 86 that after a long marriage a spouse who was absent from the

workforce because of child care responsibilities and who has demonstrated need and a disparity of income as compared to their former spouse has a strong entitlement to spousal support:

> I take this to be a strong indication from the Supreme Court of Canada that, while all relevant circumstances must of course be considered, in long term marriages in which the party seeking support has not been in the workforce as a result of assuming domestic and child care responsibilities, demonstrated need and a significant disparity in standards of living between the former spouses are strong indicators that a support order is required to address the financial consequences of the breakdown of the marriage. To similar effect see, for example, *Roberts v. Shotton, supra* at [paragraph] 48.

[61] I find that Ms. McLearn is entitled to spousal support on a non-compensatory basis.

5 What amount of spousal support is appropriate?

[62] In determining the amount of spousal support payable by Mr. McLearn I must consider the parties' condition, means, needs and other circumstances.

5.1 The parties' respective conditions

[63] Mr. McLearn is now sixty-six; Ms. McLearn is fifty-four. They were married for twenty-two years and raised four children. One of those children, James, lives with Mr. McLearn.

[64] When they separated Mr. McLearn worked with the Halifax Regional Municipality. Ms. McLearn was not working.

[65] The parties both remained in the matrimonial home following separation until May 1, 2018, when Ms. McLearn moved in with her current partner, Lyndel Munroe. Ms. McLearn was working at McDonalds when she moved in with Mr. Munroe. The evidence does not disclose when Ms. McLearn stopped working at McDonalds.

[66] Mr. McLearn remained in the family home with the parties' two youngest children. He has paid all expenses with respect to the family home since separation except for some groceries which Ms. McLearn purchased after she started working at McDonalds.

5.2 The parties' respective means

[67] Mr. McLearn's 2022 Notice of Assessment Line 150 income was $58,982. He is a unionized worker and paid union 2022 dues of $884.80 which must be deducted from his income when his spousal support obligation is calculated.

[68] Ms. McLearn has not worked since she left McDonalds in 2018. Her only income is the GST credit of 46.75 per month.

[69] I imputed income to Ms. McLearn for the period May 1, 2018, to April 1, 2020, in determining her child support obligations. Mr. McLearn says that I should impute income to Ms. McLearn. In considering Ms. McLearn's means I must

consider whether I should impute income to her for the purposes of determining her spousal support entitlement: *Saunders v. Saunders*, 2011, NSCA 81.

[70] The principles of imputation of income in child support cases apply to the imputation of incomes in spousal support cases: *Saunders, supra*; *Sampson v. Sampson*, 2019 NSCC 169.

[71] I have found that Ms. McLearn was able to work when she left the matrimonial home on May 1, 2018. I find that she has an ongoing ability to work on a full-time basis and has chosen to not work.

[72] I impute the following income at the full-time minimum wage rate to Ms. McLearn for the time period from 2018 (the year Ms. McLearn left the matrimonial home) to December 31, 2023:

Year	**Minimum Wage Rate as of January 1**	**Total Annual Full-Time Income**
2018	$10.85 increasing to $11.00 on April 1	$22,646
2019	$11.00 increasing to $11.55 on April 1	$23,738
2020	$11.55 increasing to $12.55 on April 1	$25,584
2021	$12.55 increasing to $12.95 on April 1	$26,728
2022	$12.95 increasing to $13.35 on April 1 and $13.60 on October 1	$27,690
2023	$13.60 increasing to $14.50 on April 1 and $15.00 on October 1	$29,952

The parties' respective needs

[73] The parties did not live a lavish lifestyle when together, nor do they now.

[74] Mr. McLearn remained in the matrimonial home which is a mini home in a mobile home park. The parties own the mini-home and rent the lot. Mr. McLearn's sworn Statement of Expenses discloses monthly expenses of $3,003.81 and a surplus of $31 of net income over expenses. Mr. McLearn's son, James, lives with him. James works full-time at Walmart making minimum wage. James does not pay rent to his father but buys his own groceries and pays for his phone. James could pay his father rent thereby increasing his father's monthly surplus.

[75] Mr. McLearn's monthly Statement of Expenses includes $250 for savings which is not an expense. Those funds could be directed to other costs.

[76] Ms. McLearn did not allege that Mr. McLearn's budget was unreasonable or excessive.

[77] Ms. McLearn swore a Statement of Expenses on January 30, 2023, in which she swore that her monthly expenses were $1,942.50. Her monthly GST credit of $46.75 does not fund her expenses. Ms. McLearn's partner, Mr. Munroe, pays for all of her expenses not covered by her GST credit.

[78] Ms. McLearn has been in a co-habiting relationship with Mr. Munroe for nearly six years. Mr. Munroe is supportive of Ms. McLearn, financially and emotionally. He attended the trial with her, assisted her in trial preparation, filed an Affidavit and sworn Statements of Income and Expenses and gave evidence at trial where he described Ms. McLearn as a sweetheart. I am satisfied that Ms. McLearn is in a stable long-term relationship with Mr. Munroe.

[79] Mr. Munroe testified that he takes care of Ms. McLearn and that she does not owe him anything for the expenses he has covered since 2018. When asked if he supported Ms. McLearn he responded, “to a certain extent.” He said that there is not a lot of money to give her everything she wants. He testified that she does without a lot of things. He says that she has no money for clothes, she shops for clothes at Goodwill, and that he recently bought her a pair of sneakers.

[80] Mr. Munroe is now seventy-six. His January 30, 2023, sworn Statement of Expenses confirmed monthly expenses of $3,482.82 and a monthly deficit of $260.84. Mr. Munroe’s expenses seem to duplicate most of Ms. McLearn’s expenses.

[81] Mr. Munroe’s Affidavit offered the following unchallenged evidence: during her marriage Ms. McLearn “wasn’t given much money,” only had bits at a time for

groceries, never had a credit card, and had to shop at Goodwill for clothes for herself and her children.

[82] Although Ms. McLearn does not have an income, all of her living expenses and basic needs are being met. Ms. McLearn lives frugally and relies on Mr. Munroe to provide for her needs. Her current lifestyle is not much different than it was during her marriage.

5.3 The parties' "other circumstances"

[83] Mr. McLearn says that Ms. McLearn's re-partnering with Mr. Munroe is a material fact to be considered with respect to her claim for spousal support.

[84] I find that Ms. McLearn's cohabitation with Mr. Munroe is a significant "other consideration" which must be addressed when considering the quantum of her spousal support entitlement.

[85] Ms. McLearn began cohabiting with Mr. Munroe on May 1, 2018. She continues to live with him and there was no indication at trial that their relationship is about to end.

[86] Ms. McLearn tendered Mr. Munroe's Statement of Income sworn on January 30, 2023; the attached 2018 Notice of Assessment indicated Line 150 income of $19,168 (which is net of a rental income loss of $1,724 in respect of

$8,800 in rental income). No other Notices of Assessment were tendered by or on behalf of Mr. Munroe. His Statement of Income indicates his 2023 income is $37,083.98, which includes $10,200 in rental income. Mr. Munroe says he rents at a loss, but no particulars of this loss were provided. His annual income is $26,883.98 excluding his rental income.

[87] Mr. McLearn asks that in fixing the amount of spousal support payable, I take into account the fact that Ms. McLearn has lived with Mr. Munroe since May 1, 2018, and continues in that relationship.

5.4 Given the parties' conditions, means, needs, and other circumstances are the spousal support advisory guidelines applicable?

[88] The *Spousal Support Advisory Guidelines* (hereafter "SSAG") are a useful tool that I may use in the calculation of spousal support. The SSAG is not law. That said, if I decide to award spousal support outside of the range recommended by the SSAG, I must indicate why I decided that the SSAG does not provide the appropriate result: *Strecko v Strecko*, 2014 NSCA 66 and *MacDonald, supra*.

[89] The fact that Ms. McLearn re-partnered in May of 2018 does not necessarily disentitle her to spousal support. The SSAG identifies that a spousal support recipient re-partnering may result in reduced spousal support or even termination

of entitlement. Section 13.8 of the SSAG, in the context of re-partnering after the original spousal support order was made, indicates that:

> Entitlement may then be revisited for any number of reasons - the recipient finding employment, the recipient's remarriage or re-partnering, the payor's retirement or loss of employment, etc. - and support may be terminated if entitlement has ceased.

[90] The SSAG acknowledges that re-partnering can affect the quantum of spousal support but does not provide a formula by which spousal support can be calculated when a recipient spouse re-partners. Section 14.7 of the SSAG identifies re-partnering as a fact that often reduces, suspends, or even terminates spousal support but ultimately leaves the issue to be decided on a case-by-case basis:

> The remarriage or re-partnering of the support recipient does have an effect on spousal support under the current law, but how much and when and why are less certain. There is little consensus in the decided cases. Remarriage does not mean automatic termination of spousal support, but support is often reduced or suspended or sometimes even terminated. Compensatory support is often treated differently from non-compensatory support. Much depends upon the standard of living in the recipient's new household. The length of the first marriage seems to make a difference, consistent with concepts of merger over time. The age of the recipient spouse also influences outcomes.
>
> In particular fact situations, usually at the extremes of these sorts of factors, we can predict outcomes. For example, after a short-to-medium first marriage, where the recipient spouse is younger and the support is non-compensatory and for transitional purposes, remarriage by the recipient is likely to result in termination of support. At the other extreme, where spousal support is being paid to an older spouse after a long traditional marriage, remarriage is unlikely to terminate spousal support, although the amount may be reduced.
>
> …
>
> … we still have to leave the issues surrounding the recipient's remarriage or re-partnering to individual case-by-case negotiation and decision making.

[91] Section 16 of the *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice, 2016) also confirms that re-partnering is a relevant consideration in quantifying spousal support:

> Under the current law the remarriage or repartnering of the support recipient does not mean the automatic termination of spousal support, but support is often reduced and sometimes even terminated. Much depends upon whether support is compensatory or non-compensatory, as well as the length of the first marriage, the age of the recipient, the duration and stability of the new relationship and the standard of living in the recipient's new household.

[92] In *Gates v. Gates*, 2016 NSSC 49, Justice Jesudason held that the case before him did not lend readily itself to the application of the formulas under the SSAG because both parties had re-partnered.

[93] I find that while the SSAG spousal support range based on the parties' incomes may not be as helpful as it would if Ms. McLearn had not re-partnered, the SSAG formula is still a helpful "litmus test for the reasonableness of a support award": *Rémillard v Rémillard*, 2014 MBCA 101.

[94] I have found that Ms. McLearn is entitled to spousal support on a compensatory and non-compensatory basis.

[95] I must determine if Ms. McLearn's non-compensatory spousal support entitlement should be reduced because she is in a long-term relationship with Mr. Munroe, who is paying her expenses. In *Gates, supra*, Justice Jesudason

determined that a recipient spouse's remarriage may reduce or even render "dormant" entitlement to non-compensatory spousal support.

[96] I must also consider if Ms. McLearn's re-partnering is relevant to the quantification of her compensatory spousal support claim and whether it justifies spousal support below the SSAG range; *Rozen v. Rozen*, 2016 BCCA 303 and *Politis v Politis*, 2021 ONCA 541.

5.5 Prospective spousal support

[97] Ms. McLearn filed her Petition for Divorce in January of 2022. I will determine her prospective spousal support entitlement as of January 2022 based on the *Divorce Act*, the evidence including the parties' condition, means, needs and other circumstances including Mr. McLearn's 2022 income, Ms. McLearn's imputed 2022 income and Mr. Munroe's 2022 income.

[98] In considering Ms. McLearn's prospective spousal support I note Mr. McLearn's income is stable. Mr. Munroe's retirement and rental income are also stable. Ms. McLearn's lack of income is not likely to change.

[99] The SSAG formula indicates Ms. McLearn would be entitled to indefinite spousal support in a range from $861 (low) to $1,004 (mid) and $1,147 (high) per month based on Mr. McLearn's actual 2022 income and Ms. McLearn's imputed

2022 income. This amount assumes that Ms. McLearn is meeting all of her own expenses which is not the case. All of Ms. McLearn's expenses are met by Mr. Munroe. Ms. McLearn's relationship with Mr. Munroe has reduced her needs-based entitlement to spousal support.

[100] I find that it is appropriate, in this case, to deviate from the SSAG spousal support range. I accept that Ms. McLearn's basic expenses are being covered by Mr. Munroe, with whom she is in a long-term relationship. Based on the income I have imputed to Ms. McLearn and the fact that her expenses are covered by Mr. Munroe, I find that her lifestyle is roughly the same as it was prior to her separation from Mr. McLearn. I find that Ms. McLearn's current entitlement to non-compensatory support is eliminated.

[101] Although Ms. McLearn's current circumstances eliminate her entitlement to non-compensatory spousal support, I find that her entitlement to compensatory spousal support is not eliminated by her cohabitation with Mr. Munroe. Ms. McLearn's contribution to her family during the marriage entitles her to spousal support even though her expenses are being met by Mr. Munroe. Ms. McLearn remains in a vulnerable situation dependent on Mr. Munroe. I find that Mr. McLearn has the means to pay spousal support and that Ms. McLearn's contribution to her family merits spousal support notwithstanding her current

living arrangements. That said, I find that a consideration of Ms. McLearn's needs, and other circumstances merits a reduction in her spousal support entitlement.

[102] Taking into account the compensatory nature of Ms. McLearn's spousal support claim, the fact she is not, but could be working, the fact her living expenses are paid by her long-term partner and Mr. McLearn's ability to pay, I find that Ms. McLearn is entitled to monthly spousal support on a prospective basis of $300 per month on an indefinite basis as of January 1, 2022.

[103] This amount equates to an accrued spousal support payment for the period January 1, 2022, to December 31, 2023 (twenty-four months) of $7,200. This amount must be discounted because the payment will not be subject to income deduction by Mr. McLearn or taxation in the hands of Ms. McLearn. Mr. McLearn's net cost of the gross amount of $7,200 is $4,344; Ms. McLearn's net benefit is $5,256. I will exercise my discretion and fix the net 2022/2023 lump sum spousal support amount at $4,800 which is the average of Mr. McLearn's net cost and Ms. McLearn's net benefit.

[104] Mr. McLearn will continue to pay Ms. McLearn prospective monthly spousal support in the amount of $300 on the first day of each month.

[105] Mr. McLearn is now sixty-six years of age. He says that he may retire in the next three years. I grant Mr. McLearn a right to review his spousal support when he retires. A variation can be sought at any time.

5.6 Is Ms. McLearn entitled to retroactive spousal support?

[106] Ms. McLearn seeks spousal support retroactive to May 1, 2018, the day she left the matrimonial home.

[107] Mr. McLearn says that he should not be ordered to pay spousal support.

[108] Mr. McLearn did not argue that any portion of Ms. McLearn's claim for retroactive support should be disallowed because she did not file her Petition in which she sought historic spousal support until January of 2022, six years after the parties separated.

[109] I find that Ms. McLearn is entitled to retroactive spousal support back to May 1, 2018, the date she left the matrimonial home. The circumstances of the parties were not much different after May 1, 2018, than when the Petition was filed. Other than Ms. McLearn's employment at McDonalds, which ended in 2018 she did not but could have worked. She continued to live with Mr. Munroe, and he paid for her living expenses. Mr. McLearn continued to work for the Halifax Regional Municipality and had an ability to pay spousal support. Mr. McLearn

should have paid spousal support of $300 per month from May 1, 2018, to December 31, 2021.

[110] Ms. McLearn was entitled to spousal support of $2,400 in 2018 (eight months); $3,600 in 2019; $3,600 in 2020; and $3,600 in 2021. These amounts must be discounted because the payment will not be subject to income deduction by Mr. McLearn or taxation in the hands of Ms. McLearn.

[111] I will exercise my discretion and fix the net lump sum spousal support amount payable by Mr. McLearn for this period (May 1, 2018, to December 31, 2021) at $8,968 which is the average of Mr. McLearn's net cost and Ms. McLearn's net benefit.

6 What assets owned by the parties are matrimonial assets and how should those assets and debts be divided?

[112] Mr. McLearn says that all matrimonial assets should be divided equally except for property in Kennetcook which he inherited from his mother after his marriage to Ms. McLearn. He seeks an order directing the sale of the matrimonial home and an order confirming the division of his pension with the Halifax Regional Municipality.

[113] Mr. McLearn says that Ms. McLearn should repay funds she withdrew from their joint account after she left the matrimonial home.

[114] Ms. McLearn says that she does not want to be involved in the sale of the matrimonial home. She objects to repaying the money she withdrew from the joint account and disputes some of Mr. McLearn's calculations.

[115] The parties agree that their household possessions have been distributed to their satisfaction.

[116] All assets owned by the parties are presumed to be matrimonial assets regardless of ownership and are to be divided in equal shares under Section 12 of the *Matrimonial Property Act* R.S.N.S. 1989, c. 275, s. 1 (hereafter the "MPA"). Certain assets or classes of assets enumerated in Clause 4 of the MPA are exempted from the classification of matrimonial assets and from equal division. The inheritance exceptions are set out in clause 4(1)(a):

> (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children.

[117] Debt incurred during the marriage for household management and financial support is to be shared equally between the spouses and considered in the division of matrimonial property and the overall equalization payment owing: *NB v SO*, 2023 NSSC 216.

[118] I will deal with each asset in turn.

6.1 Pension

[119] Mr. McLearn's pension is a matrimonial asset subject to equalization under the MPA. Accordingly, I order that Mr. McLearn's pension accrued up to the date of separation, January 1, 2016, be divided equally between the parties.

6.2 Matrimonial home

[120] The parties agree that the mini home situate at 43 Sharon Drive, Sackville is the matrimonial home and must be sold. The parties agree that the net sale proceeds of the matrimonial home must included in the equalization calculation.

[121] Mr. McLearn obtained an appraisal value of the matrimonial home of $124,000 as of February 16, 2022. Ms. McLearn did not object to this appraisal report being tendered without the appraiser being called.

[122] As Ms. McLearn does not wish to be involved in the sale of the matrimonial home, Mr. McLearn is authorized to immediately list the matrimonial home for sale with a real estate agent of his choosing. The following conditions will apply to the listing and sale of the matrimonial home:

(a) The home will be listed at a value suggested by the real estate agent, which value shall not be less than $124,000.

(b) Mr. McLearn will cooperate to ensure that the home is ready for viewing by potential buyers and will cooperate to affect a sale.

(c) Mr. McLearn is authorized to accept reasonable recommendations of the listing real estate agent related to any adjustments to the sale price and conditions to ensure a sale within a reasonable period of time provided that Mr. McLearn shall not accept a sale price of less than $124,000 without Ms. McLearn's written consent or an order of this court.

(d) Mr. McLearn is authorized to retain a lawyer to represent him in the sale of the matrimonial home.

(e) Mr. McLearn is authorized to execute all documents to list the matrimonial home for sale and to sell the matrimonial home. Ms. McLearn is ordered to cooperate in the listing and sale of the matrimonial home and is specifically ordered to execute any documents, such as affidavits of status, which may be required to complete the sale.

(f) Upon the sale of the home, the lawyer retained by Mr. McLearn is authorized to deduct from the sale price the real estate commission not to exceed five percent, HST on the real estate commission and the lawyer's legal fees which shall not exceed $1,200. The remaining funds shall be referred to as the "net sale proceeds."

(g) The net sale proceeds shall be held in trust by Mr. McLearn's lawyer. Each party is entitled to half of the net sale proceeds subject to any adjustments ordered herein related to unpaid child support, unpaid spousal support or the division of other matrimonial assets and debts.

(h) Mr. McLearn must provide to Ms. McLearn copies of the listing agreement, offers to purchase, counter offers and accepted offers to purchase and a statement from Mr. McLearn's lawyer showing the distribution of funds at closing and confirming the net sale proceeds held in trust by the lawyer.

(i) I retain jurisdiction to address any issues regarding the real estate listing or sale of the matrimonial home.

6.3 Various claims relating to the matrimonial home

6.3.1 Final mortgage payment

[123] Mr. McLearn says that he made the final mortgage payment of $728 for the matrimonial home in January of 2016. In her closing submission Ms. McLearn agreed to pay Mr. McLearn half of the last mortgage payment. I order Ms. McLearn to pay Mr. McLearn $364 out of her share of the net sale proceeds of the matrimonial home.

6.3.2 Pre-sale improvements

[124] Mr. McLearn says that the mobile park required him to make a number of repairs to the matrimonial home and the property which cost him $550.

[125] Mr. McLearn also says that he anticipates spending $850 on materials to prepare the matrimonial home for sale including drywall finish, door trim installation and new flooring in the porch, painting of ceiling and walls, enclosing the air exchanger piping (this work will be described as the “sale preparation work”).

[126] I accept Mr. McLearn’s evidence that he has incurred $550 in costs to meet the mobile home park requirements. I order Ms. McLearn to reimburse half of this amount to Mr. McLearn out of her half of the net sale proceeds of the matrimonial home.

[127] Mr. McLearn is entitled to reimbursement for half of the cost of materials for the sale preparation work. As these are anticipated costs, I direct Mr. McLearn to produce for Ms. McLearn the receipts for the materials purchased for the sale preparation work and order Ms. McLearn to reimburse him for half of those receipts to a maximum of $425 out of her half of the net sale proceeds of the matrimonial home.

6.4 Bank accounts at time of separation

[128] Mr. McLearn says when the parties separated, they had three bank accounts with combined balances of $3,753.45 and a Visa with a balance owing of $2,269.78 for a net positive balance of $1,483.67. Mr. McLearn says that he will pay Ms. McLearn $741.84 (half of the net amount) from his share of the net sale proceeds.

[129] Ms. McLearn says that Mr. McLearn's "figures don't add up."

[130] I find Mr. McLearn's bank account and Visa balances calculations are accurate and that he must pay Ms. McLearn $741.84, representing her share of the net positive balance out of his half of the net sale proceeds of the matrimonial home.

6.5 Funds withdrawn from account

[131] Ms. McLearn withdrew $3,756.60 from a former joint account in 2019. She says that these funds were matrimonial assets. She agrees to pay half of the amount back ($1,878) to Mr. McLearn out of her half of the net sale proceeds of the matrimonial home.

[132] Mr. McLearn says that the withdrawn funds were not matrimonial assets, and that Ms. McLearn should repay the full amount of the $3,756.60.

[133] Ms. McLearn withdrew the $3,756.60 long after the parties separated. I have addressed and accounted for the balances in the parties' bank accounts and on their Visa when they separated. The funds withdrawn by Ms. McLearn were not matrimonial assets and she is ordered to repay the entire balance of $3,756.60 to Mr. McLearn from her share of the net sale proceeds.

6.6 Vehicles

[134] Mr. McLearn says that the parties owned a 2009 Chevrolet Uplander when they separated and that he sold the vehicle on March 15, 2018, for $2,000. He says that he owed $1,558.89 on the vehicle when it was sold, leaving net proceeds of $442. He acknowledges that Ms. McLearn is owed her share ($221) from the sale of this vehicle.

[135] Ms. McLearn accepts that the Uplander was sold and says that her share of the sale proceeds are $223.50.

[136] I accept Mr. McLearn's evidence regarding the net sale price of the Uplander and order him to pay Ms. McLearn $221 out of his share of the net sale proceeds of the matrimonial home.

6.7 Kennetcook properties

[137] Mr. McLearn owns two parcels of abutting land in Kennetcook. He says that these properties were inherited from his mother and, as a result, are exempt from the classification of matrimonial assets and from equal division (MPA subsection 4(1)(a)). The Kennetcook properties were appraised and are valued at $14,000. He says that the parties spent three months at the Kennetcook properties in 1999 and other times such as weekends equating to about 2% of their married life and, therefore, Ms. McLearn should be paid 2% of $14,000 or $300 representing her interest in those properties.

[138] Ms. McLearn acknowledges Mr. McLearn inherited the Kennetcook properties and accepts Mr. McLearn's values attributed to the properties. She says these properties lost their exempt status as the parties and their three older children

spent every summer at the Kennetcook properties. Ms. McLearn says she is entitled to half of the value of the Kennetcook properties.

[139] The uncontested evidence establishes that the parties did not use the Kennetcook properties after their daughter Tammy was born in March of 2003. The uncontested evidence also confirms that the building on the Kennetcook properties in which the McLearn family stayed is now in derelict condition and uninhabitable.

[140] I find that the parties used the Kennetcook properties to some degree between 1997 until some time prior to 2003. The parties do not agree on the amount of time they spent at the Kennetcook properties. Mr. McLearn says that the parties did not use the Kennetcook properties for more than six months in total. Ms. McLearn did not quantify the time she says that the family used the properties but testified that the parties and their children used the property for the entire summer for several years. She did not suggest that the parties used the Kennetcook properties prior to 1997 or after Tammy was born in 2003.

[141] There is no evidence of any matrimonial funds being used to improve or maintain the Kennetcook properties. The fact that the once inhabitable building on

the properties is now derelict indicates that family funds were not diverted to those properties.

[142] I must determine if the Kennetcook properties remain exempt properties and not subject to division or, if as a result of their use, they have lost their exempt status. Use of the Kennetcook properties by the McLearn family for recreational purposes in more than a trifling or insignificant manner will cause them to lose their extent status and become matrimonial assets; *Fisher v. Fisher*, 2001 NSCA 18, paragraph 45. I find that the parties and their three older children used the Kennetcook properties for family purposes in more than a trifling or insignificant way and as a result the Kennetcook properties became matrimonial assets to the extent they were used for the benefit of Ms. McLearn and the children.

[143] The Court of Appeal in *Fisher, supra*, held that property inherited by Mr. Fisher lost its exempt status to the extent of its use for the benefit of the spouses and children which consisted of "some limited recreational use by the family and the taking of logs for heat". Because of the Fisher family's limited use of the property, the Court of Appeal held that a classification of fifteen percent of the property as a matrimonial asset would have been appropriate. (*Fisher*, *supra*, paragraphs 39, 47 and 52)

[144] I find that the McLearn's use and enjoyment of the Kennetcook properties was not a significant part of their family experience. Indeed, the evidence suggests that prior to their separation in 2016 the parties had not been at the properties as a family in over thirteen years. The parties used the Kennetcook properties in the summers and on weekends for a few years prior to 2003. I find that Mr. McLearn's estimate that his family only used the Kennetcook properties for 180 days in total to be low. He acknowledged under oath that his family spent an entire summer there in 1999 and was there in the summer at other times. On the other hand, Ms. McLearn's recollection that the parties spent the entire summer there every summer for a number of unspecified years is vague. I find the evidence supports a conclusion that the parties used the Kennetcook properties for part of the year for no more than six years and thereafter essentially abandoned the property. I find the parties' use of the Kennetcook properties was not enough to classify the entire property as a matrimonial asset. I find twenty percent of the value of the Kennetcook properties should be considered a matrimonial asset subject to equal division.

[145] Ms. McLearn accepts $14,000 as the value of the Kennetcook properties. She is entitled to one half of twenty percent of that value, or $1,400, which amount will be paid to her out of the net sale proceeds of the matrimonial home. Upon

these funds being paid to Ms. McLearn from the net sale proceeds, Mr. McLearn shall remain the sole owner of the Kennetcook properties.

7 Conclusion

[146] I order:

a. The divorce is granted.

b. The matrimonial home is to be sold and the net sale proceeds from the sale of the matrimonial home held in escrow. The net sale proceeds shall be evenly divided and then adjusted as follows:

i. Deduct from Mr. McLearn's one-half share of those proceeds the following amounts and add those amounts to Ms. McLearn's share of the net sale proceeds:

1. $8,968 in respect of historic spousal support between May 1, 2018, and December 31, 2021.

2. $4,800 in respect of historic spousal support for 2022 and 2023.

3. $1,400 in respect of Ms. McLearn's one-half interest in the portion of the Kennetcook properties found to be matrimonial assets.

4. $741.85 in respect of the net balance of the parties' bank accounts and Visa debt as of the Separation Date.

5. $221 in respect of Ms. McLearn's one half share of the net proceeds from the sale of the Uplander.

6. $300 in respect of Ms. McLearn's spousal support payable for January 2024.

ii. Deduct from Ms. McLearn's one-half share of those proceeds the following amount and add those amounts to Mr. McLearn's share of the net sale proceeds:

1. $7,403 in respect of Ms. McLearn's historic child support obligation.

2. $3,756.60 in respect of the funds Ms. McLearn withdrew from the account after the Separation Date.

3. $364 in respect of Ms. McLearn's share of the last mortgage payment made after the Separation Date.

4. $275 in respect of Ms. McLearn's share of the cost of the mobile home park required repairs.

5. An amount not to exceed $425 in respect of Ms. McLearn's one-half share of the cost of materials incurred to complete the sale preparation work. Mr. McLearn must produce receipts for Ms. McLearn after which this amount can be confirmed.

c. Absent further direction from the court, the net sale proceeds shall not be released to the parties until all the net sale proceeds adjustments required by this decision and summarized in this section have been finalized and approved by the court.

d. Mr. McLearn must pay Ms. McLearn spousal support of $300 per month commencing on February 1, 2024, and continuing indefinitely thereafter on the first day of each month.

e. Mr. McLearn's pension accrued up to the Separation Date shall be divided.

[147] Mr. Greenslade is asked to prepare the Divorce Order and Corollary Relief Order.

[148] In her Petition for Divorce Ms. McLearn sought a change of name. If Ms. McLearn wishes to pursue a change of name, she must advise Mr. McLearn's lawyer within twenty days of this decision and provide him with a copy of her birth certificate showing her birth name. I reserve jurisdiction to grant this relief if sought by Ms. McLearn.

[149] If either party seeks costs, and the parties cannot agree, the parties shall file their cost submissions within one month of this decision.

Daniel Ingersoll, J.