CITATION: Colivas v. Colivas, 2017 ONSC 4730
NEWMARKET COURT FILE NO.: FC-11-038492-00
DATE: 20170914

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
ROSE MARIA COLIVAS	)	
Applicant	)	Harold Niman and Deborah MacKenzie, for the Applicant
– and –	)	
STIVENS COLIVAS	)	James D. Singer, for the Respondent
Respondent	)	
	)	**HEARD:** May 18, 19, 20, 24, 25, 26, 27, 30, 31, June 1, 2, 3, November 21, 22, 23, 24, 25, 28, 29, 30, 2016, February 1 and 3, 2017

REASONS FOR JUDGMENT

DOUGLAS J.

Overview

[1] This application represents an excellent example of how distrust and dishonesty can poison a post-separation environment and lead inexorably to financial strife, enormous legal fees, stress, anxiety, anger and a maelstrom of litigation.

[2] As will be made clear as these reasons unfold, the Respondent husband's decision to deceive the Applicant wife and the court served to fuel the Applicant wife's distrust of and anger toward him and likely motivated her to maintain positions occasionally inconsistent with the weight of the available evidence.

Issues

[3] The issues before me are deceptively straight-forward. They are:

(a) Equalization, including whether there should be an unequal division of net family property in favour of the Applicant;

(b) What is the Applicant's income for support purposes?;

(c) What is the Respondent's income for support purposes?;

(d) Quantum of child support, including special expenses and retroactivity;

(e) Whether the cost of Country Day School for the two children of the marriage is an "affordable" expense;

(f) Quantum and form of spousal support (i.e. periodic or lump sum) including retroactivity;

(g) Security for support;

(h) Security for equalization;

(i) Costs.

Background

[4] There are few material facts upon which the parties are in agreement. Those few may be briefly summarized.

[5] The parties commenced cohabitation in 1998.

[6] The parties were married on July 25, 1999.

[7] There are two children of the marriage, namely Lucas born November 19, 2003 (13 at the time of trial) and Costa born December 8, 2006 (10 at the time of trial).

[8] The date of separation is June 20, 2011. The parties attempted reconciliation in 2012 and engaged in negotiations with a view to completing a marriage contract. Neither effort came to fruition.

[9] The parties have agreed to a final order regarding custody and access. That order was made by Jarvis, J. on April 11, 2016 incorporating components of the parenting plan recommendations of Linda Chodos MSW RSW. This order provides for a week-about sharing of care and control of the children and an equal sharing of holidays. The Applicant has final decision-making authority subject to her obligation to consider the Respondent's input and the input of medical and educational professionals.

Credibility and Reliability

[10] As noted above, there can be no doubting the Respondent having chosen to deceive the Applicant and the court in material respects. Some examples include the following:

(a) The Respondent's October 30, 2015 financial statement made no mention of an interest in Lucosta Investment Inc. (hereafter "Lucosta"). This did not come until his May 11, 2016 financial statement. This has proven to be one of the Respondent's most valuable assets as of the date of separation;

(b) During questioning in November 2015 the Respondent swore that he had no assets in his mother's name. This has since been conceded as untrue;

(c) The Respondent acknowledged that his May 22, 2015 affidavit was not true regarding 2134998 Ontario Ltd. ("Cedar Creek") as having "no activity or income."

(d) The Respondent acknowledged that in some instances he was dishonest regarding disclosure;

(e) Regarding Practice Fusion shares, he acknowledged the owner as Lucosta although the shares were put in his mother's name "for a number of reasons, none of which makes it right". Amongst these reasons: his "panicked state of mind", his "ignorance" and his trying to "deceive the Applicant to deny her support";

(f) The Respondent commenced his testimony indicating that as of the trial he had "come clean" and had taken responsibility for things he had comingled with his mother. This was under oath; the same oath he took in respect of his untrue evidence in his affidavits, financial statements and in questioning.

[11] There are also many reasons to consider the Respondent's evidence as unreliable. Some examples include the following:

(a) He has filed many affidavits, including sworn financial statements. In his testimony, the Respondent acknowledged that he did not read his affidavits carefully, maintaining he is "not a details person."

(b) In completing his financial statements the Respondent relied upon his accountant and bookkeepers and did not scrutinize their figures.

(c) In one of his affidavits the Respondent deposed he had "no business dealings" with his brother; however, it was established in fact he did have dealings (in particular regarding Sun Dynamics);

(d) When asked in cross-examination if his affidavits could be relied upon he was initially non-responsive and avoidant;

(e) His October 30, 2015 financial statement did not disclose his interests in condominium properties in Miami and Greece because he was "in panic mode", a phrase to which the Respondent often resorted to explain his deceitful behaviour;

(f) The Respondent acknowledges having put some of his assets in his mother's name, "but not to hide it", without adequate explanation as to his actual motive;

(g) At the motion regarding support before Boswell, J. the Respondent maintained in his sworn evidence that his income was $60,000.00. The order of January 2013 resulting from that motion was based upon a finding that his income was $250,000.00. The parties' experts have since agreed that the Respondent's income in 2012 was $76,572–$117,943, and his income in 2013 was $5,931,548 - $5,998,203;

(h) He acknowledged shredding documents with Sheldon Pettle and that they may have related to Cedar Creek. Although he described this as an uncommon experience, oddly he testified he could not recall why the documents were being shredded. His evidence in this regard defies common sense.

[12] These examples are not exhaustive of the instances of deceitful or unreliable evidence provided by the Respondent.

[13] Having said that, there are also reasons to scrutinize the Applicant's evidence with care; for example:

(a) Her characterization of herself as "subservient and submissive" to the Respondent is contradicted by evidence of Michael Bloomberg and the parties' nanny Madelyn Dyio, regarding her behaviour toward the Respondent, suggesting someone unafraid of the Respondent and ready, willing and able to express her feelings directly and bluntly;

(b) In-chief she described "emotional trauma" from her relationship with her Respondent but in cross-examination she denied saying that she had suffered anxiety or trauma;

(c) The Applicant has also presented some resistance to full disclosure; for example, she undertook to provide appraisals regarding her fur coats but failed to do so, explaining she did not have the coats. If she did not have the coats one wonders why she would agree to have them appraised.

(d) She has shown disrespect for an order of this court. The Applicant had been ordered in April 2016 to remain within a specified distance of the matrimonial home. Despite this order she knowingly breached same by moving to a residence outside the permitted distance.

(e) She described the content of her email to Dr. Pancer dated September 11, 2009 as "truthful" but later indicated: "what I wrote and what actually happened are two different things."

(f) She conceded she was not "subservient and submissive" in demanding disclosure in relation to the negotiation of the parties' marriage contract.

(g) When being questioned before trial she testified that her complaint regarding Michael Bloomberg was outstanding when in fact it had been dismissed.

(h) She wrote a positive reference letter for the parties' nanny which conflicts with the Applicant's reaction to the nanny's affidavit in relation to a support motion;

(i) In the Applicant's materials filed for the June 2012 support motion, she made no mention of a TFSA account containing approximately $40,000.00, explaining that she had other bills to tend to with these monies. In other words, she demonstrated a readiness to withhold evidence inconsistent with her desired narrative.

(j) In general during her testimony she presented as a witness determined to promote her desired narrative rather than directly answering questions put to her, whether in chief or in cross-examination.

[14] The Applicant's evidence can be distinguished from that of the Respondent in the apparent absence of any persistent and active effort by the Applicant to deceive the court on material facts. Therefore, while I consider the Applicant's evidence with care and caution, where the Applicant's evidence differs materially from that of the Respondent I will generally prefer the evidence of the Applicant on material facts, except where the Respondent's position is supported by other corroborating evidence.

Equalization

[15] There are several issues to address in determining equalization.

a) Matrimonial Home

The Parties' Positions

[16] It is the Applicant's position that she was the sole registered and beneficial owner of the parties' matrimonial home on date of separation. Thus, she argues, the value of the

matrimonial home at that time is relevant to equalization and any accretion of value thereafter inures to her sole benefit.

[17] The Applicant cites several examples of the Respondent filing affidavits in this proceeding that support her position on ownership and contradict that of the Respondent, for example:

(a) In the Respondent's affidavit sworn July 24, 2011 he states: "Rose is the registered owner of the matrimonial home..." Later in the same affidavit he states: "as far as an equalization payment is concerned, absent some successful attack on piercing these corporations, Rose will owe me money because she owns the matrimonial home". This affidavit was filed less than two weeks after this application was commenced and before the Respondent filed his first answer.

(b) In the Respondent's affidavit sworn September 10, 2012 he deposed: "Rose is sitting on more than $1,000,000.00 in equity in that she is the registered owner of the matrimonial home…"

(c) In the Respondent's affidavit sworn October 19, 2012, he deposes: "…the document includes assets that Rose owns outright, outside of the cost of such as the matrimonial home, its contents…".

(d) In the Respondent's affidavit sworn March 10, 2015 he deposes: "Rose lives in and owns our matrimonial home valued at $1,800,000.00 with a mortgage of only approximately $400,000.00. She has greater equity than me…"

[18] The Applicant argues that the Respondent fails in his claim for a finding that the matrimonial home is held in trust for him as beneficial owner as the evidence demonstrates that the parties intended that the Applicant be the sole owner of the property; alternatively, the Applicant argues that she has rebutted the presumption of resulting trust.

[19] The Applicant argues that the Respondent cannot now argue that he has a beneficial interest in the property on the basis of resulting trust as such is contradicted by his own evidence and he did not advance a claim on the basis of resulting trust until "the eve of trial".

[20] The Respondent is claiming a 100% or, alternatively, 50% interest in the matrimonial home by resulting trust.

[21] The Respondent notes that he invariably placed assets he controls outside of his name for the purpose of insulating against personal liability. He cites the example of Lucosta in which his mother Helen Colivas was the figurehead controlling shareholder as the owner

of the common shares while the Respondent was a beneficiary of a trust that owned the nominal preferred shares.

[22] The Respondent relies in part upon two statements of net worth that he prepared prior to separation and which the Applicant accepted as "truthful" in her questioning conducted in November of 2015. Each statement of net worth identifies a "principal residence valued at $1,500,000.00 as an asset of the Respondent. It is accepted that this reference was to the parties' matrimonial home.

Analysis

[23] The parties' matrimonial home is described municipally as 379 Paradelle Drive, Richmond Hill.

[24] The matrimonial home was purchased in October 2004 for approximately $880,000.00. Both parties' names appear as purchasers on the Agreement of Purchase and Sale (Exhibit 171). It is conceded by the Applicant that all of the monies for the purchase emanated from the Respondent and all mortgage payments after the purchase were made by the Respondent.

[25] The Applicant testified that the Respondent told her he was giving her the matrimonial home. In this regard she relies upon an email (Exhibit 41) from the Respondent to the Applicant dated September 6, 2005 predating the closing of the matrimonial home. The email appears to form part of negotiations between the parties regarding a marriage contract that never materialized. The Respondent says, summarizing his proposals: "In a nutshell I will give you 50% of what I own and you will give me 50% of what you own." Among his specific proposals: "You will give me 50% of the house…"

[26] Purchase of the home closed on October 31, 2005. The Applicant testified that the email refers to the original deal in the context of some sort of marriage agreement. She said the parties talked about marriage agreements their whole marriage. She testified that the parties executed the original intention i.e. that she retain ownership of the matrimonial home and cottages 1 and 2 while the Respondent would retain his business.

[27] In an email dated June 8, 2011 (Exhibit 77) the Applicant described the matrimonial home to the Respondent as "our house". It is not clear from this communication whether the Applicant was intending to refer to legal ownership of the matrimonial home as opposed to the parties' cohabitation in the same residence.

[28] In an email from the Applicant to the Respondent dated June 27, 2011 (Exhibit 40) she described the matrimonial home as "my house too". She testified that the parties lived there together and obviously she looked at it as "our family home". Again, as with the email of June 8, 2011, the Applicant's meaning is unclear.

[29] The Respondent testified that the deposit of $70,000.00 came from Lucosta or other source relating to him and that 100% of the purchase monies for the matrimonial home came from him. The parties are consistent in this regard.

[30] The Respondent was also solely responsible for paying for various upgrades to the matrimonial home.

[31] The Respondent was the guarantor of the mortgage. He was solely responsible for home mortgage payments as he took full control of anything to do with finances. The parties' evidence is consistent on this point as well.

[32] The reporting letter of February 15, 2006 (Exhibit 174) was addressed solely to the Applicant. It confirms title having been taken in the Applicant's name. There is no reference to any specific instructions or discussions regarding title.

[33] The Applicant was registered as the sole owner of the matrimonial home at the time of closing. The Respondent testified that he "never really gave it much consideration." He indicated that he had been an entrepreneur and he was wanting to shield the family from liability as his partners did the same thing. He felt it was the safer route to have the Applicant as the registered owner. Regarding the Applicant's allegation of gift, the Respondent testified that only through these proceedings has he come to understand what a "gift" is. He had never previously heard that word come out of her mouth regarding the matrimonial home. He asserts that it was not a gift, and that this concept only arose in the course of this litigation.

[34] Section 14 of the *Family Law Act* legislates a presumption of a proprietary resulting trust (see *Korman v. Korman*, [2015] O.N.C.A. 578 at para 29 in this regard). Section 14 provides as follows:

> 14. The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,
>
> (a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and
>
> (b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).

[35] As stated by the Supreme Court of Canada in *Pecore v. Pecore* [2007] SCC 17 at para 24*:*

> "The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is

> challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended… This is so because equity presumes bargains, not gifts."

[36] And further at paragraph 44:

> "As in other civil cases, regardless of the legal burden, both sides to the dispute will normally bring evidence to support their position. The trial judge will commence his or her inquiry with the applicable presumption and will weigh all of the evidence in an attempt to ascertain, on a balance of probabilities, the transferor's actual intention. Thus… the presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities."

[37] Regarding the Applicant's submission that the Respondent did not advance a claim on the basis of resulting trust until "the eve of trial", I note that the Respondent first raised the issue of his trust claim in the matrimonial home in his amended answer served and filed in November 2015. Although this claim was raised over four years after commencement of these proceedings, such came approximately six months prior to trial. While it would have been preferable for the Respondent to raise claims as soon as possible, there was nothing to preclude his raising the issue when he did. The Applicant urges me to conclude that the Respondent cannot seriously believe he had an ownership interest in the matrimonial home when he waited so long before asserting it. His personal belief on this legal issue is less important than the material facts regarding the parties' actions leading up to and following the Applicant taking title.

[38] Section 14 of the *Family Law Act* applies a presumption of a proprietary resulting trust imposing the burden of proof on balance of probabilities upon the Applicant to rebut the Respondent's claim. I come to this conclusion for the reasons that follow.

[39] In *Andrade v. Andrade,* [2016] O.N.C.A. 368 the Court of Appeal stated:

> "The fact that a party represents or deals with property in a certain way that is inconsistent with beneficial ownership does not preclude a claim of beneficial ownership in litigation… In each case, the trust claimant makes a claim that is inconsistent with how the property was dealt with at another stage and for another purpose."

[40] The context in which the Respondent's earlier affidavits were presented was in minimization of his income while addressing issues of support. The affidavits do not address the Respondent's intention at the time the home was registered in the Applicant's name to make a gift or otherwise. Some of the affidavit references by the Respondent are clearly to the fact of registered ownership as distinguished from beneficial ownership.

[41] The Applicant relies upon *Van De Mark v. Walton*, [1981] Carswell Ont. 309 (S.C. Family Division) in which throughout the litigation prior to trial no challenge had been made by a spouse that his former wife was both the registered and beneficial owner of the matrimonial home. The trial judge dismissed the husband's claim for a finding of interest in the matrimonial home as he was satisfied that at the time of transfer he was fully aware of all of the consequences of transferring the property to his wife and that he knew that for estate planning purposes he must divest himself completely of any and all interest in the property, both then and in the future. The case before me can be distinguished in that the financial statements and affidavits refer to ownership of the house not at the time of transfer but thereafter. It is clear from the case law that the relevant time for ascertaining intention is the time of acquisition of the property (see *Andrade* at para. 62 and *Nussbaum v. Nussbaum*, [2004] 9 R.F.L. 6th 455).

[42] There is no dispute that the Respondent provided all funds relating to the purchase of the matrimonial home and yet ownership was placed in the Applicant's name for no consideration. Where a transfer is made for no consideration the onus is on the transferee to prove a gift (see *Peacore* above).

[43] For these reasons I find that the presumption set out in s.14 of the *Family Law Act* applies and is rebuttable, with the burden being placed upon the shoulders of the Applicant.

[44] The next question is whether the Applicant has satisfied the onus upon her to demonstrate that the matrimonial home was an intentional and irrevocable gift.

[45] The proper test for the determination of a gift was established by the Court of Appeal in *McNamee v. McNamee*, [2011] O.N.C.A. 533 as follows:

(a) There must be an intention to make a gift on the part of the donor, without consideration or expectation of remuneration,

(b) an acceptance of the gift by the donee, and

(c) a sufficient act of delivery or transfer of the property to complete the transaction.

[46] The Applicant argues that the Respondent deeded title of the matrimonial home to the Applicant and was fully aware of the consequences of his so doing. It was his intention to make a gift of the home to the Applicant and the gift was absolute and irrevocable it is submitted.

[47] I find that the Applicant has failed to rebut the presumption of resulting trust for the following reasons:

(a) Despite concerns regarding the reliability of the Respondent's evidence and his credibility, his evidence to the affect that he did not turn his mind to the

issue of title of the matrimonial home is consistent with the evidence of his having placed title of his other significant assets in the name of other parties and is consistent with the general theory of the Applicant's case that the Respondent routinely put his assets in the names of other persons.

(b) While the Applicant described the Respondent as having gifted the property to her because he loved her, she did not say when he told her this. In the context of her evidence it appeared likely to be before the transfer and for the purpose of these reasons I proceed on the basis of that assumption; nevertheless, at best I can conclude that this was a statement of intention of the Respondent at some indeterminate time prior to the actual transfer itself. It is the intention at the moment of transfer that matters, and the Applicant's evidence was not sufficiently precise in this regard.

(c) The Applicant's evidence following transfer contradicts her perception of the house as owned by her and her alone. In this regard I note the Applicant's description of the Respondent's net worth statement (which included references to the "principal residence valued at $1,500,000.00" as one of his assets) as "truthful".

(d) At paragraph 25 of *McNamee* the Court of Appeal makes it clear that: "…the donor must divest himself or herself of all power and control over the property and transfer such control to the donee." It was common ground that the Respondent controlled the finances during the parties' marriage. It was also common ground that he was solely responsible for all of the payments regarding the matrimonial home. If he was in sole control of the finances then he continued to be in control of disposition of the matrimonial home as to withhold payments against the mortgage, or the taxes for that matter, could trigger the rights of third parties regarding possible disposition of the matrimonial home. As such I conclude that the Respondent, being the donor, had not divested himself of all power and control over the property.

[48] For these reasons I conclude that the Applicant has failed to discharge her burden in rebutting the presumption of resulting trust. I find that the Respondent has satisfied me that he had a beneficial interest in the matrimonial home.

[49] The next question is the extent of the Respondent's beneficial interest in the matrimonial home.

[50] The Respondent claims a 100% interest in the matrimonial home and alternatively a 50% interest.

[51] I find that the Respondent's interest in the matrimonial home is 50% jointly with the Applicant because the original Agreement of Purchase and Sale with respect to the matrimonial home showed both parties as purchasers and this represents the best

objective evidence of the intention of the parties at the time that document was executed in 2004.

[52] Therefore, I conclude that the parties held the matrimonial home jointly at date of separation and thus the value of the parties' respective interests for equalization purposes shall be based upon the value for which the property was sold in 2016 (being $2,032,000.00 (see Exhibit 38)), one half of which will be attributed to each of the parties.

b) Value of Art Work at Date of Separation

[53] It is common ground that the Respondent owned valuable works of art on the date of separation. The parties differ as to the value of these assets to be ascribed to the Respondent for equalization purposes.

Positions of the Parties

[54] The position of the Respondent is that the art work is valued at $13,050.00. The position of the Applicant is somewhat inconsistent in her written submissions in that her Comparison of Net Family Property Statements ascribes a value of $50,000.00 while at paragraph 188 of the Applicant's written submissions a value of "approximately $40,000.00" is ascribed. It is the position of the Applicant that each party has the onus to establish the values of his or her respective assets and debts and that the Respondent has failed to discharge this onus.

Analysis

[55] Regarding value of the paintings the Respondent testified that he had purchased a number of works from the same artist at the price of $0.58 per square inch. He referred to a written agreement between him and the artist (Exhibit 220) confirming these terms.

[56] Applying the price of $0.58 per square inch the Respondent testified that he calculated the total number of square inches of art work purchased from this particular artist and in his possession and arrived at a figure of $13,050.00.

[57] Neither party has secured a formal appraisal of these assets.

[58] In her evidence the Applicant confirmed that she retained one work of this particular artist. No admissible evidence was led as to the value of this item. There was no evidence as to the dimensions of this item. The Applicant acknowledged that no value is ascribed to the item in her financial statement and it is not specifically referred to therein. Both parties have failed to provide substantive evidence as to the date of separation values of the paintings in his/her possession.

[59] In his evidence the Respondent indicated that the paintings were perhaps 900 square inches per painting.

[60] As I have no other evidence on which to base my decision, assuming similar dimensions for the painting retained by the Applicant in this regard I ascribe a value of $522.00 to the painting retained by the Applicant and I accept the evidence of the Respondent as to the value of the paintings retained by him in the amount of $13,050.00.

c) Value of Respondent's Home Audio Video System at Date of Separation

[61] It is common ground that the Respondent owned high-end audio and video equipment as of the date of separation. The issue is the value to be ascribed to these assets as of the date of separation for equalization purposes.

Positions of the Parties

[62] The Respondent's position is that the value is approximately $73,000.00 ($73,600 according to his Comparison of Net Family Property Statements and $72,480.00 according to his written submissions). It is the Applicant's position that the equipment is worth approximately $180,000.00 according to her written submissions and $172,440.00 according to her Comparison of Net Family Property Statements.

Analysis

[63] The Respondent calculates his figure of $72,480.00 based upon Exhibit 224. Both parties referenced "Audiogon" (an internet-based marketplace for high-end audio/video equipment) as a reliable source for valuation of these components; however, neither party tendered any expert evidence. I am therefore left with the imperfect evidence before me on the basis of which to come to some meaningful conclusion as to the value of these assets owned by the Respondent.

[64] The Applicant's approach appears to have been to take the average asking price listed for a particular component on Audiogon to arrive at a total value for the home theatre system.

[65] The Respondent's approach rejected use of the average Audiogon price on the basis that the moment a piece of equipment is sold it is then "used" and the component is subject immediately to depreciation similarly to selling a motor vehicle; therefore, rather than using an average price, the Respondent used asking prices as of the date of separation as set out in the material provided through Audiogon.

[66] Through his evidence the Respondent satisfied me that many of the components included in the Applicant's calculation of value were not in fact in his possession. The Applicant's personal knowledge of these assets was necessarily limited.

[67] The Applicant relied upon Exhibit 26 as a list of all of the components that the Respondent had purchased for his system; however, it does not necessarily represent all of the components still owned by the Respondent as of the date of separation. The Applicant also confirmed that she did not have any personal knowledge of the

components or model numbers of the equipment that the Respondent removed from the matrimonial home at or after separation. These are important weaknesses in the Applicant's evidence on this issue.

[68] I accept the Respondent's reasoning that the safer approach to valuing these particular assets is to utilize the asking prices as of the date of separation of the particular components that we have sufficient confidence were owned by the Respondent as at the date of separation.

[69] Given the foregoing I accept the value ascribed by the Respondent in this regard in the amount of $72,480.00 for his home theatre system as of date of separation.

d) Value of Household Furniture/Contents as of Date of Separation

Positions of the Parties

[70] It is the position of the Applicant that value of the household furniture retained by her at date of separation is $6,370.00. It is the Applicant's position that if the parties are unable to agree on division then the contents of the matrimonial home as of date of separation should be auctioned. It is further the Applicant's position that the contents of the matrimonial home removed by the Respondent following separation exceed the value of the contents retained by the Applicant.

[71] The Respondent's position is that a current value of at least $60,000.00 (see Exhibit 107) should be attributed to the contents owned and possessed by the Applicant as at date of separation. This figure is derived from the amount that he offered to pay for the items in 2015. He argues that as the Applicant would not sell the furniture to him for $60,000.00 then the value must be greater than $60,000.00. The difficulty with this argument is that it does not account for the reality that replacing the furniture would cost considerably more than its current fair market value and that might act as a disincentive to selling at current fair market value.

[72] The Respondent further argues that his counsel directed correspondence to Applicant's counsel in the fall of 2015 repeatedly requesting that the Respondent be entitled to attend at the matrimonial home for an appraisal, and it is further submitted that this request was denied.

[73] The Respondent further submits that the Applicant's proposal to sell the contents of the former matrimonial home and equally divide the proceeds is not appropriate given that the Respondent does not trust the Applicant to make available all of the contents she retained and given the Applicant's "track record" of not disclosing or valuing her fur coats, interior furniture, patio furniture, chandeliers, etc.

Analysis

[74] The Applicant had an "appraisal" of the contents remaining in the matrimonial home completed by Waddingtons. This is not expert evidence. The letter dated March 18, 2016 refers to having reviewed photos of 34 listed items, ascribing a fair market value of $6,370.00

[75] It is clear from the exchange of correspondence between counsel that the appraisal requested by the Respondent was of the home itself and not of the contents. At no time did Respondent's counsel communicate the Respondent's interest in conducting an appraisal or even an inventory of the household contents.

[76] Exhibit 107 represents an inventory of household contents retained by the Applicant, prepared by the Respondent and based upon his recollection. It is this list for which he was prepared to pay $60,000.00 to the Applicant.

[77] Neither party has secured or provided any admissible expert evidence regarding the value of the contents retained by them.

[78] The Respondent resists the Applicant's proposal to sell the contents on the basis that the Applicant has not cooperated in the Respondent's desire to prepare an inventory and appraisal of the contents and thus her cooperation in the auction process in a good faith way cannot be relied upon. This submission presumes that the Respondent has sought an opportunity to conduct an appraisal of the contents or inventory thereof. As noted above, I am not satisfied that he has done so.

[79] The Applicant's proposal is the one more likely to produce a fair division of the value of the contents. Therefore, unless the parties otherwise agree in writing within 45 days, the contents of the former matrimonial home not otherwise equalized shall be sold at auction by a mutually agreeable auctioneer and the net proceeds will then be equally divided between the parties. Any disputes regarding terms of sale shall be referred to me by way of 14B motion.

e) Applicant's Fur Coats at Date of Separation

Positions of the Parties

[80] It is the Applicant's position that the value of her fur coats in her possession at date of separation is $300.00.

[81] It is the position of the Respondent that the fur coats are valued at $28,000.00.

Analysis

[82] Neither party tendered any expert evidence as to the value of these assets.

[83] In her testimony the Applicant indicated that she did have "some" fur coats which she described as "barter items from Extreme Fitness." She did not know their value. She also said that she no longer had them. She testified that she assumed that the Respondent has them, except for "a coat or two left behind." She identified the fur coats in Exhibit 110 as hers. The first fur coat was beaver and the second was mink. She acknowledged during questioning having undertaken to provide an appraisal regarding the fur coats. She conceded that she did not have the appraisals done claiming that she did not have the coats. She claimed that she did not remove them from the matrimonial home. She asserted her belief that the Respondent removed them from the matrimonial home although she provided no direct evidence in this regard beyond witnessing the Respondent removing items from the matrimonial home but not specifically the fur coats in question. She did not know what the Respondent paid for the coats. On this evidence I cannot conclude the Respondent has any fur coats in his possession. Indeed, the fact that the Applicant agreed to have the coats appraised supports the conclusion that at least some were in her possession.

[84] The Respondent in his evidence testified that he was present when the Applicant bought the fur coats. They were custom made full length fur coats costing in the tens of thousands of dollars. He testified that when he went to the matrimonial home to get the audio/video equipment, the coats were not there and a lot of items were missing.

[85] The figure of $28,000.00 is derived by the Respondent from Exhibit Z being an invoice to the Applicant dated December 2, 2008 for storage of three luxury fur coats. The Exhibit was never properly identified and accepted as a numbered Exhibit. It is therefore not evidence and cannot be relied upon as to value of the coats.

[86] There is evidence from both the Applicant and the Respondent that the Applicant owned at least two fur coats as of the date of separation. The Applicant undertook at questioning to provide appraisals regarding these coats. She has failed to do so.

[87] The Applicant testified that she had no idea what they were worth. These are her assets. She is tasked with the responsibility of providing some evidence of value. She undertook to do so. She has failed in both respects. This is different from the contents issue which involved assets owned by both parties. She asked the court to ascribe a value of $300.00 but offered no evidence in support of this figure. In these circumstances, I draw an inference that had she adduced meaningful evidence on this issue, it would have been inconsistent with her position.

[88] The Respondent's evidence was also vague and indicated no timing of purchase.

[89] As is so often the case, the court is left in a difficult position of valuing an asset without adequate evidence from the parties.

[90] In the circumstances I ascribe a value of $10,000 to the fur coats owned by the Applicant on the date of separation.

f) Respondent's Life and Disability Insurance at Date of Separation

Positions of the Parties

[91] The Applicant submits that the Respondent has failed to make disclosure relating to three life insurance policies in the names of both children, or in his name, at the date of separation. As a result she submits she cannot determine the appropriate cash surrender value for these policies at date of separation.

[92] The Respondent offered no specific submissions regarding this issue.

Analysis

[93] In cross-examination the Respondent testified that he had no life insurance and that it was cancelled "a long time ago". He was referred to his financial statement in which he disclosed that he did have life insurance. He then expressed uncertainty but acknowledged that he did have life insurance on the children's lives but he was not sure regarding the face value. He was not sure regarding the premiums. He conceded that it might have a cash surrender value. He did not have details. He confirmed that he owned the policies and that he was the beneficiary.

[94] In re-examination he produced evidence of these policies (Exhibits 246 and 247). Each policy carried a face value of $250,000.00 showing the Respondent as beneficiary. The Respondent referred the court to page five of the policies and relied on same as evidence that the cash surrender value on date of separation would have been zero. Further, both policies appear to have been acquired well after separation.

[95] When asked about his failure to show these policies on his financial statement, he answered by indicating that he is not a "details person", he did not have a good memory and he overlooked it.

[96] Under cross-examination on this issue he was shown a copy of another policy (Exhibit 248) in basic life insurance coverage of $1,000,000.00 regarding Costa (Canada Life Policy #20951330), issued June 8, 2010. The Respondent was the sole beneficiary. It shows "value in your policy's tax-advantaged interest options" as $8,555.88 as of June 7, 2015. He indicated that he had no idea regarding the cash surrender value of the policy as of the date of separation. He was not sure if he was still maintaining the policy.

[97] His attention was then drawn to Exhibit 249, being another policy #500047925. He recalled having this term insurance. It was his signature on the document. It changed beneficiary from the Applicant to Helen Colivas as 100% beneficiary on February 20, 2013. I have no evidence this policy was owned by the Respondent on the date of separation.

[98] He conceded that at the time of questioning there was no insurance policy that he owned pursuant to which either the wife or the children were beneficiaries.

[99] Exhibit 248 had been provided to Applicant's counsel via disclosure. The policy was effective June 8, 2010. The date of separation was approximately one year later. This is the only policy of which there is evidence of ownership by the Respondent at date of separation.

[100] The Respondent's evidence on this issue is inconsistent and late developing, and this is concerning. The only basis on which to ascribe any cash surrender value to any of the identified policies as of date of separation is in relation to Canada Life Policy #20951330 above. Assuming a cash value at inception on June 8, 2010, and $8,555.88 five years later, that suggests that after one year, which approximates the date of separation, the value would be one-fifth of $8,555.88 or $1,711.18.

[101] I therefore treat the cash surrender value of the Canada Life policy #20951330 at date of separation as $1,711.18.

g) Value of Respondent's Interest in 2951 Walkers' Line Co-Tenancy as of Date of Separation

Positions of the Parties

[102] It is the Applicant's position that the interest of Helen Colivas (3.11%) in Walkers' Line is beneficially owned by the Respondent and should be included in his net family property for equalization purposes.

[103] Relying upon the expert report in which the experts agree that the value of this interest was $156,000.00 at the date of separation, the Applicant takes the position that this value ought to be attributed to the Respondent as of date of separation.

[104] The Respondent denies any ownership interest in this asset as of date of separation.

Analysis

[105] The Walkers' Line investment was a co-tenancy in a medical building in Burlington. It was similar to the 14th Avenue investment (referred to below) in that it provided monthly cash flow. Lucosta had been one of the original investors in 2006. Like the 14th Avenue investment, Walkers' Line was managed by Boston Capital Inc. (of which the Respondent was a 50% common shareholder on date of separation).

[106] Following the death of Constantine Colivas (the Respondent's father) Helen Colivas moved from Mississauga to 22 Wolfson in Richmond Hill.

[107] The Respondent's evidence was to the effect that he decided to gift $200,000.00 to his mother to purchase an interest in the Walkers' Line investment.

[108] The Respondent testified that in January 2009 he received $900,000.00 as the final installment regarding the sale of his interest in Extreme Fitness (a successful business of which the Respondent divested his interest prior to separation).

[109] At the same time that the Respondent became aware of an investment opportunity with respect to Walkers' Line, one of the investors sought to divest and the Respondent directed $200,000.00 to the divesting investor and that a 3.11% interest in Walkers' Line be registered in the name of Helen Colivas.

[110] It was the Respondent's evidence that he thought it would be a "nice gesture" to his mother to put some of the money from the sale of Extreme Fitness into his mother's name to provide her with some funds to cover her living expenses.

[111] This transaction occurred approximately two and a half years prior to the parties' separation.

[112] There is no direct evidence to contradict the Respondent's evidence as to his intention with respect to the gifting of $200,000.00 to his mother. The Applicant relies upon inferences I am urged to draw from the Respondent's admitted practice of putting assets out of the Applicant's reach.

[113] The Respondent's alleged donative intent is consistent with the subsequent history whereby monthly payments arising from the 3.11% investment in Walkers' Line were deposited into an account in Helen Colivas' sole name. Further, the final payout of approximately $248,000.00 was also deposited into this same account in January 2015. Further, taxes in relation to this investment were paid by Helen Colivas in relation to the monthly distributions and the final payment.

[114] It is to be noted as well that the actions of the Respondent in gifting an investment in Walkers' Line to his mother are consistent with his having gifted an interest in the same investment to the Applicant which is reflected in her calculation of net family property.

[115] For these reasons, and despite the reasons for scrutinizing the evidence of the Respondent with particular care, I conclude that this asset was gifted to Helen Colivas and not held in trust by her for the benefit of the Respondent as of the date of separation.

[116] Therefore, there shall be no value ascribed to the Respondent for equalization purposes as of date of separation.

h) Value of Respondent's Interest in 22 Wolfson, Richmond Hill as of Date of Separation

Positions of the Parties

[117] The Applicant asserts that prior to separation the Respondent purchased for Helen Colivas a property municipally described as 22 Wolfson in Richmond Hill. It was located a short distance from the matrimonial home. The Respondent moved to this property

upon separation in June 2011. He continues to reside there with his mother and the children when they are in his care (50% of the time). The property is in reality the property of the Respondent the Applicant submits. She says $320,000.00 should be attributed to the Respondent in this regard.

[118] The $320,000.00 is calculated as follows according to the Applicant's written submissions:

(a) the total purchase price of Wolfson was $603,000.00. Helen subsequently repaid Lucosta $375,000.00 when her Mississauga home was sold; therefore, the Applicant submits, Lucosta/the Respondent contributed $228,000.00 ($603,000.00 - $375,000.00), or about 40%. The fair market value of the home on the date of separation was about $800,000.00; therefore, the 40% interest of Lucosta/the Respondent's is $320,000.00 (ie. 40% of $800,000.00).

[119] The Applicant further submits that Helen's primary will conveys Helen's interest in Wolfson to the Respondent subject to a formula by which a smaller portion thereof is to be diverted to the Respondent's brother Ted.

[120] The Respondent submits that he had no interest in 22 Wolfson as of date of separation.

[121] The Respondent submits that in January 2008, after selling his interest in Extreme Fitness, the Respondent gifted to his mother the funds required to cover the purchase price of her home at 22 Wolfson in excess of the sale proceeds of her home in Mississauga ($128,000.00). The Respondent submits that the parties had just had a baby and as Helen Colivas did not drive it was impractical for her to live so far from the parties' matrimonial home. The Respondent therefore took it upon himself to search for properties for his mother to purchase, despite her reluctance. Ultimately, 22 Wolfson was purchased, a location just a few minutes from the matrimonial home.

[122] Following separation the Respondent submits that he moved in to the 22 Wolfson residence and thereafter Helen received $500,000.00 from Lucosta which was used to improve the home ($350,000.00 in landscaping and $150,000.00 to finish the basement by, in the Respondent's words from trial, "recreating our home theatre").

Analysis

[123] The deposit of $15,000.00 regarding the 22 Wolfson purchase came entirely from Helen Colivas' personal account. Helen testified that the property has been hers from the outset and that the monies received from the Respondent were gifted by him to her. In her Will, she made provision for him to receive back some of the monies gifted and invested in the property, subject to her other son Ted receiving some value as well.

[124] The deed/transfer (Exhibit 159) in the amount of $608,000.00 is in Helen Colivas' name.

[125] There is no evidence that anyone other than Helen Colivas has made the mortgage payments with respect to 22 Wolfson. The Respondent testified that Helen Colivas made the utilities payments until after the Respondent moved in following separation and thereafter he made the payments.

[126] The Respondent testified that he was in "panic mode" regarding the children after separation and wanting an environment where the children would feel at home. He therefore put a pool in the backyard, created bedrooms for the children and recreated the theatre room (see Exhibit 161).

[127] The Respondent testified that he never looked at the Wolfson property as an investment. He maintained that the $500,000.00 from Lucosta was gifted to Helen Colivas and there was no expectation of repayment. The monies were forwarded to Helen Colivas shortly after separation.

[128] According to the Respondent he gifted $128,000 to Helen Colivas in respect to 22 Wolfson (the net gift from the bridge financing at purchase) and following separation a further $500,000.00 for a total of $628,000.00.

[129] The Respondent testified that while he did not expect to get the money back, he thought it was likely.

[130] During questioning prior to trial the Respondent, in reference to the $500,000.00, indicated that he was not sure if it was a gift. The Respondent claimed not to know the legal nature of a gift and again explained that he was in "panic mode".

[131] The Respondent testified that the purchase price of $608,000.00 regarding 22 Wolfson was comprised of a $15,000.00 deposit from Helen Colivas, a mortgage of $100,000.00 and bridge financing initially from the Respondent's resources (either Lucosta or Excite Holding Corp.). After Helen Colivas' home in Mississauga was sold, $375,000.00 was paid from those proceeds to Lucosta in partial repayment of the bridge financing with the remaining $128,000.00 difference between the bridge financing of $503,000.00 and $375,000.00 representing a gift to Helen Colivas.

[132] When I consider the advice that the Respondent offered to his neighbour (i.e. to "slowly and meticulously" divest oneself of assets in preparation for separation) it is tempting to conclude that the Respondent in many respects had been acting in furtherance of his own advice with respect to this transaction.

[133] However, in my view the preponderance of the evidence is consistent with the Respondent's position. Repayment of the $375,000.00 from the proceeds of sale of Helen's property in Mississauga is inconsistent with an intention on the part of the Respondent to treat Wolfson as his own property in beneficial ownership. I believe it more likely that upon separation the Respondent's intentions with respect to 22 Wolfson changed and he decided thereafter to invest substantially in improvements to the property.

In this regard I note that the separation of the parties on June 20, 2011 was precipitated by criminal charges brought against the Respondent by the Applicant's allegations. There is no evidence to suggest either party was expecting this triggering event to occur. The Respondent's need for alternate accommodation for himself (and the children when in his care) crystallized upon separation occurring. This, in my view, triggered the Respondent's change in treatment of 22 Wolfson. Thereafter it was not just his mother's residence, but also where he and the children resided.

[134] It also makes sense that, in the aftermath of the loss of his father, the Respondent would proceed with some generosity toward his widowed mother.

[135] Regarding Helen's Will, same provides for title to be transferred to the Respondent upon the death of Helen Colivas, subject to the Respondent's brother Ted receiving a payment equalling 42% of the value above $350,000.00 at time of death. Of course, Helen Colivas remains free to change these terms at any time. Even if I assume the terms to be immutable however, such are at least equally consistent with Helen's expressed desire to return to the Respondent part of the gift he gave her.

[136] Regarding whether the value of improvements to the property should be included in valuing the Respondent's interest as of date of separation, I note that the Applicant was uncertain regarding the timing of her observations of improvements being commenced at 22 Wolfson (i.e. before or after separation). I also note that the Respondent's documentary evidence confirmed movement of monies in relation to improvements to 22 Wolfson being timed after separation.

[137] As I am not persuaded that as of the date of separation the Respondent intended to retain a beneficial interest in 22 Wolfson, the value ascribed to him in this regard for equalization purposes is zero.

<u>i) Value of Respondent's Investment in 3993 14th Avenue Co-Tenancy as of Date of Separation</u>

Positions of the Parties

[138] The Applicant asserts that Helen Colivas' 5.1% ownership interest in the 3993 14th Avenue co-tenancy was held in trust for the Respondent as of date of separation. She submits that there was no evidence to substantiate a claim that Helen had the funds to purchase the Wolfson property and make large investments.

[139] The Respondent submits that after his father died in October 2006 his mother was left with a debt-free home and two stock portfolios. The first was a joint account with Helen worth $35,073.00 as of June 30, 2006 (Exhibit 157) and the second was owned by the Respondent's father's company Colivas Steel C.A.D. worth $70,783.00 as of June 30, 2006 (Exhibit 158). These funds were moved into Helen's BMO Investor Line Account #21445205 (Exhibit 155 shows total value of $71,223.00 CAD plus $40,557.00 USD as of June 30, 2007). On July 4, 2007 $111,790.00 was added to Helen's primary chequing

account #0433133-685 and the source of these funds was her Investor Line Account. On the next day a draft was prepared for $100,000.00 and earmarked for Helen's purchase of her interest in a co-tenancy in Markham, referred to as 14th Avenue.

[140] Therefore it is submitted by the Respondent that Helen's $100,000.00 was used to purchase her interest in the 14th Avenue co-tenancy. There was no gifting from the Respondent. The only connection with the Respondent is that Lucosta had a fractional investment in the 14th Avenue investment as Boston Capital managed the property. The Respondent recognized this investment as a good opportunity for his mother, it is submitted.

[141] The Respondent further submits that from the date of the first monthly distribution to the investors in 14th Avenue, all monthly distributions went directly to Helen's BMO chequing account (as evidenced through perusal of Helen's BMO bank statements in Exhibit 145). These deposits were $833.25 per month. If a deposit was not made, that is because none of the investors received distributions that month. The only person who used Helen's chequing account was Helen.

[142] Further it is submitted by the Respondent, each year Helen's tax return reflected her receipt of the monthly distributions and taxes were paid by Helen.

Analysis

[143] The parties' experts agree that the value of this investment at separation was $87,000.00.

[144] The issue is beneficial ownership at date of separation.

[145] In the Respondent's evidence he described 14th Avenue as being an investment undertaken by Boston Capital as nominal investor, the object of which was to find income-producing properties to extract their rate of return. 14th Avenue was one of those investments, as was Walkers' Line. Exhibit 167a dated September 4, 2013 shows $110,255.04 going to Helen Colivas representing her share of the 14th Avenue sale. The Respondent indicated that the 14th Avenue investment was income producing until the last two years prior to sale. There was a tenant problem contributing to this issue.

[146] The 14th Avenue co-tenancy was sold on September 4, 2013; accordingly, $110,255.04 was deposited into Helen's chequing account (see Exhibit 167a). She paid income tax on her receipt of this sum.

[147] The sum of $110,255.04 was traced by the Respondent in Exhibit 183. This is a summary prepared by the Respondent identifying and tracing all investments either in Lucosta's name or Helen's name. At Line W, Exhibit 183 traces Helen's proceeds from her sale of 14th Avenue into the Greybrook Investment known as "Ordinance-Citizen Fernbrook Garrison Point".

[148] The Respondent further submits that Helen's Will (Exhibit 132) does not include this Greybrook investment in the "carve-outs" to be bequeathed to the Respondent. It is simply part of the residue, to be divided equally with Ted.

[149] The Applicant's evidence on this issue is scant. Her personal knowledge in relation to this issue is necessarily limited. She testified that she was not aware of the details of monthly deposits received by Helen Colivas regarding her share in the 14th Avenue investment. Although Helen Colivas' income tax returns had been provided by way of disclosure, she had not looked at them. She was not aware that Helen Colivas declared income included income from the 14th Avenue investment. She was not aware that Helen Colivas' share of 14th Avenue's sale proceed went into her account. She was not aware of any balloon payment deposited into Helen Colivas' account.

[150] When asked regarding her position with respect to the 14th Avenue co-tenancy and Helen Colivas' interest therein, she indicated that she understood that Helen was "involved one way or another." Her understanding was based on bank statements. When asked about her claim in that regard, she indicated that she did not know if she had a claim, just that she knew that Helen was involved. She also indicated that she did not know if the money utilized by Helen to invest in 14th Avenue was a gift from the Respondent.

[151] The evidence available to me does not support the conclusion urged upon me by the Applicant. Her own evidence is understandably scant. The balance of the evidence readily supports the conclusion that the monies invested in 14th Avenue originated with Helen Colivas, the monthly disbursements were paid to Helen Colivas and the proceeds of sale of the interest after separation were paid to Helen Colivas. I am satisfied that this was Helen Colivas' investment and not that of the Respondent.

[152] Therefore, there will be a value of zero ascribed to the Respondent for his interest in this asset as at date of separation.

j) Funds withdrawn by Respondent from Credit Card prior to Separation

Positions of the Parties

[153] The Applicant submits that the Respondent made a number of advances from his credit cards prior to separation for which no explanation has been provided. In this regard she asserts that the sum of $24,198.00 should be ascribed to the Respondent as an asset as at date of separation.

[154] While the Applicant's written and verbal submissions make no specific reference to this issue, it is identified as an issue in the parties' respective Comparison of Net Family Property Statements.

[155] It is clear that the Respondent denies this sum as an asset as at date of separation in his name.

Analysis

[156] This issue appears to have its genesis in Exhibit 123, being an email from the Applicant's expert Steve Ranot, items 8 and 9. The purpose of the email was to identify outstanding issues of disclosure. The email was dated May 26, 2016 and comes after commencement of trial of these proceedings.

[157] Item 8 of the email reads as follows:

> "We see that the $14,197.50 was paid to the receiver general – for which individual or corporation was this payment made?"

[158] Item 9 reads:

> "Item number 2(f) from our initial production letter dated December 14, 2015 – purpose of the $10,000.00 advance from Steve's BMO Mastercard ending 4942 on May 7, 2007"

[159] The aggregate of these two amounts is approximately $24,198.00.

[160] The Respondent in submissions notes that the transactions in question took place over four years prior to separation rendering it difficult to account for disposition of funds. It is further submitted that $10,000.00 could just as easily have been expended by the Applicant or by both parties. Further, the $14,198.00 referred to is clearly referenced as having been paid to the receiver general and the only issue remaining was to whose credit it was paid.

[161] I am not satisfied that this should be attributed to the Respondent as an asset as at date of separation. The transactions in question occurred over 4 years prior to separation and are therefore too far removed from the fact of separation to be reasonably rooted in any effort by the Respondent, as alleged by the Applicant, to divest himself of assets by way of unreasonable depletion of his resources in contemplation of separation.

[162] Therefore I ascribe a value of zero to the Respondent on date of separation in this regard.

<u>k) The Respondent's unexplained withdrawal from Lucosta on April 19, 2011</u>

[163] The Applicant submits that the Respondent withdrew funds from Lucosta on April 19, 2011 for which he has not provided a complete explanation. As a consequence she seeks to attribute as an asset to the Respondent the sum of $65,300.00 as of date of separation as referenced in her Comparison of Net Family Property Statements provided with her written submissions. In this regard there is a letter dated December 14, 2015 from Steven Ranot to Applicant's counsel requesting disclosure regarding a $160,000.00 withdrawal from Lucosta on April 19, 2011 (see Exhibit 129); In Mr. Ranot's email dated May 26, 2016 (Exhibit 123) no specific reference is made to this disclosure being outstanding. I

have been directed to no other evidence in relation to this issue. Without further it is not possible for me to conclude that the Respondent has failed in his disclosure obligations.

[164] The Respondent makes no reference to this issue in either his written or verbal submissions.

[165] Similarly, beyond advancing the allegation, the Applicant's submissions do not guide me to any particular items of evidence in support of this submission. I have reviewed my notes of the Respondent's testimony and I cannot find any direct references to the issue in his evidence. My review of the evidence of Steven Ranot leads me to a similar conclusion. Both witnesses did address requests for disclosure and responses thereto, but mostly in broad terms or by reference to requests for productions.

[166] Accordingly I reject the Applicant's submission in this regard.

l) Balances of Respondent's Credit Cards as of Date of Separation

*BMO Mastercard ****9812*

[167] It is the Applicant's position that this card was not activated until 2013 and as such this card should not be included as a liability as at the date of separation for the Respondent. It is further submitted that the Respondent has provided inaccurate figures for his credit card liabilities at separation.

[168] In submissions the Applicant ascribes a balance of zero as of date of separation whereas the Respondent ascribes a balance of $14,057.00 as of date of separation.

[169] I have reviewed the evidence, both oral testimony and documentary. I can find no evidence to support the Respondent's position and I have not been directed to any in the Respondent's submissions. The Respondent bears the burden of proof on this issue. He has failed to discharge same; accordingly I treat the balance of this credit card as "zero" at date of separation.

*CIBC Aerogold Visa ****3509*

[170] Following completion of oral submissions the parties agreed to treat the Respondent's CIBC Aerogold Visa Infinite credit card ending #3509 as having a balance of $42,234.16 at date of separation. This number will be utilized for equalization purposes.

BMO Mastercard (US)

[171] Regarding the Respondent's BMO Mastercard (US) account the Applicant submits that the balance at date of separation for the Respondent is $29.00. The Respondent says the balance was $8,571.00 on date of separation. I have not been provided an account number to aid my review of the evidence. I have not been directed to any item of documentary evidence in support of either party's position. The Respondent bears the burden of proof

and he has not discharged that burden. I therefore find the balance of this account at date of separation to be $29.00.

*BMO Mastercard ****4942*

[172] Regarding the Respondent's BMO Mastercard account #4942, the parties have agreed that the balance outstanding at date of separation for the Respondent is $8,324.00.

*RBC Visa ****4585*

[173] Regarding the Respondent's RBC Visa account #4585 (formerly #4052) it is the position of the Applicant that the balance for the Respondent as of date of separation was $3,271.76. It is the position of the Respondent that the balance was $14,100.00 at date of separation. Again, I have not been directed to any item of documentary evidence in support of either party's position. The Respondent bears the burden of proof and he has not discharged that burden. I therefore find the balance of this account at date of separation to be $3,271.76.

m) Value of Respondent's General Household Items and Vehicles at date of Marriage

[174] The Respondent asserts that he owned $35,000.00 of "household goods" on the date of marriage.

[175] The Applicant submits that a zero value should be ascribed given his failure to satisfy his evidentiary burden in the absence of any evidence of the value of the contents owned on the date of marriage.

[176] Regarding this issue the Respondent refers to the Supplementary Trial Record, Tab A, page 6. He describes living in a condominium unit of 800 square feet. He indicated it was his practice to buy things at the "high end". He estimated the total value at about $35,000.00 which included the following:

(a) four paintings - $20,000.00;

(b) bedroom set and lamps - $2,000.00 to $3,000.00;

(c) large T.V. - $5,000.00;

(d) couch, lamps, bar stools, drum set and electronics making up the balance.

[177] It is the Respondent's obligation to provide meaningful evidence of the value of these items. I have no way of knowing what his approach to developing the values was; for example is he estimating the cost of replacement? Is he using the cost of acquisition? Is he using fair value at date of marriage, or at some other point in time? If so, how has he determined such value? I have no way of knowing.

[178] I note that the Applicant had little to say in her evidence on this issue and confirmed that the parties were living in a rented one bedroom apartment and that the contents had been purchased by the Respondent. She indicated that there was "not a lot of furniture" but such included a bed, mattress and a night table.

[179] As it is the Respondent's obligation to provide this evidence and he has failed to do so I draw an adverse inference that had he produced meaningful evidence same would have been meaningfully at odds with the estimate of $35,000.00 which he proffers and that such evidence would not have been of assistance to him.

[180] In these circumstances I ascribe a value of $10,000 in this regard.

n) The Respondent's Rolex and Hublot Watches at Dates of Marriage and Separation

[181] Although not specifically so identified in his Net Family Property Statement it appears to be common ground that the reference to a $2,000.00 line item for the Respondent on date of marriage refers to a Rolex watch.

[182] The Applicant submits that the Respondent has not provided any evidence of the value of any contents owned on the date of marriage and he has thus failed to satisfy his evidentiary burden and thus the claim should not be accepted.

[183] The Respondent submits that the Rolex watch had been given to him by his father and hence is subject to exclusion from his net family property. Exhibit 217 is an email exchange between the parties date July 28, 2011. In that email, the Respondent expresses gratitude to the Applicant for returning his Rolex watch that she took "because it has sentimental value to me". The Applicant replied: "I know".

[184] The Respondent gave some evidence regarding the issue of the Rolex watch but only as to issues of possession and ownership, not value. On the issue of ownership I am satisfied that the Rolex watch was a gift from the Respondent's father to the Respondent and that it was owned by the Respondent on dates of marriage and separation.

[185] Regarding the Hublot watch, the Respondent submits that no evidence was led by the Applicant to establish that the watch was obtained by the Respondent prior to separation. The watch was not subject to any of the requisition letters provided by Applicant's counsel. The Respondent was not cross-examined on the point. There is no evidence that the Respondent owned this watch on the date of marriage or separation or any value for the watch in any event. Therefore no value will be ascribed to the Respondent for this item at either dates of marriage or separation.

Preliminary Conclusion re Equalization

[186] Therefore I conclude on a preliminary basis that the parties' respective Net Family Properties and equalizing payment owing to the Applicant by the Respondent is

$1,085,154.64, calculated as set out in Schedule "A". My conclusion is "preliminary" given the issue of Unequal Division raised by the Applicant.

Unequal Division of Net Family Properties

Positions of the Parties

[187] The Applicant's position on these issues may be summarized as follows:

(a) There is no way to know whether all of the Respondent's assets and income have now been uncovered. Given his pattern of conduct, it is more likely than not that he still has hidden assets.

(b) Section 5(6) of the *Family Law Act* provides that the court may award an amount that is more than half the difference between the net family properties of the parties if the court is of the opinion that equalizing the net family properties would be unconscionable having regard to a number of factors including "…any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property".

(c) In the present case, the fact that the Respondent attempted to dispose of his property by placing investments, bank accounts, real property and shares in his mother's name, is unconscionable. If the court holds that these were all "gifts" to the Respondent's mother, then it would be appropriate to grant the Applicant an unequal division of net family property given the extent to which the Respondent depleted his assets.

(d) The Comparison of Net Family Properties (Exhibit 120) was revised based on evidence uncovered at trial and was provided with the Applicant's written submissions. It calculates the Applicant's entitlement to an equalizing payment from the Respondent of $1,258,394.94, assuming the Applicant retains ownership of the matrimonial home and the remaining proceeds of sale. This calculation also presumes value of the Respondent's home theatre system of $172,440.00 rather than sale thereof with the proceeds being divided between the parties.

[188] In addition to the above, the Applicant submits that she should be entitled to the entire net proceeds of sale of the matrimonial home, 379 Paradelle Drive. I have already addressed the issue of ownership of the matrimonial home above, concluding that it was jointly owned on date of separation and until sale thereafter. The balance of the net proceeds of sale of the matrimonial home which are being held in trust by the Applicant's solicitor should be released to her it is submitted. The balance as of January 27, 2017 is $304,652.32.

[189] The Respondent's position on these issues may be summarized as follows:

(a) The Respondent, at the time of trial, had "come clean" with respect to disclosure. He had been overwhelmed by the financial burden of the interim support order and went into "panic mode" when he hid assets post-separation in his mother's name.

(b) Transfers of assets into his mother's name prior to separation were gifts, including 22 Wolfson. The improvements to 22 Wolfson paid for by the Respondent cannot represent a depletion of his net family property as the evidence supports the conclusion that such were initiated after separation.

(c) The Applicant cannot pursue her claimed relief for an unequal division of net family properties as such was never claimed in her application.

Analysis

[190] Section 5 of the *Family Law Act* establishes a spouse's entitlement to equalization in the following terms:

> 5. (1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them. R.S.O. 1990, c. F.3, s. 5 (1)…
>
> 5. (6) The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,
>
> (a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
>
> (b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
>
> (c) the part of a spouse's net family property that consists of gifts made by the other spouse;
>
> (d) a spouse's intentional or reckless depletion of his or her net family property;
>
> (e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;

(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;

(g) a written agreement between the spouses that is not a domestic contract; or

(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property. R.S.O. 1990, c. F.3, s. 5 (6).

5. (7) The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6). R.S.O. 1990, c. F.3, s. 5 (7).

[191] In *Colquhoun v. Colquhoun,* [2007] O.J. 9 (SCJ) at paragraph 11, the court identified the following steps in determining a spouse's rights under Part 1 of the *Family Law Act:*

(a) The court must establish the net family property of each spouse.

(b) The court must determine whether one spouse's net family property is less than one half of the difference between them.

(c) "The court must decide whether it would be unconscionable (per s.5(6) of the *Family Law Act*) to equalize the net family properties. If so, the court may make an award that is more or less than half of the difference between the net family properties. If not, the net family properties are equalized…The obligation and onus to satisfy the court as to income and the value of assets and debts is on the person whose income or asset or debt is called into question. This obligation exists prior to any court orders, conferences or court attendances."

[192] In *Blaney v. Blaney,* [2012] ONSC 1777 at para 29 – 31 Czutrin J. stated:

"References to production of voluminous disclosure being made by the husband fail to answer whether the necessary, relevant, complete disclosures for income and valuation purposes to meet disclosure obligations have been made.

This process should have been undertaken by him soon after January 1, 2010. Had he done so, the need for motions, repeated attendances may

> have been avoided and the initial case conference may have been achieved more."

[193] A party's assets, debts and liabilities must be properly valued. If necessary, all supporting documentation must be disclosed. A realistic value must be provided and, if such cannot be readily ascertained, an independent evaluation must be obtained. Failure to provide such credible evidence may result in the court assigning a value less advantageous to that party (see *Conway v. Conway*, [2005] OJ 1698 (SCJ) at paras 13 – 15).

[194] I am not in the circumstances before me inclined to grant relief as submitted by the Applicant. Section 5(6) of the *Family Law Act* established the test of unconscionability to trigger unequal division. This is a very high threshold. While the Applicant submits there is no way of knowing whether all of the Respondent's assets and income have now been disclosed, neither is there evidence to suggest that further significant assets remain unrevealed. There is no doubting the Respondent has not been diligent in disclosure and that he has actively concealed assets; as a result, I have scrutinized his evidence very carefully. He presented as a man unwillingly held to account, and he did so reluctantly and imperfectly. The Respondent's conduct certainly entitles me to draw adverse inferences against him, but such must be reasonable inferences arising naturally from the evidence and better than speculation. On the evidence before me I am not prepared to treat the prospect of the Respondent having yet more undisclosed assets as anything better than speculation, despite the Respondent's concerning disclosure history.

[195] Certainly it can be said that hiding the assets of the Respondent in the name of a third party in order to defeat the Applicant's claim in whole or in part is unconscionable; however, unequal division is not a remedy for unconscionable conduct; rather, it is a remedy for circumstances where equalization is unconscionable having regard to the considerations outlined in s. 5(6). Any unconscionability occasioned by the Respondent having attempted to put assets out of the Applicant's reach has been addressed by putting those assets within reach, as has been achieved here, although with unnecessary and avoidable cost and effort for the Applicant. The more appropriate remedy for the Respondent's conduct may be that of costs.

[196] Furthermore, the Applicant's claim for unequal division of Net Family Properties is a substantive claim and procedural fairness dictates that notice of such claim must be given to an opposing party so that such party knows the case he must meet. The Application did not include a claim for unequal division. This claim is not referenced in the Trial Scheduling Endorsement. A claim for an unequal division of net family property is antithetical to an equal division which is the foundation of equalization. In my view this too is fatal to her efforts to seek same now (see *Taylor v. Taylor*, [2004] O.J. 4802 (Ont SCJ)).

[197] Therefore, on either basis, I would dismiss the Applicant's claim for unequal division.

[198] For these reasons, the Applicant is entitled to the equalization payment calculated as set out in Schedule A, and her claim for an unequal division is dismissed.

Respondent's Income for Child Support Purposes

Positions of the Parties

[199] During the trial the parties filed Exhibit 119 ("Calculation of [Respondent's] 2011 to Projected 2015 Income Pursuant to the *Federal Child Support Guidelines* Pre-2016"). It is a chart showing the calculations of income for the Respondent for the years 2011 through 2015. The forensic accountants (Melanie Russell on behalf of the Respondent and Steve Ranot on behalf of the Applicant), agreed upon the numbers. The chart presents four scenarios:

(a) Scenario 1 shows the income excluding Helen's interest in co-tenancies and the capital loss that occurred in 2014.

(b) Scenario 2 shows the income excluding Helen's interest in the co-tenancies and treating the capital loss as zero.

(c) Scenario 3 includes Helen's interest in the co-tenancies and the capital loss that occurred in 2014.

(d) Scenario 4 includes Helen's interest in co-tenancies and treats the capital loss as zero.

[200] The numbers are summarized as follows:

Scenario #	Description	Projected 2015	2014	2013	2012	2011
1	Income excluding Helen's interest in co-tenancies	$557,437	($2,663,350)	$5,931,548	$76,572	($490,807)
2	Scenario 1, if negative income treated as nil	$557,437	$0	$5,931,548	$76,572	$0
3	Income including Helen's interest in co-tenancies	$552,264	($2,676,400)	$5,998,203	$117,943	($453,839)
4	Scenario 3, if negative income treated as nil	$552,264	$0	$5,998,203	$117,943	$0

[201] The Applicant submits that child support should be determined based on Scenario 4 of Exhibit 281 including a "double dip". If income is averaged over the three year period, the Respondent's income for child support purposes going forward would be $2,266,822.00. If averaged over five years, it would be $1,486,533.00. The numbers are summarized by the Applicant as follows:

Scenario #	Description	Projected 2015	2014	2013	2012	2011
1	Income excluding Helen's interest in co-tenancies	$743,437	($2,598,350)	$5,995,548	$76,572	$477,283
2	Scenario 1, if negative income treated as nil	$743,437	$0	$5,995,548	$76,572	$477,283
3	Income including Helen's interest in co-tenancies	$738,264	($2,611,400)	$6,062,203	$117,943	$514,251
4	Scenario 3, if negative income treated as nil	$738,264	$0	$6,062,203	$117,943	$514,251

[202] The Respondent submits that for the period 2011 to 2015 his income for child support purposes is consistent with Scenario #2 in Exhibit 119. For 2016 he says his income is $133,995 and for 2017 is $199,000. No income ought to be imputed to him, it is submitted.

Should Income be Imputed to the Respondent?

[203] The Applicant bears the onus of establishing a basis for imputing income to the Respondent.

[204] The Applicant advances the following submissions in respect of imputation of income to the Respondent:

(a) Section 19(1) of the *Child Support Guidelines* gives the court discretion to impute such income to a spouse as it considers appropriate in the circumstances. While there is no express provision that addresses the imputation of income for spousal support, the courts have imputed income in numerous cases for spousal support purposes. The *Spousal Support Advisory Guidelines* also refer to imputing income along the lines of the *Child Support Guidelines*.

(b) The failure to make full and complete disclosure is a factor that is of significant concern when assessing the appropriate quantum of support. A payor who fails to make proper disclosure of his or her income runs the risk that income will be attributed to him – accurately or otherwise.

(c) While the onus is on a party seeking to have income imputed to establish the grounds for this request, this onus must be balanced with the payor's obligation to disclose all information relevant to his or her position, which includes full and frank disclosure of all information required to properly assess his or her income, incoming earning potential, and efforts made to maximize earnings. Where a party fails to provide full financial disclosure, the court is entitled to draw an adverse inference and to impute income.

(d) The Respondent has stonewalled disclosure for years and has still not provided full and frank disclosure. The Respondent has not been truthful in his financial statements and has hidden assets and income sources. The Respondent's conduct has made it impossible to determine his true income for support purposes. The Respondent's expert completed her updated schedules based on misleading and incomplete information provided to her by the Respondent.

[205] The Applicant further submits that income should be imputed to the Respondent based upon his success as a businessman and entrepreneur and his lifestyle. In this regard she submits:

(a) Where there are no other accurate indicators of income, the court has looked at the cost of the payor's lifestyle and imputed income based on that assessment (see *Reyes v. Rollo,* [2001] O.J. 5110 (SCJ) at para 62).

(b) If a payor's lifestyle and or disclosed expenses are incompatible with disclosed income it is a red flag that will encourage a judge to draw an adverse inference (see *McLean v. Vassell,* [2004] O.J. 3036 (SCJ) at para 22).

(c) The Court should examine the lifestyles of the parties to determine what income should be imputed. Although lifestyle is not categorically a type of income, with regard to imputing income a payor's lifestyle often will be relevant (see *Bak v. Dobell,* [2007] CarswellOnt 2324 (CAN) at para 41).

(d) The Respondent has failed to provide all relevant disclosure, he has underutilized his capital, he is intentionally under employed and he lives a lifestyle that is far beyond the lifestyle that could be supported on his stated income. An income must be imputed to the Respondent.

[206] The Applicant further submits that the Respondent is not reasonably utilizing his capital. In this regard she submits as follows:

(a) Pursuant to s. 19(1)(e) of the *Child Support Guidelines* the court may impute such amount of income to a spouse as it considers appropriate where the spousal property is not reasonably utilized to generate income. The

Respondent has not reasonably utilized his Keek warrants, and an income should be imputed to him.

(b) In making an order for support, the court is required to consider the condition, means, needs and other circumstances of each spouse. "Means" are not limited to income (see *Jackson v. Jackson*, [1997] CarswellOnt 4717 at para 22).

(c) It is trite law that income may be imputed where a payor has not reasonably utilized stock options/warrants to generate income. The Respondent owns 700,000 Keek warrants which are excercisable at a price of $0.30 per warrant at any time before March 28, 2017. At November 22, 2016 this stock was trading at $2.10 per share. The Respondent has not reasonably utilized his warrants to generate income. He is intentionally delaying the exercise of these warrants in an attempt to deny appropriate support to the Applicant and the children. An income should be imputed to him accordingly, it is submitted.

[207] The Applicant further submits that the Respondent is intentionally under-employed. In this regard she submits as follows:

(a) If it is the Respondent's position that his income is $199,000.00 (per trial Exhibit 276) for support purposes going forward, this figure is inaccurate and not supported by the facts.

(b) Section 19(1)(a) of the *Child Support Guidelines* allows the court to impute income to a spouse who is intentionally under-employed or unemployed.

(c) Prior to imputing income to a party under s.19(1)(a) a court must undertake the three part analysis set out in *Drygala v. Pauli,* [2002] 61 O.R. 3d 711 ONCA:

(i) Is the spouse intentionally underemployed or unemployed?

(ii) If so, is there intentional underemployment or unemployment required by virtue of the needs of a child of the marriage or any child under the age of majority?

(iii) If the answer to question "b" is no, what income is appropriately imputed in the circumstances?

(d) A spouse will be found to be intentionally under-employed if he adheres to a career path that permits payment of support at a level inadequate to cover the needs of dependents in the face of an ability or capacity to earn more (see *L(N) v. P(B),* [2000] CarswellOnt 2487 SCJ).

(e) The Respondent is intentionally under employed; this underemployment is not required by virtue of the Respondent's parenting responsibilities. The Respondent's dependants should not bear the consequences of the Respondent's negative decisions.

[208] It is the Respondent's position that there is no basis to impute income to him.

Analysis

[209] I note that the court is given broad discretion under s.19(1) to "impute such amount of income…as it considers appropriate in the circumstances…", with those circumstances including, non-exhaustively, those that follow thereafter.

[210] The Respondent testified regarding how he earns income. Essentially he conducts research pertaining to various possible investments. Sometimes this research takes months. Even after months of research the Respondent may conclude that the investment is not worthy of pursuit. If he concludes it is worthy of pursuit he tries to raise financing or capital. Where an investment is made it can take years to realize a profit or incur a loss. The Respondent presented voluminous documentary evidence representing various projects on which he had been working in 2016. He said there were about 20 such projects. He testified that he expended about 40 hours per week in this regard. Sometimes he will receive the "go-ahead" to prepare a formal business plan. He provides the out-of-pocket expenses. A consulting agreement will then be entered into with the company. The Respondent receives income if he can bring enhanced value to the company. He testified that he had not generated any income from these projects in 2016.

[211] The Respondent has given both the Applicant and the court good reason to consider his evidence with care, particularly on financial issues; for example:

(a) It has been agreed by the experts that in 2013 the Respondent's income was $5.9 million. In mid-2013 he took the position on a motion for leave to appeal the temporary support order of January 11, 2013 that his income was $140,000.

(b) He filed 3 financial statements in 2015, all describing his income in that year as $371,208. It has been agreed by the experts that his 2015 income was between $552,264 and $557,437.

(c) In his Financial Statement sworn April 10, 2015 he claimed his net worth to be only $289,583, dramatically less than reality (which, according to his most recent Financial Statement is $2.8 million).

(d) Not until his Financial Statement sworn May 11, 2016 did the Respondent acknowledge his ownership of the property in Greece. He had previously stated under oath that it was owned by his mother.

(e) Not until his Financial Statement sworn April 10, 2015 did the Respondent acknowledge his interest in Lucosta Investments Inc.

(f) Not until his Financial Statement sworn May 11, 2016 did the Respondent acknowledge the assets owned beneficially by Lucosta but registered in Helen Colivas' name.

[212] Despite the strong basis for a cautious consideration of the Respondent's evidence, and while the Applicant understandably harbours misgivings as to the veracity and reliability of this evidence, the Applicant is not in a position to meaningfully contradict the Respondent's evidence about how he goes about earning a living; further, the Respondent's evidence on this point is corroborated by documentary evidence of his business research and plans and to an extent by testimony from Mark Gross, one of the Respondent's business associates. Accordingly I accept the Respondent's general description of the means by which he earns his income. I am also satisfied that he is not deliberately under-employed and that he expends reasonable efforts in pursuit of income through market research and so on. I also find that the demands of this litigation have served to restrict the time available to the Respondent to pursue income. In this regard I note the Applicant referenced in her evidence the demands of this litigation upon her time in defence of the assertion that she was underemployed. There can be little doubt that the Respondent's more complex circumstances have resulted in a greater expenditure of time.

[213] The Applicant references the Respondent's Keek warrants in support of her position that he is under-utilising capital to generate income. The warrants must be exercised by March 31, 2017 (a deadline that passed after evidence concluded). He has 700,000 warrants, the income-generating potential of which is dependent upon the price of the stock when exercised. The Respondent does not need to exercise all the warrants at the same time, and there is a requirement to pay $0.30 per share when redeeming. There was evidence at trial that these stocks were then trading at $2.10 per share. The cost of redemption is $210,000 (i.e. 700,000 shares at $.030 per share) resulting in a potential net profit of $1.26 million (i.e. 700,000 x $2.10) – 210,000 =$1,260,000).

[214] The Respondent submits that Ms. Russell determined that it would be incorrect to include the Respondent's 700,000.00 Keek warrants in his 2016 income for many reasons, including uncertainty regarding value at time of redemption, the Respondent's inability to afford the funds required to trigger redemption and the fact that such cannot be exercised en masse without driving down the value of the shares.

[215] While there are elements of uncertainty regarding the Keek warrants as a possible source of income for the Respondent, I find them not so uncertain as to preclude consideration in determining whether to inpute an appropriate level of income to the Respondent going

forward. Due to the elements of uncertainty (i.e. the value of the stock when the warrants are exercised and the availability of funds to trigger redemption) the influence of this factor in my determination of the Respondent's income will necessarily be more broad than specific, however, some guidance can be gleaned from more specific considerations. For example, it might be reasonable to expect the Respondent to redeem one-fifth (140,000) of his Keek shares each year. This would cost $42,000 (i.e. 140,000 at $0.30 per share). Assuming $2.10 per share, this would yield a return of $252,000 (140,000 x $2.10 less $42,000 cost of redemption). This presumes availability to the Respondent of resources to fund the redemption. Given the reasons outlined above regarding the Respondent's credibility and the reliability of his evidence, I do not accept his protests as to his inability to secure the funds necessary to exercise the Keek warrants in this general fashion. I therefore conclude that in this respect the Respondent is under-utilizing capital to generate income.

[216] The Applicant further submits that income should be imputed to the Respondent based upon his lifestyle. In this regard she submits:

(a) Where there are no other accurate indicators of income, the court has looked at the cost of the payor's lifestyle and imputed income based on that assessment (see *Reyes v. Rollo,* [2001] O.J. 5110 (SCJ) at para 62).

(b) If a payor's lifestyle and or disclosed expenses are incompatible with disclosed income it is a red flag that will encourage a judge to draw an adverse inference (see *McLean v. Vassell,* [2004] O.J. 3036 (SCJ) at para 22) .

(c) The Court should examine the lifestyles of the parties to determine what income should be imputed. Although lifestyle is not categorically a type of income, with regard to imputing income a payor's lifestyle often will be relevant (see *Bak v. Dobell,* [2007] CarswellOnt 2324 OCA at para 41).

(d) The Respondent has failed to provide all relevant disclosure, he has underutilized his capital, he is intentionally under employed and he lives a lifestyle that is far beyond the lifestyle that could be supported on his stated income. An income must be imputed to the Respondent.

(e) In his Financial Statement sworn May 11, 2016 the Respondent deposed his income was $20,833.00/month, annualizing to $250,000.00. Some notable monthly expenses include:

(i) $1,200 Meals outside the home

(ii) $352 Car insurance and licence for 2000 Porshe and Range Rover

(iii) $1,869 Loan or lease re above vehicles

(iv) $3152 Country Day School fees

(v) $4,500 Legal fees

(vi) $2,500 Accounting fees

(vii) $4,200 Professional fees (expert reports)

(f) The Respondent's expenses total $45,231.00/month. He deposed that his total debt at separation in 2011 was $2,016,546.00 compared to $2,729,387.00 in May, 2016 (a difference of $712,841.00). The higher debt load is almost entirely made up of alleged post-separation debts owing to Lucosta ($456,398.00) and his mother Helen ($314,000.00), neither of which has been proven with documentary evidence at trial.

(g) The Respondent says his income for 2016 was $133,995 and for 2017 it will be $199,000.00. These incomes are not consistent with his lifestyle.

(h) The Respondent travels regularly to Miami and Greece, usually with a companion. Between November 2015 and November 2016 he went to Greece for 2 weeks and brought a friend with him. He also traveled to Miami about 8 times, bringing a companion at least once. He pays for his companion's travel. He spends a significant amount of time out of the country and testified of his plan to conduct business out of Florida, describing his time there as a "lifestyle choice". At the same time he maintains he is renting his College Street condo at a loss to a friend.

(i) In the absence of other reliable indicators of income, the court has looked at the cost of a payor's lifestyle and imputed income based on that assessment (see *Reyes v. Rollo*, [2001] O.J. No. 5110 (S.C.J.)).

(j) If a payor's lifestyle and/or disclosed expenses are incompatible with disclosed income it is a red flag that will encourage the court to draw an adverse inference (see *McLean v. Vassell*, [2004] O.J. No. 3036 (S.C.J.)).

(k) The court should examine the lifestyles of the parties to determine what income should be imputed. Although lifestyle is not categorically a type of income, with regard to imputing income "…a payor's lifestyle often will be relevant to whether a court may impute income under s.19(1) of the CSG…In such a case, the recipient who calls evidence of the payor's lifestyle will ask the court to draw the reasonable inference that the payor must have a greater income than he or she has disclosed." (see *Bak v. Dobell*, 2007 CarswellOnt 2324 (C.A.)).

(l) The Respondent testified: "I'm not saying I don't live a good lifestyle, but it's not the Rich and Famous."

[217] There can be no avoiding the conclusion that the Respondent enjoys a luxurious lifestyle. He travels extensively and enjoys the amenities of someone with ready access to resources. Apart from the allegation of intentional under-employment, I agree with the Applicant's submissions summarized above.

[218] The Respondent in his submissions proposes that his income be treated as $133,995 for child support in 2016 and $199,000 in 2017; however, the Respondent's evidence regarding his spending on the children, his other significant monthly expenses set out in his financial statements, his failure to adequately prove his increased debt and the relation thereof to his expenses, all while maintaining his acknowledged lifestyle, all leads me to conclude that his income is likely greater than he would urge me to accept. His history of understating his income serves to support this conclusion.

[219] Again, this is a broad observation in reaction to the whole of the evidence and one to which it is difficult to ascribe a specific numeric value. Suffice to say that my conclusions regarding the Respondent's income for ongoing support purposes will reflect these findings.

Should the Co-Tenancies Income be Included in Respondent's Income?

[220] The Applicant submits that the interest of Helen Colivas in the co-tenancies[1] should be included in the Respondent's income for support purposes. It is submitted that the Respondent is the true owner of Helen Colivas' interest in the co-tenancies and therefore income generated from these assets should be treated as the Respondent's income for support purposes, just as referral fees have been treated as his income.

[221] The Respondent submits that the co-tenancies are not his assets and therefore any income therefrom should not be imputed to him.

[222] I have already concluded that the Walker's Line and 14th Avenue co-tenancies are not the property of the Respondent for equalization purposes.

[223] I agree with the Respondent's submissions. The evidence on this issue is consistent with Helen Colivas' ownership of these co-tenancies. Given the documentary trail drawing me to this conclusion I am not distracted by the earlier stated concerns regarding the Respondent's credibility and reliability of his evidence, notwithstanding his demonstrated readiness to conceal his assets in his mother's name. I am satisfied on the whole of the evidence that such did not occur in relation to the co-tenancies in question.

[224] I therefore conclude that income from the co-tenancies is not the income of the Respondent for support purposes.

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[1] That is, Walkers Line and 14th Avenue

How Should Capital Losses be Treated in Determining Income?

[225] The Applicant submits that the Respondent's "negative income" should be treated as "nil". In this regard she refers to s.18(1)(a) and (b) of the *Federal Child Support Guidelines* which provides as follows:

> 18. (1) Where a parent or spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the parent's or spouse's annual income as determined under section 16 does not fairly reflect all the money available to the parent or spouse for the payment of child support, the court may consider the situations described in section 17 and determine the parent's or spouse's annual income to include,
>
> (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
>
> (b) an amount commensurate with the services that the parent or spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

[226] In this regard the Applicant submits that as s.18(1)(a) of the *Child Support Guidelines* refers to "pre-tax income" of the Corporation, this does not allow the court to consider "pre-tax losses". It is submitted that loss years must be treated as "nil" in the calculation of the Respondent's average income for the past three years. In this regard the Applicant refers to *Thompson v. Thompson*, [2013] ONSC 5500 at para 89 where Chappel J. observes: "It is important to emphasize that section 18(1) refers to the corporation's 'pre-tax income'…"

[227] Regarding whether losses are to be treated as zero the Respondent submits that it would be a "gross injustice" to accept this proposition for the following reasons:

(a) The Respondent suffered a "catastrophic loss" in 2014 (i.e. -$2,663,350.00). In 2011, the Respondent's and Helen Colivas' collective losses were ($490,807.00).

(b) These are actual cash losses, not depreciation or some other accounting technique.

(c) These losses arose from trading the same penny stocks that resulted in huge gains in 2014.

(d) In 2013 to 2014 the Respondent's business was investing in the stock market. Rather than pull out all of his stock market earnings from 2013, he decided to keep these earnings invested in 2014, basically utilizing a compounding approach. The court can take judicial notice that in the long run the stock

market has gone up, so the Respondent made a rational decision, without the benefit of hindsight. Application of Mr. Ranot's logic results in the Respondent minimizing his income earning ability.

(e) It is "Monday morning quarterbacking" years after the fact to second guess the Respondent that he should have pulled out all Lucosta pre-tax corporate income at the end of 2013.

(f) Mr. Ranot's argument essentially places 100% of the risk on the support payor and none on the support recipient. This is because the support recipient shares in all gains but is absolved from all losses.

(g) Mr. Ranot's argument is grossly artificial because he treats persons who have had dramatically different results in an identical manner. Mr. Ranot makes no distinction between someone like the Respondent who lost $2,600,000.00 in a particular year and a person who lost $1.00 in the same year. That is irrational and is in direct conflict with s.1(d) of the Child Support Guidelines "to ensure consistent treatment of spouses and children who are under similar circumstances."

(h) Most significantly, Mr. Ranot himself has written on this very topic (Exhibit 127, being Mr. Ranot's article entitled "Capital Losses and the *Child Support Guidelines"*) and concluded that it is "inequitable" not to treat capital losses for what they are: actual losses.

(i) It is entirely appropriate to adopt Melanie Russell's approach of holding back the pre-tax corporate income in 2011 and 2013 which effectively takes account of the losses to achieve an equitable result.

[228] Neither party cites a case on point.

[229] The Respondent disputes Mr. Ranot's position that the pre-tax corporate losses cannot be applied in reduction of a payor's income for child support purposes. The Respondent refers to Mr. Ranot's conceded "personal opinion" that this result is "inequitable". It is submitted that Mr. Ranot is thus ignoring his duty as an expert to be fair, objective and non-partisan (see *Moore v. Getahun,* 2015 ONCA 55 (CanLII). I disagree. There is a distinction to be drawn between Mr. Ranot's opinion as to the application or effect of s.18(1)(a) of the Child Support Guidelines and his opinion as to the fairness thereof. These are two different, albeit related, subjects.

[230] The *Thompson* case cited by the Applicant does not assist as it sheds no light on the central question: What is income? *Black's Law Dictionary* defines "income" as "the return in money from one's business, labour, or capital invested; gains, profits, salary, wages, etc." It is "something of exchangeable value", "the true increase in amount of wealth which comes to a person during a period of time."

[231] These definitions are not sufficiently broad to include “losses” in my view.

[232] It would have been a simple matter for Parliament to make reference in s. 18(1)(a) of the *Child Support Guidelines* to “pre-tax income *or losses* of the corporation” in determining income; however, it did not do so. The inequity of the result may be set in stark relief on the facts of this case, but that does not give me licence to shoe-horn into this section a meaning which is not readily apparent on its face. This result is consistent with the definition of “income” referred to above and the plain meaning of the words used in the statute.

[233] I therefore conclude that pre-tax corporate losses cannot be considered in determining income under s. 18(1)(a) of the *Child Support Guidelines*.

Is "Double-Dipping" Appropriate?

[234] The Applicant submits that "double dipping" is appropriate in determining the Respondent's income for child support purposes. In this regard she submits as follows:

(a) There is no reason why an available source of income to fund child support should be excluded because of dealings between the parents and where child support was not being paid to increase the mother's lifestyle (see *Fraser v. Fraser*, [2013] ONCA 715 at para 10, in which the Court of Appeal was not persuaded that the payor had demonstrated that treating his RRSP withdrawal as income would not lead to the fairest determination of income.)

(b) The *Fraser* reasoning was applied in *Musgrave v. Musgrave,* [2014] ONSC 1367 at para 4 in which the payor argued that his employment severance payment should not be included in income for child support purposes. The court disagreed, concluding that these and comparable payments ought to be included in a payor's income for the purpose of determining the quantum of child support and that the weight of the jurisprudence, both in Ontario and other provinces, supports this conclusion.

(c) Child support is to benefit the children, not the recipient, so the "double dipping" that is a concern for the purpose of determining income for spousal support is not in play for child support purposes. The children are entitled to benefit from all of the Respondent's income.

[235] Regarding whether the court can "double dip" in determining a payor's income for child support purposes the Respondent submits as follows:

(a) On the very last day of trial, during cross-examination of Melanie Russel, counsel for the Applicant raised the notion that the Respondent's income "stipulated by the parties in Exhibit 119" actually is only in relation to spousal support, and so for child support, the Respondent's income ought to be higher "to allow for the double dip."

(b) The court should not countenance a litigation strategy of lying in wait until the last day of trial to raise this contrary meaning to Exhibit 119. At no point during Mr. Ranot's testimony was such a hidden meaning even hinted at. The caption of Exhibit 119 makes it clear that the incomes listed are for child support purposes.

(c) The Respondent's negative income for 2011 expressly carved out the value of property that was being equalized and was agreed upon. It would be unfair if on the last day of trial the Applicant could resile from that position.

(d) To allow this "duplicity" would be unfair and contrary to the court's previous evidentiary ruling concerning the Respondent's 2015 income; that is, the court ruled that Melanie Russell was estopped from revising the Respondent's stipulated 2015 income (i.e. as agreed to in the same Exhibit 119) to remove an unpaid shareholder's loan as income because Exhibit 119 was on consent, there were no rights reserved to make later changes Ms. Russell and Mr. Ranot had assumed it would be "T4ed" but during the summer recess the loan was in fact repaid when the Greek condo was transferred to Lucosta.

(e) Non-compensable prejudice arises to the Respondent if a second set of incomes is open for consideration by the court through Melanie Russell because counsel has been denied an opportunity to cross-examine the Applicant or Steve Ranot regarding how much money the Applicant is actually spending on the children (re disguised spousal support), the appropriateness of the double dip, to determine what sums she was actually spending on the children, and whether the stipulated incomes would have been agreed to by the experts in the first instances. The Applicant did not call reply evidence on which cross-examination could have occurred.

[236] Before further considering this issue, I intend to address the issue of procedural fairness raised by the Respondent. At the foundation of the Respondent's submissions is Exhibit 119, entitled "Calculation of [the Respondent's] 2011 to Projected 2015 Income Pursuant to the Federal Child Support Guidelines." It was tendered in evidence on consent of the parties as representing the consensus of the parties' respective experts regarding the Respondent's income for the stipulated years (subject to the years stipulated therein). The Exhibit itself makes it clear that the income figures are "…Pursuant to the Federal Child Support Guidelines." The consensus which Exhibit 119 represents was subject only to two areas of dispute; namely whether pre-tax corporate losses should be considered under s.18(1)(a) of the CSG and whether income from Helen Colivas' co-tenancies ought to be included in the Respondent's income. Apart from these issues it was the clear intention of the parties that Exhibit 119 be relied upon as evidence of the Respondent's income for the years 2011 to 2015 inclusive, for child support purposes.

[237] Acceding to the Applicant's submission that the Respondent's income for child support purposes for the years 2011 to 2015 inclusive should include possible "double-dipping" elements, while consistent with the reasoning in *Fraser* and *Musgrave*, would be unfair to the Respondent who has proceeded on the reasonable understanding that the income figures in Exhibit 119 represented a consensus on the evidence summarized therein. The Applicant's contrary position did not reveal itself until the end of the trial, well after the conclusion of evidence from witnesses who might reasonably be expected to have some more to say had this issue been identified earlier.

[238] But for the forgoing I would have accepted the Applicant's submission as to the possibility of so-called "double-dipping" when calculating a child support payor's

income, subject to "…the possibility that the facts of a particular situation could in theory reach the threshold of unfairness…" (see *Fraser*, supra, para. 103).

[239] Therefore, for the years 2011 to 2015 inclusive, the income figures set out in Scenario #2 of Exhibit 119 shall represent the Respondent's income in those years for child support purposes (Scenario #2 being that excluding the co-tenancies income and treating corporate losses as "zero").

What is the Respondent's "Go-Forward" Income for Child Support Purpose?

[240] The Applicant submits that the Respondent's income going forward should be determined by averaging over either a three or five year period. In this regard she refers to s.16 of the *Child Support Guidelines* which provides that, subject to s.17 to 20, a parent's or spouse's annual income is determined using the sources of income set out under the heading "total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

[241] Section 17(1) of the *Child Support Guidelines* provides as follows:

> 17. (1) If the court is of the opinion that the determination of a parent's or spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the parent's or spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years. O. Reg. 446/01, s. 5.

[242] The Applicant refers to several examples of cases of which three year averages were utilized (i.e. *Degrace v. Boissonnault,* [2010] NBBR 87, *Desrochers v. Tait,* [2008] CarswellOnt 4075, *M.H.G. v. D.J.G.,* [2006] BCJ 275 (SC) at para 29-30) and a five year average (see *Neilipovitz v. Neilipovitz*¸ [2014] ONSC 3889).

[243] Notably, s. 17(1) does not contemplate a 5 year averaging of income.

[244] The Applicant submits that that it is appropriate to impute to the Respondent an income based on his average over the last three years as not only did he produce inadequate evidence regarding his historical and current earnings, but this approach will create equity for both parties, smoothing out the highs and lows of the Respondent's income giving both parties finality without need for readjustment. In the alternative it is argued the court should have regard to the Respondent's income over the last five years to determine the amount that is fair and reasonable for support purposes.

[245] The Applicant submits that there is no compelling evidence regarding the Respondent's 2016 income. He did not provide an income report for 2016. The Respondent's 2015 income, based on trial Exhibit 119, is $557,437.00. Thus the Applicant argues that given the extent to which the Respondent's income fluctuates, the nature of his income, the

extent to which he is an investor in high risk ventures and his pattern of hiding income and assets, his last known income is not the fairest way to deal with support on a go forward basis.

[246] It is further submitted by the Applicant that the Respondent's income for support purposes should not be based on either of the "without prejudice draft" schedules (Exhibits 275 and 276) provided by Kalex (dated November 28, 2016) for the following reasons:

(a) As the schedules were produced on November 28, 2016, the 17th day of trial and more than six months after the Applicant had concluded her case, there was no opportunity for the Applicant to respond;

(b) The Kalex schedules are not a report. They are marked "without prejudice draft dated November 28, 2016 – for discussion purposes only – subject to change". The production of these schedules is directly in violation of the *Canadian Institute of Charter's Business Valuators Practice Bulletin 7* (Exhibit 279) and should be given no weight;

(c) There are serious questions relating to the completeness of the information. As was the case in *Blatherwick v. Blatherwick*, [2015] ONSC 2606 at para 361(a), 439 and 440, Ms. Russell relied heavily on information from the Respondent which cannot be relied upon to be complete or accurate. Ms. Russell's opinion regarding the Respondent's ongoing income is inconsistent with the Respondent's lifestyle and spending habits, and does not reflect a number of investments/ventures that the Respondent admitted during trial. The suggestion that the Respondent's income is $199,000.00 for support purposes going forward is simply unreasonable.

[247] The Respondent relies upon the evidence of Ms. Russell in support of his position that his income for child support purposes is $133,995 in 2016 and $199,000.00 for 2017. No averaging is sought.

[248] Regarding the Respondent's income for 2016, the Respondent submits as follows:

(a) Only Melanie Russell offered evidence on the Respondent's income for 2016 (Exhibit 275). Mr. Ranot was not called to give reply evidence. Ms. Russell concluded it was $133,995.00. Ms. Russell took into account all of Helen Colivas' referral fees for 2016.

(b) Melanie Russell thought it was reasonable to close the book on 2016 because Lucosta's year end was November 30, 2016 and there was only December to account for in terms of a full calendar year.

(c) As to timing of Ms. Russell's evidence on this issue, I ruled during trial that the evidence from Ms. Russell updating her earlier income report would be received subject to some stated limitations and the Applicant's right to call reply evidence on the issue if desired. The Applicant chose not to exercise this right and there was no request for adjournment; as a consequence her complaint that she had no opportunity to respond rings hollow.

Analysis

[249] The Applicant's argument that the schedules summarizing Melanie Russell's conclusions do not represent a "report" within the meaning of Rule 20.1 of the Family Law Rules has merit. Rule 20.1(9) requires the delivery of a "report" while Rule 20.1(10) sets out the required content of the report. The schedules prepared by Ms. Russell clearly do not qualify as a "report" under Rule 20.1.

[250] Another area of concern regarding Ms. Russell's evidence is its foundation. Ms. Russell has necessarily relied upon information provided by the Respondent in formulating her opinions. The Respondent has demonstrated a readiness to manipulate his financial circumstances to achieve a result more favourable to him. As a result there is another reason to attach little weight to this evidence.

[251] The result of these deficiencies is the minimal weight that I attach to the opinions on these issues summarized in the schedules.

[252] I am attaching little weight to the evidence of Ms. Russell summarized in Exhibits 275 and 276 due its unfair timing (on the 17th day of trial and after conclusion of the Applicant's evidence), the fact that the documents both indicate "WITHOUT PREJUDICE DRAFT…FOR DISCUSSION PURPOSES ONLY – SUBJECT TO CHANGE" (the presence which words undermines the reliability of the content of each document) and the fact that the Respondent himself is the primary source of information upon which Ms. Russell has relied, a source I have found to be dubious.

[253] It is common ground, and I am of the view, that the determination of the Respondent's income under s.16 would not be the fairest determination of that income; as a result, s.17(1) of the *Federal Child Support Guidelines* is potentially engaged. Thus I "…may have regard to the parent's or spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years."

[254] However, from the findings I have made regarding the Respondent's income for 2011 to 2015 it is abundantly clear that no pattern emerges from which to extrapolate a fair prediction of income; instead, dramatic fluctuation appears to have been the norm. This does not, in my view, form the foundation of a constructive application of s.17.

[255] I also note that the 2013 income of the Respondent represents a spike that is unlikely to recur. Similarly, the trough represented by his losses of $2.6 million in 2014 appears unlikely to recur, on the evidence available to me.

[256] In the result I come to a resolution of the issue as outlined below, one which I am confident will inspire roughly equal degrees of dissatisfaction from both parties. In the circumstance of this case, this may be the best test of the correctness of the result.

Conclusions re Income of the Respondent

[257] As indicated above I have concluded that corporate pre-tax losses and income from the co-tenancies are not to be accounted for in determining the Respondent's income; therefore his income as agreed by the parties' respective experts according to Scenario #2 of Exhibit 119 for child support purposes is as follows:

2011	$0
2012	$76,572
2013	$5,931,548
2014	$0
2015	$557,437

[258] I have broad discretion to impute income for both child and spousal support purposes in 2016 and 2017. The Respondent's evidence regarding his actual income is suspect due to his history of deceit in relation to his finances. I attach little weight to the evidence of Ms. Russell regarding the Respondent's income for child support purposes in 2016 and 2017 for reasons set out above, althought I nevertheless treat the Respondent as maintaining a position regarding his 2016 and 2017 income that is consistent with Ms. Russell's evidence. The Respondent had access to the Keek warrants as a possible source of revenue, in an uncertain amount. The Respondent's most recent Financial Statement from 1 year ago puts his income at $250,000. His yearly expenses were $542,772.00, with about $712,000.00 of arguably "new debt" compared to the date of separation, but that new debt was not proven with documentary evidence. The experts agreed, and I have found, that his income for 2015 was $557,437.00. Added to all of this is the Respondent's lifestyle which, on the evidence before me, is inconsistent with an income of $199,000.00. The Respondent's own evidence as to his income is suspect due to his history of deceit.

[259] In these circumstances it is impossible to feel confident in the result of the exercise. It will necessarily be imperfect.

[260] On the evidence before me I see no compelling reason to treat the Respondent's income as different in 2017 as compared to 2016.

[261] I am satisfied on the evidence of both parties regarding the enormous drain upon their time and energy imposed by this litigation. I have no doubt as to the negative impact of this litigation upon the ability of both parties to more fully pursue remunerative income-generating.

[262] In the circumstances I find the Respondent's income in 2016 and 2017 for child support purposes to be $450,000.00 per annum, an amount roughly commensurate with his lifestyle, the availability of the Keek warrants, and within sight of the most recent income year for which we have more reliable evidence (that is, 2015).

Applicant's Income for Support Purposes

The Parties' Positions

[263] The Applicant's position on this issue is summarized as follows:

(a) The Applicant is not intentionally unemployed. She has made reasonable choices, and has been unable to earn an income. She has been out of the work force since 2001 and has been the primary parent to the parties' two special needs children. At separation she remained in the matrimonial home with the children who were seven and four years old at the time. Since then the Applicant's full-time job has been being a parent to the children.

(b) The Applicant further argues that these proceedings were commenced in 2011 and over the past six years the Respondent has lied, hidden and divested himself of assets and stonewalled disclosure. There have been many Motions in this proceeding and the Respondent has been ordered to pay costs on seven occasions. In all of the circumstances the Applicant has been unable to earn an income.

(c) At most the Applicant submits income not exceeding $50,000.00 per annum might be imputed to her.

[264] The Respondent's position on this issue may be summarized as follows:

(a) Relying upon *Drygala v. Pauli*, [2002] OJ No. 3731 (CA) in relation to s.19(1)(a) of the *Child Support Guidelines*, "intentional underemployment" means a voluntary act. Further, "the parent required to pay is intentionally underemployed if that parent choses to earn less than he or she is capable of earning. That parent is intentionally unemployed when her or she chooses not to work when capable of earning an income."

(b) The Applicant must be imputed a teacher's salary. She adamantly refused to find employment in this field despite being fully qualified, young, able-bodied and with the children only half the time.

(c) The appropriate time for the Applicant to have restarted her career as a teacher was September 2011. The parties separated on June 20, 2011 so she had the rest of the summer to find employment. According to the evidence of Cristina Cassata the Applicant was fully qualified and licensed to teach anywhere in Ontario. The Applicant had kept her registration with the Ontario Teacher's College in good standing each year (see Exhibit 93).

(d) Even if September 2011 is too soon for the Applicant to have found a teaching position, Justice Boswell's temporary support Order was effective November 1, 2012. It was "practicable" for the Applicant to have secured a teaching job within two years of separation.

(e) Ms. Cassata testified that no refresher courses were required. Two years earlier, the Applicant had been keen to open her own Montessori School. She purposely refused to seek out a teaching job at separation so as to create "need" to obtain maximum support. Pursuant to s.15.2(6)(d) of the *Divorce Act* the Applicant has a statutory obligation to become self-sufficient as soon as practicable and she had the means to accomplish this immediately upon separation.

(f) Cross-examination of Ms. Cassata was limited to job availability for teachers in 2016, not at any time before then.

(g) The Respondent further submits that according to Ms. Cassata, the starting salary for a teacher at level A3 of the grid for September 2012 was $53,161.00 per year. The Applicant would likely qualify for at least A3 because according to her resume she has a four-year undergraduate degree (Exhibit 92 resume and Exhibit 258 Cuco Certification Chart. Mandatory raises each year yield minimum employment income assuming the Applicant did not take steps to achieve level A4).

(h) Mandatory raises each year yield minimum employment income according to the grid as follows:

2011 – not applicable

2012 – not applicable

2013 - $49,400.00

2014 - $54,209.00 (see Exhibit 260)

2015 - $58,040.00

2016 - $65,708.00

(i) The Applicant had TFSA income in 2012. It must be grossed up. The experts agreed that it was correct to gross up the Respondent's TFSA income and Steve Ranot admitted in cross-examination it would be equally appropriate to gross up the Applicant's TFSA income (see Exhibits 79 to 82, being the Macquarie statements from February to June 2012. These are the only statements the Applicant produced regarding TFSA. When asked to explain what happened to the money in cross-examination, the Applicant said that she "spent it".)

(j) The Respondent submits that the Applicant must be imputed with a teacher's salary effective September 2013. Also, the Applicant had TFSA income in 2012 of $48,865.00 which must be grossed up to $66,977.00. Further, when the Walkers' Line investment was sold she started receiving $875.00 per month for her share followed by a balloon payment at the end of $120,120.00 received in 2015. The sum of $120,120.00 is to be grossed up to $222,066.00 according to the Respondent.

(k) Adopting the foregoing approaches, the Applicant's income should be imputed as follows:

Year	**Teaching Income (imputed)**	**TFSA Income (actual)**	**Walkers' Line Income (actual)**	**Total Income**
2011	$49.400.00	Nil	$10,500.00	$59,900.00
2012	$53,161.00	$48,865 (grossed up to $66,977.00)	$10,500.00	$130,638.00
2013	$49,400.00	Nil	$10,500.00	$59,900.00
2014	$54,209.00	Nil	$10,500.00	$64,709.00
2015	$58,040.00	Nil	$120,120.00 (grossed up to $222,066.00)	$280,106.00
2016	$65,708.00	Nil		$65,708.00
2017	$69,542.00			$69,542.00
2018	$73,379.00			$73,379.00
2019	$77,212.00			$77,212.00

Evidence

[265] According to the Applicant's résumé she obtained her bachelor of business management in 1991 from Ryerson and Poly Technical Institute. She holds a diploma (2000 – 2001) from Panamerican Montessori Society. She holds a bachelor of education (2002 – 2003) from York University. She attended a home staging workshop in June 2013 through Humber College. She is a certified stager (October 2014) having obtained such certification from the Ultimate Stager Academy.

[266] The Applicant's employment history is summarized as follows:

(a) From 1992 to 1995 she was an account executive with Marion Marketing and Communications Inc.

(b) From 1995 to 1996 she was an account executive on a contract basis with Padulo Integrated Inc.

(c) From 1996 to 1997 she was an account executive on contract with Fidelity Investments Canada.

(d) From 1997 to 1998 she was an account manager on contract with the Henderson-Robb Group. This was a contract position that expired.

(e) She was then employed at Impact North Ad Agency as an account manager. She left in January 1999 following issues of sexual harassment.

(f) September 2001 to June 2002 she was a "full-time Casa teacher for bachelor of education internship – Trillium Montessori School".

(g) Throughout the period 1992 to 1998 she describes herself as a "marketing professional working in the advertising industry."

(h) For the period of 1998 to "present" she describes herself as a "stay home wife/mother".

(i) In October 2015 she incorporated "My House Stager Inc.". The business is not active.

[267] The Applicant testified she is spending too much time on the divorce.

[268] In cross-examination she was asked: "Did you not intend to be employed as a teacher?" After a lengthy non-responsive answer, she answered: "Perhaps".

[269] She confirmed that she paid her teacher union dues every year and that she "never said she didn't want to teach."

[270] She testified that the Respondent wanted her to stay home to care for the children and he did not encourage her to find employment. She succumbed to this and she was "very subservient and submissive". In cross-examination she was challenged that she was not submissive about signing a marriage contract without disclosure. She indicated that she could not have signed blindly to something that she did not understand. Regarding hiring her own lawyers to assist her with respect to the marriage contract negotiations, she testified that the Respondent had encouraged that. She also testified that she was "not submissive and subservient today." She did not clarify when she no longer felt "submissive and subservient."

[271] She was asked whether health, children and the Respondent not wanting her to find a job were the factors regarding her not finding employment. She answered: "Staying at home to care for the children was the expectation."

[272] She testified that even after the date of separation when the children were with her fifty percent of the time she still did not pursue employment because it would be very stressful to maintain a job and continue this litigation. The litigation is a "full-time job". She testified that she never said that she had "anxiety or trauma." She confirmed that she is in good standing with the Ontario Teacher's College. She stated that she wished to open a "staging company". There was no income from this yet. Time was an issue for her. She believed teaching jobs were scarce.

[273] She confirmed that she is qualified to teach kindergarten to grade six.

[274] She has not worked since Montessori School. She has been a full-time mother since Lucas was born in 2003.

[275] When presented in cross-examination with an email dated February 24, 2009 the Applicant acknowledged that she was considering opening a daycare in 2009 but that "it ended there". She testified that it would not have been good for her and the children.

[276] Further cross-examination revealed the following in relation to the prospect of opening a daycare:

(a) It was the Respondent who corresponded with the lawyer Sheldon Peddle on behalf of the Applicant in pursuit of various name searches for a possible business name;

(b) The Respondent exchanged email with the Applicant regarding possible names for the business;

(c) In an email dated February 26, 2009 she indicated that she was "planning to open a daycare by end of June." She was planning on "three classrooms at full capacity";

(d) The Respondent assisted her with the project. He helped her regarding “number crunching”.

(e) The project reached the point of searching for premises.

(f) A Realtor friend of the Respondent was enlisted to assist in finding space from which to operate the business. A floor plan was provided in this regard on March 3, 2009.

(g) In an email dated March 5, 2009 she wrote to the Regional Director of York Region of CT Workshop: "I am in the process of opening up a little school and I am very interested in working with you to incorporate programs that you see fit."

(h) In March 2009 she submitted a letter of intent in pursuit of licencing.

(i) In an email dated March 10, 2009 she wrote that she was "moving forward rather quickly with my plans to open a school for this September."

(j) While she was planning to open the school in September that was not realistic. It was a huge commitment. Licencing takes a year. She completely underestimated the time required. There was a flurry of activity up to March 10, 2009 and little thereafter.

(k) The Respondent had been helping with the numbers and the forms. The Respondent told her that the numbers for the particular location that had been scouted would not work but that was not the only reason that she did not proceed.

[277] Lucas had been identified as a child with special needs including speech challenges starting when he was two. He has been diagnosed with ADHD, anxiety disorder, OCD, Tourette's and with a learning disability and a processing disorder. Lucas started part-time at Montessori School in 2005. In 2009 he was in grade one at Country Day School. He is still there in grade seven. Lucas was delayed in his speech. The parties retained a private speech pathologist. Lucas is presently in grade seven at Country Day School which he commenced in grade one in 2009.

[278] Costa started at Country Day School in junior kindergarten in 2010. Costa too has special needs. A Psycho-Educational report flagged him with ADHD and a learning disability. The Respondent testified that the parties hired the nanny after Costa was born with the expectation that the Applicant could work. He testified that he was "absolutely supportive" of the Applicant attending Teacher's College and pursuing a career in teaching thereafter. This is consistent with the Applicant's evidence in part above.

[279] The Applicant was diagnosed with thyroid cancer in November 2010. She had surgery in March 2011.

[280] The Respondent notes that the Applicant's health never prevented her from attending meetings regarding the trust and marriage contract negotiations. The Respondent understood the Applicant's cancer to have been benign, her treatment "routine" and that there was a small chance of the cancer progressing to something serious.

[281] The parties hired a nanny (Madelyn Duyo) in April 2007. She worked for them until September 2009. Prior to that the parties had assistance from the Applicant's mother. The nanny was hired to assist with household tasks and with Lucas around the home.

[282] When the nanny was hired Lucas was in school full-time (junior kindergarten). At this point the Applicant still unable to get a job because she had a newborn and the nanny was a back-up. She still had household tasks, the children and her health as roadblocks to pursuing employment.

[283] Regarding Walker's Line, the Applicant testified that when it was sold she received $875 per month for her share followed by a balloon payment at the end, received in 2015 in the amount of $120,120.00.

[284] The Applicant has had no employment income since the date of separation. She has not tried to obtain a job. She has not sent out a résumé. Until 2016 she lived in the matrimonial home, 50 percent of the time with the children as the children are with the Respondent the balance of the time.

[285] The evidence of Christina Cassata, a school teacher with the York Region District School Broad and a Vice-President with the Ontario Secondary School Teachers' Federation is outlined in part in the summary of the Respondent's position summarized above. In addition, she testified that the Applicant, or anyone with the Applicant's qualifications, can teach at any primary public school in Ontario. She could not say how many teachers had been hired in the last 10 years or the number of applications made. She could not say how many supply teachers there are in York Region. She could not identify the percentage of unemployed teachers in Ontario. She could not say how many people had graduated with teaching degrees in the last 10 years.

[286] Both children have been attending school full-time since approximately September 2012 at which time Costa was five years old.

[287] The parties have been equally sharing care of their children since shortly after separation.

[288] The Applicant has tendered no medical evidence in support of any argument that she has been unable to pursue employment for medical reasons at any point, notwithstanding her diagnosis of and treatment for thyroid cancer well prior to separation.

[289] The Applicant is an extremely intelligent and articulate person. She made these qualities clear during her testimony.

Analysis

[290] There appears to be common ground that for child support purposes I may look beyond s.16 of the Federal Child Support Guidelines and consider imputing income to the Applicant. As with the Respondent's income, reference is made to s.19 of the Federal

Child Support Guidelines, which considerations can also offer guidance with respect to income determination for spousal support purposes.

[291] At this stage in my analysis I am considering only what income, if any, ought to be attributed to the Applicant. Section 19 of the *Federal Child Support Guidelines* authorizes the court to impute income to a spouse where appropriate in the circumstances, including those enumerated in s. 19(1), for the purposes of determining a spouse's income for child support purposes.

[292] The *Divorce Act*, under which the Applicant applies for an award of spousal support, makes no specific provision for determination of income for support purposes. Such is left to the discretion of the court, considering the factors and objectives outlined in the *Act*.

[293] Both parties reference *Drygala, supra*, which directs that, prior to imputing income to a party under s.19(1) of the Guidelines, a court must undertake the following three part analysis:

(a) Is the spouse intentionally underemployed or unemployed?

(b) If so, is there intentional underemployment or unemployment required by virtue of the needs of a child of the marriage or any child under the age of majority?

(c) If the answer to question b is negative, what income is appropriately imputed in the circumstances?

[294] In my view, the foregoing evidence outlining the Respondent's efforts to assist the Applicant in establishing a daycare are inconsistent with the Applicant's assertions that the Respondent expected her to stay home to care for the children and that she perceived that she was prevented by her household duties from seeking employment. I note in this regard that the parties had the benefit of a nanny from spring 2007 until fall 2009. Prior to that the parties had assistance from the Applicant's mother. The nanny was hired to assist with household tasks and with Lucas around the home.

[295] The Respondent has submitted that the *Divorce Act* imposes a duty upon separated spouses to pursue economic self-sufficiency within a reasonable period of time following separation, insofar as such is practicable. It is clear that such is not a "duty" of the recipient spouse but rather simply one factor amongst others to be taken into account in determining entitlement to and the appropriate level of support (see *Leskun v. Leskun,* [2006] SCJ 25 SCC).

[296] The Applicant is well educated. She is intelligent and articulate as amply demonstrated throughout her testimony. She has demonstrated ability in the workplace through her prior employment summarized in her resume. She is qualified to teach kindergarten to

grade six in Ontario. She has maintained her teacher's certification in Ontario. There is no medical evidence to support any suggestion that she is incapable of working for any reason. The children are both attending school full-time and have been since Costa commenced full-time kindergarten. From spring 2007 until fall 2009 the parties had the benefit of a nanny to assist with childcare.

[297] The Applicant, through her own efforts to pursue a daycare business in 2009, demonstrated a willingness to pursue her own source of income.

[298] The Applicant's own evidence is internally inconsistent regarding her assertion that the Respondent stood in the way of her pursuing employment and accordingly I reject this submission.

[299] The Applicant submits that participating in this litigation became a full-time occupation. At the same time, she has rejected the Respondent's similar assertions, even though time-consuming disclosure obligations borne by the Respondent have clearly far outstripped the disclosure obligations imposed upon the Applicant, by virtue of the complex nature of the Respondent's income and asset circumstances.

[300] In the circumstances I find that the Applicant is intentionally unemployed.

[301] The parties separated on June 20, 2011. It is not unreasonable to expect a party in the Applicant's circumstances to have secured full-time employment by September, 2013. I find that her intentional unemployment is not required by virtue of the needs of either child of the marriage.

[302] Given Ms. Cassata's inability to assist with the issue of job availability, I cannot necessarily conclude that full-time employment would have been immediately available to the Applicant through the relevant periods of time.

[303] At a minimum, it would be reasonably expected that the applicant could have secured employment on a part-time basis as a supply teacher commencing September 2013.

[304] The next question is what level of income to attribute to the Applicant. The best evidence I have in this regard is that provided by Ms. Cassata, tempered by the reality that I have no evidence as to the availability of any teaching positions in York Region available to the Applicant following separation. The Applicant herself must bear some responsibility for the dearth of evidence in this regard which results in part from her failure to apply herself to pursuit of gainful employment following separation, resulting in no evidence from the Applicant as to the availability of employment, or lack thereof.

[305] The Respondent, through the evidence of Ms. Cassata, provided the court with some evidence to support his submissions summarized above regarding levels of income to be imputed to the Applicant based upon her qualification as a teacher in the province of Ontario. There is also evidence about the number of schools within York Region where

the parties reside where the Applicant might be expected to have a possibility of securing a teaching position. Unfortunately, there was no evidence regarding the availability of positions of employment for the relevant timeframe, being from date of separation to the time of trial. I assign reduced weight to this evidence accordingly.

[306] It is difficult to estimate how much a supply teacher earns compared to a teacher employed on a full-time basis as I have not been provided evidence to consider in this regard.

[307] I am therefore going to apply what I consider to be a reasonable but necessarily arbitrary percentage of 60 percent in this regard.

[308] Ms. Cassata's evidence regarding the salary grid is uncontradicted and there is no reason not to accept same.

[309] I therefore find that the Applicant's imputed employment income commencing September 2013 is as follows:

(a) 2013 – 60% x 49,400 (per column A3 of the grid) = $29,640, rounded to $30,000

(b) 2014 – 60% x $54,209 (per column A3 of the grid) = $32,525, rounded to $32,500

(c) 2015 - By 2015 it is reasonable to expect the Applicant to have been successful in securing a full-time position and accordingly her income in 2015 from teaching will be $58,000 (rounded from the figure of $58,040 from the grid)

(d) 2016 - $62,000 (rounded from the figure of $61,877 from the grid)

(e) 2017 - $66,000 (rounded from the figure of $65,708 from the grid)

Conclusion

[310] Building upon the Applicant's TFSA and Walker's Line incomes referenced in the chart above, I make the following findings regarding the Applicant's income in the following years:

Year	Teaching Income (Imputed)	TFSA Income (Actual)	Walker's Line Income (Actual)	Total Income
(a) 2011	Nil	Nil	10,500	$10,500
(b) 2012	Nil	$66,977	$10,500	$77,477
(c) 2013	$30,000/year commencing September 1/13	Nil	$10,500	$10,500/year January 1/13 through August 31/13 $40,500 annualized commencing September 1/13
(d) 2014	$32,500	Nil	$10,500	$43,000
(e) 2015	$58,000	Nil	$222,066	$280,066
(f) 2016	$62,000	Nil	Nil	$62,000
(g) 2017	$66,000	Nil	Nil	$66,000

Child Support and Section 9

The Parties' Positions

[311] The Applicant submits that the Respondent should pay full set-off child support calculated in accordance with the *Child Support Guidelines* including his share of s. 7 expenses of the children. The Respondent submits that the increased costs of shared custody justify a reduction in the child support payable pursuant to s. 9 and *Contino v. Leonell-Contino* (2005), 3 S.C.R. 217 (SCC).

Analysis

[312] The objectives of the *Child Support Guidelines* are:

(a) To establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

(b) To reduce conflict and tension between spouses by making the calculation of child support orders more objective;

(c) To improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(d) To ensure consistent treatment of spouses and children who are in similar circumstances (see *Federal Child Support Guidelines*, s. 1).

[313] Section 3 of the *Child Support Guidelines* provides that table child support is presumptive. Where a child is under of age of majority, the amount of child support is the amount set out in the applicant table and the amount determined under s. 7.

[314] Where the payor has an income of over $150,000 per year, s. 4 of the *Child Support Guidelines* allows the court deviate from a strict application of the tables only if the court considers the corresponding amount of table child support to be inappropriate. The test is whether at some point, the amount generated by the tables is so in excess of the children's reasonable needs so as to no longer qualify as child support (see *Federal Child Support Guidelines* s. 4, *Turk v. Turk*, 2008 O.J. No. 397 (S.C.J.) at para. 48 and *D.B.S. v. S.R.G.*, 2006 S.C.C. 37 at para. 46 and *Francis v. Baker*, 1999 3 S.C.R. 250 at para. 41).

[315] Courts must have regard to the objectives of the *Divorce Act* and the *Child Support Guidelines*, and to the factors expressly listed in subsection 4(b)(ii) of the *Child Support Guidelines* in considering whether the presumption is rebutted. The legislative objectives are intended to ensure "that a divorce will affect the child as little as possible." A payor seeking an order different from the table amount bears the onus of rebutting the presumption of s. 3 of the *Child Support Guidelines*. The onus may only be rebutted with clear and compelling evidence that the table amount is inappropriate. The sheer size of the table amount is not by itself a reason not to apply the table amount (see *Francis*, supra, *Mudronja v. Mudronja*, 2014 ONSC 6217 at para. 154, *Simon v. Simon*, 1999 O.J. No. 4492 (Ont. C.A.) at paras. 31-32 and *Turk*, supra).

[316] The family's lifestyle and pattern of expenditure are also relevant and important considerations in determining appropriateness under s. 4 of the *Child Support Guidelines* (see *Federal Child Support Guidelines* s. 4, *Tauber v. Tauber*, 2001 2003 D.L.R. 4th, 168 (Ont. S.C.J.) at paras. 61 and 74, aff'd 2003 225 D.L.R. 4th 186 and *R. v. R.*, 2002 O.J. No. 1095 (C.A.) at para. 39).

[317] The Applicant submits the following summary offers examples as to how the courts have applied the *Child Support Guidelines* regarding high income payors:

Case Name	Income	Child Support Ordered	Percentage of Income (Monthly)	Table Amount Ordered [3]
Simon v. Simon	$1,400,000 (approximate)	$9,215 monthly	7.9% (approximate)	Yes
Desrochers v. Tail	$2,296,874 for 2007; $4,446,902 for 2008	$17,140 monthly for 2007; $33,051 monthly for 2008	8.9% for 2007; 9% for 2008.	Yes
Thomson v. Ludwick	$1,342,080	$16,150 monthly	14%	Yes
Pakka v. Nygard	$2,237,096	$15,091.54 monthly	8.1%	Yes
Tauber v. Tauber	$1,652,200	$11,173 monthly	8.1%	Yes
R. v. R.	$4,100,000	$36,000 monthly	10.5%	No
Smeets v. Seip	$4,959,979	$45,000 monthly	10.9%	No

[318] There is a consent final order dated April 11, 2016 regarding parenting pursuant to which the parties equally share custody of the two children of the marriage. In fact the parties have equally shared care and control since shortly following separation.

[319] Pursuant to s. 9 of the *Child Support Guidelines*, where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 percent of the time over the course of a year, the amount of the child support order must be determined by taking into account,

(a) The amounts set out in the applicable tables for each of the spouses;

(b) The increased costs of shared custody arrangements; and

(c) The conditions, means, needs and other circumstances of each spouse and of any child for whom child support is sought.

[320] In *Contino*, supra, the Supreme Court of Canada set out the following principles when dealing with cases under s. 9 of the *Child Support Guidelines*:

(a) Once the payor surpasses the 40 percent threshold, s. 9 creates a different method of determining child support in shared custody cases. There is no onus on the payor to convince the court to order a different amount than the table amount.

(b) There is no presumption of a reduction in the table amount for child support in s. 9 cases. A court may still order the full table amount after conducting the s. 9 analysis.

(c) There should be no mathematical formula or multipliers applied to s. 9 cases. In particular, the simple setoff only serves as a starting point under subsection 9(a) of the *Child Support Guidelines*, but it has no presumptive value.

(d) The court should consider all three factors in s. 9. None should necessarily prevail over the others.

(e) Section 9 of the *Child Support Guidelines* is broad enough to incorporate s. 7 *Guideline* expenses directly in the examination of child related expenses, and expenses can be considered that might not fit within s. 7.

[321] The Applicant submits that where both parents maintain equivalent accommodations for the children but there is a wide disparity in income between the mother and father, it is appropriate to maintain child support at the *Guidelines* level (see *Bond v. Bond*, [2006] O.J. No. 5205 (S.C.J.) aff'd 2008 ONCA 560).

[322] Regarding step number 1 of the *Contino* analysis (determine the setoff amount) the court is required to take into account the amounts set out in the applicable tables for each of the parents. As stated by the court at paras. 49 and 51:

> …the simple setoff serves as the starting point, but it cannot be the end of the enquiry. It has no presumptive value. Its true value is in bringing the court to focus first on the fact that both parents must make a contribution and that fixed and variable costs of each of them have to be measured before making adjustments to take into account increased costs attributable to joint custody and further adjustments needed to ensure that the final outcome is fair in light of the conditions, means, needs and other circumstances of each spouse and child for whom support is sought. Full consideration must be given to these last two factors. The cliff effect is only resolved if the court covers and regards the other criteria as set out in paragraphs (b) and (c) as equally important elements to determine the child support. …the court retains the discretion to modify the setoff amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the children as

> they move from one household to another, something which Parliament did not intend…

[323] A simple set-off approach based on my findings regarding the parties' incomes for child support purposes suggests the following differential payments owing in the following years:

Year	Applicant's Income and Base Payable by A	Respondent's Income and Base Payable by R	Set-off owing by the A/R	Totals
2011	$10,500/$0	$0/$0	$0	
2012	$77,477/$1,139	$76,572/$1,127	$12/mo A to R	$144 A to R
2013 A Jan. 1 to Aug. 31	$10,500/$0	$5,931,548/$67,922	$67,922/mo R to A	$543,376 R to A
2013 B Sept. 1 to Dec. 31	$40,500/$588	$5,931,548/$67,922	$67,334/mo R to A	$269,336 R to A
2014	$43,000/$630	$0/$0	$630/mo A to R	$7,560 A to R
2015	$280,066/$3,495	$557,437/$6,657	$3,162/mo R to A	$37,944 R to A
2016	$62,000/$921	$450,000/$5,432	$4,511/mo R to A	$54,132 R to A
2017	$66,000/$981	$450,000/$5,432	$4,451/mo R to A	$40,059 R to A (9 mos through Sept/17
				Total set-off amount owing $937,143 R to A through Sept/17

[324] Regarding Step 2 of the *Contino* analysis (determine the increased costs of the shared custody arrangement), the court must examine financial statements and/or child expense budgets to determine whether the shared custody arrangements have resulted in an increase in the total costs of providing for the children because of the duplication of fixed costs in providing two homes for the children.

[325] In this regard, the Applicant submits that the Respondent has not provided any evidence that he has increased costs due to the shared custody arrangement. He lives with his mother in a home registered in his mother's name, rent free. The Applicant has been required to purchase a home to accommodate the two children.

[326] The Respondent submits as follows regarding Step 2 of the *Contino* analysis:

(a) The parties have had shared custody since shortly after separation, on a week-about basis. The Respondent's bookkeeper, who testified, tabulated all sums paid by the Respondent towards the child, year over year (Exhibit 214). She testified that her entries were based strictly on credit card invoices and actual receipts.

(b) The Respondent's expenses in relation to the children are summarized as follows:

2011 - $21,619

2012 - $64,284

2013 - $37,800

2014 - $52,363

2015 - $55,198

2016 - $11,098

Total - $242,362

(c) The Applicant's expenses in this regard are summarized as follows:

2011 – nil

2012 – nil

2013 - $11,110

2014 - $33,741

2015 - $25,643

2016 - $6,556 (assuming contribution to Country Day School)

Total - $77,050

(d) The difference between the Applicant's and the Respondent's expenditures in this regard is $165,312, representing the surplus expended by the Respondent in comparison to that expended by the Applicant. The total such expenses of the parties is $319,412 (excluding shelter and other basic amenities).

(e) Exhibit 214, strictly relates to actual money spent directly on the children. It is not "watered down" to include gasoline spent on taking the children to their hockey.

(f) Since the table sums assume the access parent expends literally nothing on the children (see para. 36 in Contino) the difference between the parties' expenditures of $165,312 needs to be recognized in its entirety when considering 2013 and 2014.

(g) The children's standard of living is as good if not better with the Applicant than with the Respondent. The Respondent submits that for the majority of the children's time following separation their time with the Applicant was spent in the luxury matrimonial home. The Applicant's housing was superior to that offered by the Respondent, who lives in a "very nice home" owned by his mother, but not as "posh" as the matrimonial home. The children's housing was therefore superior while in the Applicant's care; consequently, the table amounts are less meaningful.

(h) It should also be kept in mind that the children have attended private school throughout. The actual costs of the children should not be conflated with a wealth transfer. Referring to the Applicant's Financial Statement sworn May 14, 2015, total annual expenses, including discretionary expenses, attributable to the children are $50,472 ($87,996 per year including fixed expenses or $7,333 per month). Carrying out a similar exercise for the Respondent's Financial Statement suggests total annual expenses including discretionary expenses attributable to the children of $29,928 ($34,512 per year including fixed expenses or $2,876 per month).

(i) Between the parties' respective households, total annual expenses, including discretionary expenses requested by the Applicant for the children are $122,508 (i.e. $87,996 + $34,512 = $122,508 per year or $10,209 per month). It is submitted that the court should put virtually no weight on the table amounts because they bear no relationship to not only the children's actual costs, but as importantly to the children's discretionary expenses. Therefore, it is likely appropriate to include some of the fixed costs associated with the children.

(j) In 2013 to 2014, the Respondent earned about 95 percent of the parties' total income. He should therefore be responsible for 95 percent of the children's total costs (i.e. approximately $115,900. This works out to $9,658 per month.

[327] Step 2 of the *Contino* analysis leads me to conclude that there has been significant duplication of costs in providing two homes for the children. While the Applicant had possession of the matrimonial home for the majority of time following separation until sale the Respondent took steps to ensure the children enjoyed a similar quality of life in

the home he shares with his mother. This entailed significant renovations post-separation. The Applicant offered no detailed submissions regarding calculation of the children's expenses. There is sufficient evidence to support the conclusion that the children's expenses (i.e. total, spread over two households) including fixed costs are approximately $10,000 per month. The parties also both incur significant expenses pertaining to food and clothing for the children.

[328] Regarding Step 3 of the s. 9 analysis (the conditions, means, needs and other circumstances of the parents and the children), the Applicant submits:

(a) The Respondent has lived rent free with his mother since separation, while also earning significant income. The Respondent does not have to pay for child care expenses given his mother's assistance. There is no evidence that the Respondent intends to change his residence.

(b) The Respondent refuses to contribute to the children's s. 7 expenses, including tutoring costs or medication. The Applicant has higher costs for the children.

(c) The Respondent has intentionally divested himself of any assets so as to preclude the Applicant from securing an equalization payment in this proceeding.

(d) The Respondent's temporary support obligation was based on an income of $250,000 per year. Since then, the Respondent has earned significantly more. Despite this increase, the Respondent has not paid increased support (in fact, he has challenged the existing order throughout this proceeding, claiming that the support amount is unaffordable for him). He has had the benefit of underpaying child and spousal support since the temporary order was made in 2013.

(e) The Respondent acknowledged in his evidence that she is completely dependent on him for support. Further, the Applicant has purchased a home for herself and the children in Brantford, Ontario. She has to pay ongoing housing costs associated with proving appropriate accommodations for the children. She has significant food, housing, medication and other costs whereas the Respondent does not.

(f) Pursuant to the order of Justice Boswell the Respondent has been paying child support of $3,182 per month through January 31, 2017 totalling $162,132. The total child support he should have paid (based on the Applicant's calculation) is $1,200,081 through January, 2017, for a total underpayment through January 31, 2017 of $1,037,949.

[329] Regarding Step 3 of the *Contino* analysis, I have made my findings regarding the parties' incomes and thus their means. In this context it is open to me to consider the actual costs

associated with the children and compare same against the child support that might be payable utilizing a simple set-off. I note in this regard the set-off amount in 2013 of over $67,000 per month far exceeds the actual expenses associated with the children as found above.

[330] In the cases of *R. v. R.* and *Smeets v. Seip* summarized in chart form above, the courts declined to apply the table amounts where the payor's income exceeded $4 million per year. In 2013 the Respondent's income was almost $6 million. I therefore find that it would be inappropriate to apply the *Guidelines* strictly in respect of the Respondent's child support obligation in 2013, pursuant to s. 4(b) of the *Guidelines*. However, I see no basis for similar findings regarding the other years under consideration.

[331] Under s. 9 of the *Guidelines* the table amount of child support is not presumptive. The "clear and compelling evidence" analysis normally required to justify a deviation from the table amount is therefore not applicable. In 2013 the Respondent experienced a dramatic spike in his income. The monthly table amount exceeds $67,000 per month while the actual child-related costs are approximately $10,000 per month. Requiring the Respondent to pay the table amount raises a genuine concern that the Applicant would benefit from an inadvertent wealth transfer. Section 26.1(2) of the *Divorce Act* dictates that maintenance of children, rather than household equalization or spousal support, is the objective of child support.

[332] Regarding the s. 9 issues, I have calculated child support on a simple set-off basis, I have found duplication of costs and I have considered the conditions, means, needs and other circumstances of the parties and children. Having done so I conclude there is no good reason to assess child support otherwise then by set-off, except regarding 2013. For 2013, I would fix the Respondent's set-off child support obligation at $30,000 per month. This amount reflects the reality that, with greater income availability likely comes greater expenditure to the benefit of the children. This amount would also account for any imprecision in any determination of the children's budget.

[333] As to date of commencement, this application was commenced July 13, 2011. The parties separated June 20, 2011. Child support obligations commence immediately upon separation. I would commence child support July 1, 2011. Based on the foregoing, I calculate retroactive child support owing by the Respondent to the Applicant through September, 2017 in the amount of $484,431, subject to credits for amounts paid by the Respondent.

Section 7 Expense Country Day School

[334] This issue relates to whether the children should continue attendance at Country Day School at a cost of $33,000 per year per child (before taxes). As agreed by the parties, the question for any determination is whether this expense is "affordable".

The Parties' Positions

[335] The Applicant submits as follows:

(a) The authors of the *Child Support Guidelines* service state the following regarding the "reasonableness" of any expense claimed under s. 7 of the *Child Support Guidelines*:

> The reasonableness of any expense claimed under s. 7 of the *Guidelines* is tested against the means of the parents and the child. The concept of "means" is much broader than the term "income". The word includes "all a person's pecuniary resources, capital assets, income from employment or earning capacity and any other source from which the person receives gains or benefits, together with, in certain circumstances, monies which the person does not have in possession that which are available to such person."

(b) Regarding the family pattern of spending, the authors of the *Child Support Guidelines* service state as follows:

> The pre-separation spending pattern of the family will be an important consideration in determining payment for s. 7 expenses. Family spending patterns are usually determined by the joint decisions of the parents. Previous spending patterns illustrate what activities the parents formally considered to be necessary and in the best interests of their children.

(c) Where a pre-separation pattern of spending is established, it can be expected to continue even where the expense seems relatively excessive:

> In fact, the pre-separation pattern of spending may assist the court on the issue of reasonableness and necessity even where the expense seems relatively excessive. For example, in *Winseck v. Winseck*, 2008 235 O.A.C. 38 at paras. 30-31 (S.C.J.) the trial judge determined that private school expenses which seemed excessive in relation to the incomes of the parties were reasonable in the circumstances, as the Respondent had insisted and the Applicant acquiesced in these expenses since before the separation. On appeal, the court determined that the fact that the expenses were a continuation of expenses the parents had funded for many years and the fact that the parents' income had not changed all that much was sufficient to support the trial judge's conclusion (see *Delichte v. Rogers*, 2013 M.B.C.A. 106 at para. 41).

(d) Country Day school is an affordable expense in relation to the means of the spouses and those of the children and to the family's spending pattern prior to the separation (see *Park v. Thompson*, 2005 O.J. No. 1695 (C.A.))

(e) Yearly tuition for each child is approximately $33,000 which includes tuition and another incidental school expenses.

(f) In *Flikerski v. Flikerski*, 2001 O.J. No. 2964 (S.C.J.) the court allowed US university tuition and housing at a cost of US $36,234 although the parents' combined income was only $100,000 Canadian meaning that over half of the parents' combined pre-tax income was consumed by the expense.

(g) In *Sauvé-Roy v. Hart*, 2003 O.J. No. 5059 (S.C.J.) the court allowed $12,000 for university tuition, fees and costs of a single room for a child, $7,500 for musical instruments and nearly $5,000 for additional expenses in a family with a combined income totalling $80,000. These expenses represented 30.6 percent of the combined income.

(h) In *Rajic v. Milanovich*, 2002 O.J. No. 610 (S.C.J.) the court allowed Montessori schooling at a cost of $15,600 per year for a four year old child where the parents had a $135,000 per year combined income, meaning the expense represented approximately 11.6 percent of the total combined income.

(i) In *Reidy v. Reidy*, 2005 O.J. No. 5152 (S.C.J.) the court allowed pre and post-school child care and Kumar programme for special tutoring for two high needs children, plus bowling and summer camp, with total costs of over $10,000 per year where the combined family annual income was $100,000.

(j) In *DeZen v. DeZen*, 2002 O.J. No. 5827 (S.C.J.) the court allowed private schools and summer camp for the three children totally $60,000 where the father's income was $1.6 million and the children attended private school before separation.

(k) The Respondent has made false claims regarding "affordability" throughout this proceeding. In 2013 for example the Respondent unsuccessfully appealed the support order of Justice Boswell (based on an income of $250,000 per year). Several years later, it was determined that the Respondent's income for support purposes was nearly $6 million that same year and that while the Respondent was claiming the amounts were unaffordable, he was in fact significantly underpaying support.

(l) Similarly, the Respondent brought a Motion to Change Justice Boswell's order in 2015. In 2015 the Respondent's income was at least $552,000. The fact that the children have always attended private school must also be considered.

(m) Country Day school is an affordable expense given the parties' means and historical spending.

[336] The Respondent submits as follows:

(a) The parties stipulated that this determination was to be made by the court purely on grounds of "affordability". Country Day school costs about $45,000 in after tax dollars. Private school is a luxury.

(b) Neither party has employment. The Applicant has received more spousal support than she is entitled to. The Respondent has not generated any income in 2016 from his business ventures. His assets have been depleted. Ms. Russell determined that absent employment income, his imputed income (based on his historic rates of return) for 2016 should be $133,995. This includes all referral fees in Helen Colivas' name, properly belonging to the Respondent.

(c) Country Day school does not deal with payment of its fees on an "imputed basis". The majority of what Ms. Russell attributed to the Respondent's income for 2016 was based on historic rates of return. Greybrook Investments will take years to materialize into a profit. These investments do not pay out monthly in the interim years prior to the balloon payment being received. The only actual cash flow the Respondent received in 2016 is the Greybook referral fees ($54,378, see p. 2 Exhibit 275). This is inadequate to pay for Country Day school.

Analysis

[337] The Applicant's submissions on this issue, summarized in part above, accurately sets out some of the applicable law on this issue. While the parties have framed the issue as one of "affordability", in essence the question is whether this expense is "reasonable" within the meaning of s. 7 of the *Guidelines*. It appears to be common ground that the expense is "necessary" within the meaning of s. 7 as neither party submits otherwise. This expense's reasonableness must be assessed in the context of the parties' "means", including "all of a person's pecuniary resources, capital assets, income from employment or earning capacity and any other source from which the person receives gains or benefits together within certain circumstances, monies which the person does not have in possession but which are available to that person". I have made findings regarding the parties' means, including consideration of lifestyle and available resources (such as the Keek warrants). In my view, this expense, which at $66,000 per year before taxes represents about 12 per cent of the parties' combined incomes as found by me, is reasonable and affordable.

[338] The expense is also one which is consistent with the parties' historical pattern of spending.

[339] While not strictly relevant to the issue of affordability, I would observe that the children both have special needs and any change in their academic program would be cause for concern without adequate evidence justifying such change.

[340] For these reasons I find County Day School an "affordable" and "reasonable" expense, and one that will be subject to proportionate sharing by the parties.

Spousal Support Entitlement and Quantum

Positions of the Parties

[341] The Applicant seeks mid-range spousal support of $51,499 per month based upon the Respondent's income of $2,180,000 (average of 2013 to 2015 per Exhibit 119), and the Applicant's income being deemed to be $50,000 or, alternatively, spousal support of $34,756 per month based upon the Respondent's income of $1,480,000 and the Applicant's income being deemed to be $50,000. No duration is specified. Entitlement is established on both compensatory and non-compensatory grounds, it is submitted.

[342] Obviously the Applicant's position is inconsistent with the income findings I have now made.

[343] I note that in the Applicant's calculation of retroactive spousal support she advances no claims in 2011 and 2014, the years in which the parties' experts agreed (in Exhibit 119) that the Respondent's income was "zero" for child support purposes.

[344] The Respondent disputes entitlement and seeks termination of spousal support.

[345] The Respondent's fundamental position is that spousal support is no longer payable because the Applicant has been overpaid. Unlike child support, spousal support is generally a fixed amount that does not fluctuate annually "lock-step" with the payor's income, it is submitted.

[346] The Respondent submits further that the Court of Appeal recently enunciated that there must be support in the record for a trial judge to order payment of indefinite support (see *Berta v. Berta*, 2015 ONCA 918). There is no reason why this principle should be any different with time-limited go-forward support, it is submitted.

[347] The Respondent relies upon the evidence of Ms. Russell that his income at separation was $264,000, thus establishing the "marital standard of living." The Respondent's submissions include SSAG calculations from 2013 forward, but not before.

Analysis

[348] Entitlement to spousal support is governed by subsections 15.2(1) – (6) of the *Divorce Act*:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Terms and conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

(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.

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.

[349] Regarding the "condition, means and needs" of the parties to be considered pursuant to s. 15.2(4):

(a) The "condition" of a spouse includes factors such as their age, health, needs, obligations, dependence and their station in life.

(b) The "means" encompass all financial recourses, capital assets, income from employment and any other sources from which the spouse derives gains or benefits.

(c) "Needs" of a spouse should take into consideration the accustomed lifestyle of the spouse, subject to the ability to pay (see *Thompson v. Thompson*, 2013 ONSC 5500 at para. 47).

[350] All of the statutory objectives set out in subsection 15.2(6) of the *Divorce Act* must be considered, and no single objective is paramount. The court must consider the factors set out in subsection 15.2(4) in light of those objectives and "exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown" (see *Thompson*, supra, and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.) at paras. 35-36).

[351] There are three conceptual bases for entitlement to spousal support:

(a) Compensatory support (relating primarily to the first two objectives of subsection 15.2(6) of the *Divorce Act*);

(b) Non-compensatory support (relating primarily to the third and fourth objectives; and

(c) Contractual support (see *Thompson*, supra.)

[352] The compensatory basis for spousal support recognizes that there should be an equitable distribution between the parties of the economic consequences of the marriage upon marriage breakdown. If a spouse's ability to enjoy the same standard of living as the one during the relationship is adversely affected by the breakdown of the marriage, compensatory support is appropriate to ensure that the economic impact of the breakdown is shared in an equitable manner (see *Thompson*, supra).

[353] Entitlement to non-compensatory spousal support can arise as a result of the needs of a spouse. A spouse may be obliged to pay support based on the other spouse's economic need alone, even if that need does not arise as a result of the roles adopted or sacrifices made during the marriage:

> Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the State. Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support. (see *Bracklow*, supra at paras. 18 and 33, *Chutter v. Chutter*, 2008 B.C.C.A. 507 at para. 54 and *Thompson*, supra at para. 59).

[354] The *Spousal Support Advisory Guidelines* are an important tool in examining the financial picture of the parties. When a trial judge decides to award a quantum of support outside the suggested range in *Spousal Support Advisory Guidelines*, appellate review will be assisted by the inclusion of reasons explaining why the *Spousal Support Advisory*

Guidelines do not provide an appropriate result (see *Fisher v. Fisher*, 2008 ONCA 11 at para. 53 and *Gibson v. Gibson*, 2011 ONSC 4406 at para. 125).

[355] The court may consider the following factors in deciding the appropriate quantum and duration of support within the ranges:

(a) The strength of any compensatory claim for support: a strong compensatory claim may favour a spousal support award at the higher end of the ranges both in terms of quantum and duration.

(b) The recipient's needs: where the recipient has limited income and/or earning capacity, the level of their needs may call for an award at the higher end of the quantum and duration ranges.

(c) The age, number, needs and standard of living of the children.

(d) The payor spouse's means and ability to pay.

(e) The need to preserve work incentives for the payor.

(f) Property division and debts.

(g) Self-sufficiency incentives in relation to the recipient spouse (see *Thompson*, supra at para. 61).

[356] Of the two basic formulae under the Spousal Support Advisory Guidelines (the "without child support" formula and "with child support" formula), in cases where there are dependent children, the "with child" support formula applies.

[357] According to s. 3.3.4 of the *Spousal Support Advisory Guidelines*:

> On the theoretical front, marriages with dependent children raise strong compensatory claims based on the economic disadvantages flowing from assumption of primary responsibility for child care, not only during the marriage, but also after separation. We have identified this aspect of the compensatory principle as it operates in cases involving dependent children as the parental partnership principle, and have drawn on this concept in structuring the "with child" support formula. For marriages with dependent children, length of marriage is not the most important determinant of support outcomes as compared to post-separation child care responsibilities. (See *Spousal Support Advisory Guidelines* s. 3.3.4)

[358] Even if the spousal support amount is not at the high end of the *Spousal Support Advisory Guidelines*, there must be sufficient support so that a support recipient does not have to

encroach upon her capital to maintain her standard of living (see *Blatherwick* v. *Blatherwick*, 2015 ONSC 2606 at paras. 272-276).

[359] Under the *Spousal Support Advisory Guidelines*, orders under the "with children" support formula are initially indefinite in form but the formula also establishes durational ranges which are intended to structure the process of review and variation and which limit the cumulative duration of awards under this formula. These durational limits rely upon both length of marriage and the ages of the children (see *Spousal Support Advisory Guidelines* p. 33).

[360] Regarding the objective of promoting self-sufficiency, the *Divorce Act* stipulates this only applies "insofar as practicable." It does not rise to the level of a "duty" as submitted by the Respondent.

[361] I am satisfied that the Applicant has established an entitlement to spousal support on a non-compensatory basis for the following reasons:

(a) Although the parties have since separation largely shared equal care and control of the children, prior to separation the Applicant was the party primarily responsible for organizing the children's appointments and daily activities (tempered by the presence of the nanny). By so observing I do not intend to minimize the Respondent's significant role in caring for the children, however, as he was the sole income source it stands to reason that the Applicant assumed more of the childcare responsibilities;

(b) The parties' marriage lasted 12 years, a period of medium duration, during which the Respondent was the sole income source and the Applicant was dependent thereupon. She has not been employed since 2003;

(c) The Applicant, even had she applied herself fully post-separation to acquisition of gainful employment, would still be unable to provide a remotely close approximation of the parties' pre-separation lifestyle;

(d) The Respondent is clearly able to pay and the Applicant is clearly in need.

[362] I am not satisfied that the Applicant has made out her claim for compensatory spousal support for the following reasons:

(a) The purpose of compensatory support is in part to recognize that there should be an equitable distribution between the parties of the economic consequences of marital breakdown. The significant equalization payment I have found owing by the Respondent will go a long way to addressing this concern.

(b) The Respondent's primary source of income during the relationship, and the parties' wealth pre-separation, is rooted in his Extreme Fitness business. This

business was already well-established before marriage, thus the Applicant's contributions to the Respondent's success are not clearly linked.

(c) The marriage was of 12 years duration. This was not a long-term relationship. It is more fairly described as one of medium duration.

(d) Although the Applicant was not employed following the births of the children and she was thus more available to care for the children, the parties also had the assistance of a nanny and the Respondent nevertheless remained, on the whole, an actively involved parent. The Applicant's argument that she subordinated her career to devote herself to the children's care is thus diminished. She was at times the primary caregiver, but not throughout as alleged.

(e) The parties' history of financial disputes and negotiations in relation to a possible marriage contract serves to underscore the extent to which the parties' financial circumstances were not integrated. The Applicant testified as to her lack of awareness of the Respondent's finances.

(f) The Applicant will have shared in the increase in value of the Respondent's interest in Extreme Fitness throughout equalization.

(g) The Applicant's assertion that the Respondent expected her to stay home is contradicted by her own evidence of his efforts to assist her in launching a private school. Her position that she was compelled to make a sacrifice to the Respondent's benefit is thus undermined.

(h) The Respondent's income post-separation has clearly been the product of his own efforts, without direct contribution from the Applicant, and while caring for the children 50 per cent of the time. His success with the Tear Lab investment in 2013 is a striking example.

[363] As a result, I see no basis for the Applicant to share in post-separation increases in the Respondent's income in determining an appropriate quantum of spousal support.

What is Respondent's Income for Spousal Support Purposes?

[364] Unlike the issue of child support, the parties developed no common understanding as to the Respondent's income for spousal support purposes. This issue requires a consideration of the Respondent's pre-separation income history.

[365] The Respondent refers to Melanie Russell's report addressing the Respondent's income for support purposes for 2008, 2009 and 2010 (Exhibit 273). Her conclusions from her report dated October 3, 2012 are as follows:

(a) 2008 $193,000 (excluding attribution of pre-tax corporate income)

$337,000 (including attribution of pre-tax corporate income)

(b) 2009 $77,000 (excluding attribution of pre-tax corporate income)

$68,000 (including attribution of pre-tax corporate income)

(c) 2010 $65,000 (excluding attribution of pre-tax corporate income)

$72,000 (including attribution of pre-tax corporate income)

[366] A simple average of the Respondent's income in 2008 – 2010 excluding attribution of pre-tax corporate income is $111,000. For the same period but including pre-tax corporate income the average is $159,000.

[367] At trial Ms. Russell updated her conclusions regarding the Respondent's pre-separation income to take into account the Cedar Creek[2] income. Ms. Russell concluded that the Respondent's three year average for the years immediately preceding separation was $264,000.00 per year (i.e. $159,000.00 plus $105,000.00 ($315,000.00 of Cedar Creek income over three years) or $264,000.00 per year). This is the marital standard of living for the measure of spousal support, it is submitted by the Respondent.

[368] The Respondent notes that Ms. Russell was not challenged under cross-examination regarding pre-separation income and that the Applicant's expert (Mr. Ranot) did not prepare a report dealing with the Respondent's income for 2008, 2009 and 2010.

[369] The Respondent further submits that between Exhibits 273 and 119, the Respondent's income from 2008 to 2015 has been established, subject to three outstanding issues:

(a) whether losses are to be treated (as per Mr. Ranot) as merely "zero" or "nil" or, as per Melanie Russell, as the actual amount of the loss;

(b) whether Helen Colivas' income from her co-tenancies is to be included in the Respondent's income; and

(c) whether the court can consider amounts different than those agreed to in Exhibit 119 for child support purposes only, by virtue of applying a "double dip" as urged by the Applicant, an issue raised by the Applicant on the last day of trial in cross-examination of Melanie Russell.

[370] It is the Applicant's position that for the purpose of spousal support, Scenario 4 in Exhibit 119 is the correct approach (ie. excluding capital losses and including income from the co-tenancies). She further submits that given the fluctuation in income, it is appropriate to average the Respondent's income over three or five years for the purpose of

[2] Cedar Creek is one of the Respondent's investments.

determining income for ongoing spousal support and that retroactive support should be based on actual income. On this basis, the Respondent's income is $2,183,489.00 if averaged over three years or $1,333,682.00 if averaged over five years. In the alternative the Applicant submits that ongoing support may be determined by using his 2015 income, as determined in Exhibit 119. Given the Respondent's history of deceit and non-disclosure, concealing income, producing assets and diverting income, however, this would not be the fairest determination of his income for spousal support purposes the Applicant submits.

[371] While there is no express statutory provision regarding imputing income for spousal support purposes, courts in Ontario have often applied the concepts enunciated in s.19 of the *Federal Child Support Guidelines* to make determinations of income in relation to spousal support, although there is no requirement to do so. The considerations identified by s.19 to represent a useful guide to determination of issues pertaining to imputing income in either a child or spousal support context.

[372] As to the Respondent's pre-separation income, only Ms. Russell gave expert evidence.

[373] The average of the Respondent's income for the three years excluding pre-tax corporate income is $111,666 and including pre-tax corporate income is $159,000. Ms. Russell, in her evidence regarding the Respondent's pre-separation income, relied upon the three year average of $159,000 and added $105,000 representing 1/3 of the $315,000 Cedar Creek income over three years. The resulting figure of $264,000 is more than originally opined by Ms. Russell and therefore against the interests of the Respondent in the sense that absent tis evidence I would be left with the evidence of the lower income figures. It is also a figure more consistent with evidence of the parties' lifestyle pre-separation. There is no competing expert evidence from Ms. Ranot. I therefore find the Respondent's income to be $264,000 at separation for spousal support purposes.

[374] Given my conclusion above regarding the basis for the Applicant's entitlement to spousal support, it is not necessary for me to make further determinations of the Respondent's income for spousal support purposes for subsequent years.

[375] In her submissions the Applicant assigned zero income to the Respondent in 2011 and 2014, consistent with the experts' conclusions summarized in Exhibit 119. As the Applicant does not calculate spousal support payable in 2011, neither will I. She uses the figure of $120,000 for the Respondent's 2012 income. This is higher than the $76,572 assigned to the Respondent in Exhibit 119 but I will use the figure of $120,000 because it is more consistent with evidence of the Respondent's lifestyle at the time. For 2013 and following years I will use the figure of $264,000 for the Respondent's income.

[376] In *Spousal Support Advisory Guidelines* calculations I have adopted the following approach:

(a) Despite the income inputs for spousal support purposes I have used the child support payable based on incomes for child support purposes as determined above.

(b) I have assumed an after-tax expense of $45,000 total per year for the Country Day School expense. Both children have been attending since separation. I am not certain that this is the precisely correct amount. If I am significantly wrong such can be addressed after release of these Reasons. I also assume proportionate contributions by the parties.

(c) I am using the high end of the SSAG range in each case to reflect the reality that in fact the Respondent's income is in most cases higher than the $264,000 used. I am using $264,000 in 2014 despite the experts' conclusions of "zero" in that year given the significant income received by the Respondent in 2013 (i.e. $5.9 million) while in 2013 it is nevertheless limited to $264,000 for reasons outlined above.

[377] I therefore calculate spousal support payable as follows:

Year	Applicant's Income	Respondent's Income	SSAG High	Totals
2011	$10,500	$0	$0	$ 0
2012	$77,477	$120,000	$1,408	$16,896
2013 A B	$10,500 $40,500	$264,000	$0 $0	$ 0 Due to $30,000/mo $ 0 Child Support
2014	$43,000	$264,000	$10,402/mo	$124,824
2015	$280,066	$264,000	$0	$ 0
2016	$62,000	$264,000	$1,407/mo	$16,884
2017	$66,000	$264,000	$1,286/mo	$11,574 (through Sept/17)
				Total payable through Sept/17 $170,178

[378] Regarding retroactivity this Application was commenced in July 2011. When considering retroactivity I must consider the needs of the recipient, the payor's conduct, the reasons for any delay in pursing the claim and any hardship a retroactive award might impose upon the payor (see *Kerr v. Baranow*, 2011 S.C.C. 10). Given the parties' income history there can be no denying the Applicant's need. Similarly, there can be no denying the Respondent's blameworthy conduct in delaying disclosure and actively deceiving the Applicant and the court.

[379] As to any hardship that such retroactivity might visit upon the Respondent, given his history of deceit in relation to disclosure I am not confident that I have the full picture of his financial circumstances. Assuming he has underpaid, he may be absolutely sincere in his protests of inability to afford a retroactive award, but my disbelief is a natural and predicable consequence of his history of deceit. Given the Respondent's payments under the interim order of Justice Boswell, it may well be that the Respondent will have overpaid spousal support. I defer this conclusion until up to date information is made available to me regarding the Respondent's payments in this regard. Justice Boswell's interim order represents an entirely appropriate resolution of the issues of child and spousal support on a temporary basis pending trial, on incomplete evidence. My decision is based on as complete an evidentiary record as can be expected. It is therefore appropriate to revisit the timeframe addressed by Justice Boswell's order through this retroactivity. I therefore see no reason not to award spousal support on the amounts set out above, retroactive to January 1, 2012.

Duration

[380] The Applicant seeks indefinite term spousal support going forward. According to the SSAG, "the formula results in a range of spousal support of $0 to $1,286 per month for an indefinite (unspecified) duration, subject to variation and possibly review, with a minimum duration of six years and a maximum duration of 12 years from the date of separation".

[381] Of course, the foregoing represents a suggestion only and is not binding upon me.

[382] I have found that the Applicant is not entitled to compensatory spousal support. I have found that the Applicant is currently in need of spousal support and that the Respondent has the ability to pay, assuming the objective of maintaining the marital standard of living.

[383] I have calculated retroactivity from January 1, 2012 almost six years ago.

[384] In *Miglin v. Miglin* [2001], OJ No 1510 (Ont CA), varied [2003] SCJ No 21 (SCC), the court held that in the absence of evidence that the payee is deliberately or arbitrarily thwarting her economic self-sufficiency, there is no reason in law or policy for imposing a time limit on the duration of support. In the case before me, I have found that the Applicant is intentionally unemployed. In fact, she has been intentionally unemployed

for years on the evidence before me. Thus, in the presence of evidence that the Applicant is deliberately thwarting her economic self-sufficiency, there is reason in law or policy for imposing a time limit on the duration of support.

[385] As found above, I am satisfied that the Applicant is readily capable of pursuing, securing and maintaining meaningful employment and thus achieving self-sufficiency.

[386] This marriage was of medium duration. The parties share custody of their children and have essentially done so since separation over six years ago.

[387] In the circumstance I would order the Respondent to pay ongoing spousal support to the Applicant through August 31, 2021, a period of four years representing a total spousal support duration of approximately 10 years. Spousal support shall thereupon terminate.

Lump Sum v. Periodic Payments

[388] The Applicant seeks a lump sum award of spousal support given the Respondent's poor payment history to date. He was in arrears of $59,760 as of January 1, 2017.

[389] In making a lump sum award, the court must weigh the advantages of making the award in the particular case against any apparent disadvantages. The advantages will be highly variable and case specific including:

(a) Ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support; and

(b) Lack of proper financial disclosure (see *Davis v. Crawford*, 2011 ONCA 294 at paras. 66-67 and 78).

[390] Lump sum awards are not restricted to "very unusual circumstances" (see *Davis*, supra).

[391] A lump sum is appropriate in circumstances "where the level of acrimony between the parties is such that it would be desirable to terminate ongoing contact between the parties and to encourage a clean break" (see *Brown v. Brown*, 2015 ONSC 7968 at para. 97).

[392] A payor's abusive, controlling and harassing behaviour, demonstrated intention not to pay support and probable future non-compliance with a court order may demonstrate the need for a lump sum order in favour of the recipient (see *Zenteno v. Ticknor*, 2011 ONCA 722 at para. 5).

[393] The Respondent has not articulated a position on payment of ongoing spousal support beyond asserting that he has overpaid and no further spousal support is owing

[394] I am persuaded that a lump sum award of spousal support is appropriate in this case for the following reasons:

(a) I have found the Applicant is entitled to ongoing spousal support of $1,286/mo for four years. According to the SSAG, the Net Present Value of such is:

(i) Respondent's after-tax cost $28,365

(ii) Applicant's after-tax benefit $42,334

(iii) Midpoint $35,350

(b) The Respondent's payment history has been inconsistent and unreliable.

(c) The Applicant herself seeks a lump sum award (although she was clearly seeking a much larger award);

(d) The midpoint referenced in subparagraph (a) is a manageable amount when accounted for in final resolution of the issues.

[395] For these reasons I find the Respondent shall satisfy his spousal support obligations by way of lump sum payment to the Applicant in the amount of $35,350.

Security for Support Obligations

[396] The Applicant seeks security for performance of the Respondent's obligations for child and spousal support.

[397] The *Divorce Act* provides a number of possibilities concerning payment of child and spousal support and security for such payments:

> Child Support:
>
> 15.1(4) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as it thinks fit and just.
>
> Spousal Support:
>
> 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
>
> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a

> specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

[398] The test for whether a court ought to order security for support obligations is as follows:

(i) Has the spouse against whom the order is made habitually been in arrears?

(ii) Is there a real danger either through leaving the country or in some other way of a spouse avoiding the obligation under the support order?

(iii) Will the support order unreasonably interfere with the ability of the spouse to manager his or her business affairs?

(iv) Is the spouse substantial to the extent that there is no real danger that the support will not be enforceable by other means?

(v) Has there been an indication of strenuous opposition by the spouse against the support order and a refusal or reluctance to recognize the order?

(vi) Has the spouse given or offered substantial security for the payment that could stand in place of the registration of the support order and the charge created thereby for a reasonable period of time? (see *Kumar v. Kumar*, 1988 O.J. No. 35 (H.C.J.) and *Singh v. Singh*, 1999 O.J. No. 2840 (S.C.J.) at para. 13).

[399] Where a payor had been deceitful and had divested himself of his assets in an effort to make himself judgment-proof and had failed to disclose relevant financial information, the court may make an order for security for support (see *Riel v. Holland*, 2002 O.J. No. 5609 (S.C.J.) at paras. 67-68, aff'd 2003 67 O.R. 3d 417 (C.A.) at pars. 38-39).

[400] In *Zenteno v. Ticknor*, 2011 ONCA 722 at paras. 2 and 5, the Court of Appeal affirmed the decision of the lower court which had ordered that a lump sum payment for spousal support be secured by a charge on the property owned by the payor and a 2002 automobile to be transferred to the recipient absolutely based on the payor's abusive behaviour, intention not to pay spousal support and probable non-compliance with a court order.

[401] In *Guest v. Guest*, 1992 CarswellOnt 1682 at para. 16, the court issued a charging order against the Applicant's estate to preserve the Respondent's claim to an amount of support.

[402] In *Dickie*, supra at para. 1, the court ordered the husband to provide an irrevocable letter of credit in favour of the recipient in the amount of $150,000 to secure his child and spousal support obligations and to provide the wife security for costs.

[403] In *Lebovic v. Lebovic*, 2001 O.J. No. 4841 S.C.J. at para. 8 the court ordered security for support and costs in the form of letter of credit in the amount of $10 million where there had been a refusal to provide any information relating to business transactions coupled with incomplete, late and misleading information.

[404] Security may be ordered where the payor spouse revealed by his conduct (lying, violation of earlier court orders, etc.) that he could not be completely trusted to abide by an order of the court. In *Carrubba v. Carrubba*, (1983) O.J. No. 2047 (UFC), the court ordered that the balance of the house sale proceeds payable to the Respondent, after deducting the monies owing to the Applicant on the division of property, the lump sum maintenance payment to the Applicant and any order in her favour for costs, be paid into court to the credit of this action to be held as security.

[405] The Respondent has divested himself of significant assets and only acknowledged having done so reluctantly. The Respondent has also removed the Applicant as the beneficiary of his life insurance policy in favour of his mother.

[406] Given the Respondent's penchant for divestiture, it not practicable to consider securing the Applicant's entitlement through only a charge on the Respondent's estate. He has already divested himself of several significant assets.

[407] I note the Life Insurance Estimate calculated by the Divorce Mate program for the Respondent's ongoing child support obligation is $443,169.

[408] The circumstances of this case are reflected in many of the cases cited above, and readily support the conclusion that security for the Respondent's support obligations is warranted. There will be judgment accordingly as below.

The Responsibility for Fees Relating to Linda Chodos

[409] Justice Kaufman's order appointing Linda Chodos to carry out an assessment was made on the basis that the Respondent would pay the initial fee of $14,650 and that it would later be determined by the trial judge as to how it would be characterized.

[410] The Respondent submits that at the time the order was made the Applicant was not receiving spousal support. The Applicant's Financial Statements set out that she was paying Linda Chodos. Both parties derived benefit from Ms. Chodos' work. There is no reason why this sum should not be split and thus the Respondent submits he should receive a credit for one-half or $7,325.

[411] The Applicant has not made any specific submissions in this regard.

[412] In the absence of submissions to the contrary from the Applicant, as the Respondent has paid the full amount owing to Ms. Chodos, he shall receive credit for 50 per cent , or $7,325, against monies owing to the Applicant.

Security for Equalization Payment

[413] The Applicant seeks an order securing her equalization entitlement against certain assets of the Respondent, including a general security agreement and an order restraining the Respondent from disposing of, transferring or encumbering certain assets.

[414] In dealing with an equalization payment, s. 9 of the *Family Law Act* provides that a court may order a spouse to:

(i) Pay the amount;

(ii) Provide security, including a charge on property;

(iii) If necessary to avoid hardship, order an amount referred to in (i) to be paid in installments during a period not to exceed ten years or that payment of all or part of the amount be delayed for a period not exceeding ten years;

(iv) If appropriate to satisfy an obligation imposed by the order,

(1) Property be transferred to or in trust for or vested in a spouse whether absolutely for life or for a term of years or,

(2) Any property be partitioned and sold (see *Family Law Act* s.9, *Eva v. Eva*, 2011 ONSC 5217 at paras. 134-135 and *Best v. Best*, 1999 S.C.J. No. 40 (S.C.C.) at para. 107)

[415] In *Jacobs v. Jacobs*, 2011 ONSC 2699 at para. 65, the court states as follows:

> Pursuant to s. 9(1)(d)(i) of the *Family Law Act* the court has the power to transfer ownership to satisfy the equalization obligation and the list of "appropriate circumstances" for the ordered of the transfer of property of by no means exhaustive; "this power should be given a broad interpretation with the intent of the legislation to provide a wide range of remedies so that a fair and reasonable solution may be fashioned. (*Webster v. Webster*, 1997, 37 R.F.L. 4th 347 (Ont. Gen. Div.)."

[416] Subsection 9(2) also entitles the court to require financial information and inspections and to furnish specific financial information to the other spouse pending the payment of the equalization amount owed (see s. 9 *Family Law Act*, *Eva*, supra and *Best*, supra)

[417] Section 10 of the *Family Law Act* allows the court to make determinations of questions of title between spouses. Pursuant to s. 10, the court can make declarations of ownership, compensations for property disposed of, order a property be partitioned and sold, impose

security to ensure performance of an obligation so found, and make ancillary orders or directions (see *Family Law Act*, s. 10).

[418] The court's authority to make ancillary orders or direction exists to facilitate the performance of orders and determinations made by the court and give a court the power to designate certain after acquired assets (i.e. post-separation acquisition) as being imbued with a trust relative to an asset which existed during the court of the marriage. Sections 10 and 12 of the *Family Law Act* give the court the power to make orders for the preservation of a spouse's interest by either a restraining order or the delivering up of property (see *Kramer v. Kramer*, 2014 ONSC 5952 at paras. 193-194).

[419] In *Farrar v. Farrar*, 2003 O.J. No. 181 (C.A.) at paras. 52 and 61 the Ontario Court of Appeal upheld a charging order made by the trial judge against the Respondent's estate in an amount equal to the differential in equalization payment in the event that the Appellant was not entitled to the survivor pension.

[420] A charge against the interest of an individual in a real property does not guarantee payment of the obligation in the face of other charges (such as tax liens and writs of execution). The possibility of payment is contingent on the relative priority of the security in light of other charges (see *Boisvert v. Boisvert*, 2007 O.J. No. 2555 (S.C.J.) at para. 80).

[421] A court can direct the vesting of a trust and has the jurisdiction to direct the date of the vesting of the trust (see *Stephens v. Stephens*, 2006 O.J. No. 2755 (C.A.)).

[422] The court can make a vesting order with respect to a payor's account to ensure payment of the equalization payment where the payor's whereabouts were unknown and he had acted in bad faith incurring debts, including forging the recipient's signature and non-payment of support (see *Belton v. Belton*, 2010 O.J. No. 1691).

[423] The matrimonial home may also be transferred to and invested absolutely in the name of the payee in order to satisfy (if only in part) the equalization payment to be made by the payor (see *Jacobs v. Jacobs*, 2011 ONSC 2699 at para. 67).

Analysis

[424] In his submissions the Respondent does not appear to specifically oppose security for the equalization payment owing. The issue is the appropriate form.

[425] The Respondent has conceded that he is the owner of Lucosta Investments Inc. Lucosta owns 297 College Street, Unit 1603, Toronto, Ontario and 1113 Melitiou Mataxakis Floor 7, Chania, Greece.

[426] There is a sizeable equalization payment owing to the Applicant. I am concerned about the Respondent's readiness to pay this amount, given his history of obstruction and deceit.

[427] There shall therefore be judgment in the terms set out below.

Security Against Assets of Lucosta

[428] The Applicant seeks an order that upon breach of any payments of support or equalization, ownership of the College Street property would vest in the Applicant and credited against the Respondent's obligations. While the Respondent makes no specific submissions I assume he opposes such an order.

[429] A vesting order can be made pursuant to s. 100 of the *Courts of Justice Act* which states:

> A court may by order vest in any person and interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed (see *Courts of Justice Act*, s. 100).

[430] Authority for a vesting order is set out in subsection 9(1)(d)(i) of the *Family Law Act* which provides that,

> The court may order…that, if appropriate to satisfy an obligation imposed by the order…property be transferred to or in trust for or vested in a spouse, whether absolutely, for life or for a term of years.

[431] "Property" is broadly defined under s. 4 of the *Family Law Act* and does not restrict such to property that existed at the date of separation (see *Family Law Act* s. 4 and *Wehbe v. Wehbe*, 2016 ONSC 1445).

[432] Section 9 allows the court to vest property owned by the spouse at any time (see s. 9 *Family Law Act* and *Wehbe*, supra).

[433] A vesting order is an equitable remedy to use as an enforcement mechanism where there is a likelihood that a payor would fail to comply with any lump sum spousal support or equalization order (see *Wehbe* supra at para. 367).

[434] Based on the Respondent's spotty and reluctant payment of support owing pursuant to Justice Boswell's order, his divestiture of assets and obstinacy regarding disclosure it is reasonable for the Applicant to seek such an order in the event of default of periodic support or the equalization payment.

[435] In *Wildman v. Wildman*, 2006 O.J. No. 3966 (C.A.) at paras. 23, 25, 26, 27, 31, 43, 44 and 45, the Ontario Court of Appeal pierced the corporate veil and stated that the separate

legal personality of a corporation should be disregarded in appropriate family law cases. In particular, the court found that the husband had controlled the business and apprises an structured corporate assets in a way that diverted money from them for his own personal use and that this harmed the wife and the children. The court found that the husband exercised complete control over the corporate entities.

[436] The corporate veil can be pierced even if circumstances where the corporation was set up for legitimate purposes (see *Wildman*, supra at para. 38 and *Keeling v. Darrigo*, 2011 ONSC 7560 at para. 100).

[437] The court has a broad discretion in granting a vesting order. The court will need to be satisfied that the previous conduct of the person obliged to pay and his or her reasonably anticipated future behaviour indicate that the payment order will not likely complied with in the absence of more intrusive provisions (see *Lynch v. Segal*, 2006 O.J. No. 5014 (C.A.) at para. 32).

[438] Regarding piercing the corporation veil, "a more flexible approach is appropriate in the family law context, particularly where…the corporations in question are completely controlled by one spouse, for that spouse's benefit and no third parties are involved." (See *Lynch*, supra at para. 36).

[439] As in *Wehbe*, supra the Respondent has shown a persistent lack of cooperation and non-compliance with court ordered payments. The Respondent has intentionally divested himself of significant assets, placing them in the name of Lucosta for the purpose of diminishing the Applicant's support and equalization claims. Given his past history of non-compliance, the Applicant will likely face challenges in enforcing the payments owed to her by the Respondent (see *Wehbe*, supra) in the absence of more intrusive measures and remedies.

[440] This is an appropriate case for making an order in the terms below.

Prejudgment Interest

[441] The Applicant seeks pre-judgment interest. The Respondent makes no specific submissions but I assume he opposes this relief.

[442] As a general rule, the payor spouse is required to pay prejudgment interest on an equalization payment owing to the payee spouse. This encourages timely settlement of equalization claims (see *Burgess v. Burgess*, 1995 24 O.R. 3d 547 (C.A.) at para. 22 and *Green v. Green*, 2008 CarswellOnt 5757 at para. 50).

[443] The parties separated June 20, 2011. The Respondent owes the Applicant prejudgment interest on the equalization payment from the date of separation in accordance with the *Courts of Justice Act* s. 128(1); however, the court's discretion will be exercised under s. 130 of the *Courts of Justice Act*, and prejudgment interest will not be awarded on an

equalization payment where, for various reasons, the payor spouse cannot realize on the asset giving rise to the equalization payment until after the trial, does not have the use of it prior to trial, the asset generates no income, and the payor spouse has not delayed the case being brought to trial (s. 130 *Courts of Justice Act* and *Burgess*, supra at para. 25).

[444] Section 130 of the *Courts of Justice Act* also provides the court with discretion to allow interest at a rate higher than that provided in s. 128.

[445] At the valuation date, the Respondent had substantial savings and investment assets (in his name or otherwise) of which he had the use and complete control. Further, the Respondent has had significant income since that time. The Respondent could conceivably have made the equalization payment or part thereof much earlier.

[446] The Applicant is entitled to prejudgment interest from June 21, 2011 to February 1, 2017.

[447] The Applicant also seeks prejudgment interest on the Respondent's support arrears.

[448] Courts have the discretion to award prejudgment interest where a payor has been in arrears for child and spousal support and should do so here in all of the circumstances (see *Pfann v. Pfann*, 2008 BCSC 452 and *Smith v. Smith*, 2002 CarswellOnt 4729 (C.J.)).

[449] Prejudgment interest is properly chargeable on support arrears. My retroactive awards above regarding child and spousal support, subject to credits for payments made by the Respondent, will determine whether there are arrears triggering entitlement to pre-judgment interest.

Conclusion and Judgment

[450] For all the foregoing reasons, judgment to issue as follows:

(1) The Respondent shall pay to the Applicant an equalization payment of $1,085,154.64 together with interest from June 20, 2011.

(2) Unless the parties otherwise agree in writing within 45 days, the contents of the former matrimonial home, excluding chattels equalized herein, shall be sold at auction by a mutually agreeable auctioneer. Any issues pertaining to terms of sale may be referred to my attention by way of 14B motion.

(3) The Respondent shall pay retroactive child support to the Applicant for the children Lucas Colivas, born November 19, 2003 and Costa Colivas, born December 8, 2006 fixed in the amount of $484,431 calculated through September 2017 less payments made by him pursuant to the January 11, 2013 Temporary Order.

(4) The Respondent shall pay retroactive spousal support to the Applicant in the amount of $170,178 calculated through September 2017, less payments made by him pursuant to the January 11, 2013 Temporary Order.

(5) The following amounts shall be credited against any amounts owing by the Respondent to the Applicant:

(a) $134,050.73 representing payments by Respondent to Applicant before the January 11, 2013 Temporary Order;

(b) $7,638.68 representing retroactive expenses paid by the Respondent as agreed by the parties; and

(c) $7,325 representing one half of Linda Chodos' fees.

(6) Commencing October 1, 2017, the Respondent shall pay to the Applicant the sum of $4,451/mo by way of set-off child support for the aforesaid children of the marriage, based upon income of $450,000 for the Respondent and $66,000 for the Applicant.

(7) The Respondent shall pay to the Applicant a lump sum of $35,350 representing the balance of his spousal support obligation to the Applicant on a go-forward basis.

(8) The balance of the net proceeds of sale of the matrimonial home shall be divided equally between the parties after application thereof against any monetary obligations of one party to the other pursuant to the terms of this judgment.

(9) The Respondent is deemed to be the owner of the Lucosta Investments Inc. ("Lucosta") and all of the assets of Lucosta. The equalization payment referred to in paragraph 1, less any payments or credits provided for herein but including interest, shall be secured, in part, by registration of this judgment against title to the following properties:

(a) 297 College Street, Unit 1603, Toronto ("the College Street property");

(b) 1113 Melitiou Mataxakis, Floor 7, Chania, Greece ("the Greece property");

(c) Any other properties registered in the name of Lucosta.

(10) The equalization payment referred to in paragraph 1, less any payments or credits provided for herein, shall also be secured by a general security agreement over all of the Respondent's business interests, including those that may be held in trust for him.

(11) The Respondent shall be restrained from disposing of, transferring or encumbering the assets listed in paragraph 9 without the consent in writing of the Applicant or a court order, excepting transactions in the ordinary course of business.

(12) Should the Respondent fail within six months to pay the Applicant the equalization payment referred to in paragraph 1, less any payments or credits provided for herein, but including interest, the College Street property shall be vested in the Applicant and the Respondent shall be credited with the fair value of the College Street property less the registered encumbrances at the date of transfer. Fair value shall be determined by a mutually agreeable real property appraiser.

(13) The parties shall proportionately share the reasonable and necessary s. 7 expenses of the children as agreed upon from time to time, agreement not to be unreasonably withheld. The children shall continue to attend Country Day School until the parties otherwise agree in writing or the court otherwise orders. The expenses associated with the children's attendance at Country Day School shall be shared proportionately by the parties.

(14) The Respondent shall forthwith secure a policy of life insurance upon his life with a face amount of $450,000, naming the Applicant as the Respondent's irrevocable beneficiary in trust for the benefit of the children. He shall maintain such insurance for so long as the children remain "children of the marriage" within the meaning of the *Divorce Act*, or until he becomes uninsurable for medical reasons. The Respondent shall provide proof of coverage to the Applicant within 30 days and annually thereafter upon written request.

(15) The parties shall determine the amounts to be credited to the Respondent by way of child and spousal support payments made through September 2017 pursuant to the January 11, 2013 Temporary Order and share this information with the court as part of their written submissions on costs. The final net amount owing by the Respondent to the Applicant shall be determined by the court after receiving such submissions.

(16) If unable to agree on costs, the parties shall provide written submissions, limited to seven pages (excluding Bills of Costs and Offers to Settle) as follows:

(a) Applicant, within 30 days;

(b) Respondent, within 60 days;

(c) Applicant in Rely, if desired, within 90 days.

(17) The parties may, in their written submissions, identify any arithmetical errors made in the Reasons for Judgment.

(18) Pre-judgment interest shall be calculated from July 1, 2011 pursuant to the *Courts of Justice Act*.

DOUGLAS J.

Released: September 14, 2017

SCHEDULE "A"
ONTARIO

Court File Number
FC-11-038492-00

Superior Court of Justice
(Name of court)

at 50 Eagle Street West, Newmarket, ON
Court office address

Form 13B: Net Family Property Statement

Applicant(s)

Full legal name & address for service - street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address- street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
Rosa Maria Colivas 379 Paradell Drive Richmond Hill, Ontario L4E 4R7	Harold Niman/Deborah MacKenzie Niman Gelgoot and Associates LLP Barristers 10 Prince Street Suite 300 Toronto, Ontario M4W 1Z4 Tel: (416) 921-1700 Fax: (416) 921-8936 niman@ngafamlaw.com;mackenzie@ngafamlaw.com

Respondent(s)

Full legal name & address for service — street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).	*Lawyer's name & address- street & number, municipality, postal code, telephone & fax numbers and e-mail address (if any).*
Stiven Colivas 22 Wolfson Crescent Richmond Hill, Ontario L4E 4N9	James D. Singer 8901 Woodbine Avenue, Suite 219 Markham, Ontario L3R 9Y4 Tel: (416) 223-2007 Fax: (905) 947-9106 jamessinger@bellnet.ca

The valuation date for the following material is *(date)* **June 20, 2011**

(Complete the tables by filling in the columns for both parties, showing your assets, debts, etc., and those of your spouse.)

TABLE 1: Value of assets owned on valuation date
(List in the order of the categories in the financial statement.)

ITEM	APPLICANT	RESPONDENT
Matrimonial Home - 379 Paradelle Drive, Richmond Hill, ON - proceeds to be equally divided subject to post separation accounting	0.00	0.00
Paintings Stereo Household furniture and chattels not otherwise equalized- to be sold at auction and net proceeds equally divided	522.00 $	13,050.00 72,480.00 $
Fur coats Porsche Boxer S Year 2000	10,000.00 $	$ 12,000.00
Gold Tennis Bracelet, Movado Watch and gold cross Rolex Watch	12,690.00 $	$ 2,000.00
Chequing RBC Account No. 5041652 Chequing BMO- joint Account No. 3021263 Savings BMO- joint Account No.8071497 TFSA- Wellington West (now with Macquarie Private Wealth) Account No. 4AON9M-W TFSA- Macquarie Private Wealth Account No. 323-150K-1	100,028.62 762.95 82.26 22,056.26 $ N/A	$
RRSP- Haywood Securities (est.) now with Macquarie Private Wealth Account No. TR11360C	3,151.50 $	$

RRSP- Macquarie Private Wealth Account No. 323-1508-1 Investment- National Bank Financial as of June 20, 2011 (now with Macquarie Private Wealth) Account No. 4A-ON9M-W	N/A 19,167.00	
RRSP- Haywood Securities Inc. Account No. TR1-1360-C Securities- Wellington West Account No.4A85F7-E TFSA – Wellington West Account No. 4A85F7-W RRSP- BMO Account No. 750-04181-11	$	18,507.00 $ 56,229.00
Canada Life - 20951330- Steve Colivas (insured person: Costa Colivas) Face amount $1,000,000- Beneficiary Steve Colivas 50% of the equity of Boston Capital Inc.	$	1,711.18 $ 0.00
Due to Respondent from Investment Trust 100% of the equity of CIC- which Owns 100% of the equity in Lucosta Investments Inc.- Includes 2283912		119,435.00 3,024,000.00
Management Salaries owing to Respondent (net of tax)	$	$ 8,300.00
Due to Respondent from Lucosta	$	$ 164,796.00
Sun Dynamics - 100%		Nominal
Assets in Helen's name that are beneficially owned by Lucosta – BMO Investorline account (#225-32310)	$	$ 54,083.75
The Colivas Family Investment Trust Investment in Walker's Line co-tenancy (1.55%)	1.00 78,000.00	
Investment in Walker's Line Co-tenancy (3.11%) - registered in the name of Helen Colivas	NIL	
Wolfson Property – registered in the name of Helen Colivas	NIL	
3993 14th Avenue	NIL	
Credit Card- Funds allegedly withdrawn by Respondent from credit card prior to separation	NIL	
Lucosta- alleged unexplained withdraws by Respondent from Lucosta prior to the valuation date	NIL	
TOTAL1	$ 246,461.59	3,546,591.80

TABLE 2: Value of debts and liabilities on valuation date
(List in the order of the categories in the financial statement.)

ITEM	APPLICANT	RESPONDENT
Mortgage – 379 Paradelle Drive, Richmond Hill, ON BMO#3554294054- Accounted for in net proceeds of sale	$	$
Notional Costs of Disposition – Accounted for in net proceeds of sale	$	$
Notional Disposition RRSPs @ 25%	$ 787.88	$
Line of Credit RBC	$	$
Credit Cards – BMO MasterCard Account #***9812 (Card not activated until 2013)		NIL
- CIBC Aerogold Visa Infinite ***3509		42,234.00
- BMO Mastercard (US)		29.00
- BMO Mastercard Account #***4942		8,324.00
- RBC VISA Account #***4585 (formerly ***4052)	$	$ 3,271.76
Notional Debt on RRSPs - 25%	$	$ 14,000.00
Tax Liability (est) – Cedar Creek@ $331,000	$	$ 153,950.00
TOTAL 2	$ 787.88	$ 221,808.76

TABLE 3: Net value on date of marriage of property (other than a matrimonial home) after deducting debts or other liabilities on date of marriage (other than those relating directly to the purchase or significant improvement of a matrimonial home)		
3(a) PROPERTY ITEM	APPLICANT	RESPONDENT
Land - Trailwood, 2 acres of land	$	$ 133,300.00
General Household items and vehicles in Respondent's Condo	$	$ 10,000.00
Rolex Watch	$	$ 2,000.00
The Colivas Family Trust	$	$ 840,000.00
Contingent Disposition costs on 1194561 Ontario Inc.	$	$ (102,500.00)
Management Salaries receivable by Respondent, net money owed to him	$	$ 35,000.00
TOTAL OF PROPERTY ITEMS	$	$ 917,800.00
3(b) DEBT ITEM		
	$	$
TOTAL OF DEBT ITEMS	$	$
NET TOTAL 3 [3(a) *minus* 3(b)]	$	$ 917,800.00

TABLE 4: Value or property excluded under subsection 4(2) of the *Family Law Act* *(List in the order of the categories in the financial statement.)*		
ITEM	APPLICANT	RESPONDENT
	$	$
TOTAL 4	$	$

TOTAL 2	$ 787.88	$ 221,808.76
TOTAL 3	$	$ 917,800.00
TOTAL 4	$	$
TOTAL 5 ([Total 2] +[Total 3] +[Total 4])	$ 787.88	$ 1,139,608.70

TOTAL 1	$ 246,461.59	$ 3,546,591.80
TOTAL 5	$ 787.88	$ 1,139,608.70
TOTAL 6: NET FAMILY PROPERTY ([Total1] *minus* [Total 5])	$ 245,673.71	$ 2,406,983.10

EQUALIZATON PAYMENT **$ 1,085,154.64**