Court of Queen's Bench of Alberta

Citation: Taylor v. Taylor, 2009 ABQB 7

Date:
Docket: 4803 135770
Registry: Edmonton

Between:

Lisa Lorine Taylor

Plaintiff

- and -

Gordon Daniel Taylor

Defendant

Reasons for Judgment
of the
Honourable Mr. Justice K.D. Yamauchi

Introduction

[1] This case involves ongoing child and spousal support that Lisa Lorine Taylor ("Lisa") seeks from Gordon Daniel Taylor ("Gordon"). The parties have settled other matters including the divorce and other corollary relief.

Facts

[2] The parties were married on April 25, 1987 and ceased cohabiting on or about April 1, 2005. They have two children of the marriage, being a son born in 1994 and a daughter born in 1992. Immediately following the parties' separation, the children lived primarily with Gordon while Lisa established herself at her new residence. Thereafter, the children have shared their time between Gordon and Lisa, with the exception of one month in May of 2008, when the daughter lived primarily with Gordon.

The Marriage Relationship Pre-Separation

[3] Lisa, who was raised in the Lower Mainland of British Columbia, moved to Edmonton, Alberta to be with Gordon. Before the parties married, Lisa intended to build a career in recreation administration and earned a Recreation Administration degree from the University of Alberta.

[4] Lisa was the primary caregiver for the children and had no other familial support in Edmonton. Gordon was often away from the parties' home with his work and his recreational activities, which included playing golf frequently. Because she felt she was not receiving sufficient help from Gordon in raising the children, Lisa became depressed and she and Gordon attended counselling. During counselling, Gordon promised that he would spend more time with Lisa and the children but he soon fell back into his former routine. Although he felt he was a good father, he had little involvement with the children and rarely offered to help. Although he was frequently away from home for work, his golf clubs always accompanied him during his work travel.

[5] Gordon worked with A.R. Thomson Group Partnership ("ARTGP"), a family-owned business involving many of Lisa's family members. The parties had a good financial life through ARTGP's earning and profit allocations. ARTGP paid part of the parties' mortgage and provided the financing that helped the parties construct and purchase their new home.

[6] In April of 2005, Lisa was not happy with the marital situation and the fact that Gordon was "angry all the time" so she left him. Gordon made many promises but did not live up to them. In Lisa's opinion, golf always came first in Gordon's mind. They had no love between them and there was very little sexual contact. Lisa's family had a mixed reaction to her leaving Gordon. Primarily, her family was concerned with the business aspect of their separation.

The Marriage Relationship Post-Separation

[7] Following the parties' separation, Lisa acquired a new home and the parties, for the most part, shared custody of the children. Lisa's parents provided her with financial assistance to purchase her home and in June of 2005, she moved into it. She intends to pay her parents back for this loan, which is secured by a mortgage.

[8] After the parties' separation, Gordon became more possessive of the children because he feared he would lose them. In Lisa's words, he completely changed and insisted on shared custody. He became more involved and more intrusive. Lisa testified that in July of 2005, Gordon said that because the children would be with him 50% of the time, he should not have to pay any child support. As well, Lisa testified that in March of 2006, Gordon said to her that "the gloves are off" and when he lost his job, he would not pay her anything.

[9] Gordon was late with his payments of child support and spousal support so she registered with the Director of Maintenance Enforcement. When Gordon found this out, he said to her that

he would "make her life difficult" by not supporting her. As late as May of 2008, Lisa learned that Gordon made the comment that "Lisa has to learn a lesson."

[10] This case has resulted in numerous court orders. By November of 2006, Gordon's income had increased but he had not increased his child support. He was $2,000 in arrears so Lisa sought an order of this court. Ouellette J. granted a consent order on November 22, 2006 ("the Ouellette Order"), which acknowledged an income-splitting arrangement, whereby ARTGP effectively would pay $238,980 to Gordon and Lisa through their holding company. This amount would be divided between Gordon and Lisa in the amounts of $172,800 per annum and $66,180 per annum, respectively. This required Gordon to pay Lisa child support in the amount of $1,900 per month. In February of 2007, because she had not received some of those payments, Lisa again registered with the Director of Maintenance Enforcement. She then received payments through her children, a babysitter and a realtor, which she found embarrassing. Gordon paid Lisa pursuant to the Ouellette Order up to the end of May of 2007, when ARTGP stopped making the payments.

[11] Because Lisa was receiving nothing from Gordon, she sought a further order of this court. On July 10, 2007, counsel for Lisa and Gordon appeared before Belzil J., who granted an order (the "Belzil Order") that imputed income to Gordon in the amount of $100,000 per year. The Belzil Order required Gordon to pay Lisa $2,000 per month in spousal support for the months of July, August and September 2007, and child support in the amount of $1,428 per month for the same period. These amounts were intended to tide Lisa over until Gordon found a job. Thereafter, the amounts pursuant to the Belzil Order would be adjusted retroactively.

[12] Gordon paid Lisa the following amounts after the Belzil Order:

July 16, 2007	$950
July 20, 2007	$1,075
July 31, 2007	$4,006
September 1, 2007	$3,428

Lisa received nothing thereafter. In fact, because Gordon did not have a job at that time, he asked that the money he paid to Lisa pursuant to the Belzil Order be paid back to him.

[13] Gordon testified that he never said he will not pay child support and that he recognized that he had an obligation so to do. He stopped paying child support in May of 2007, as he did not have a source of income from which to draw that amount. He did not feel good about terminating his support. As well, he testified that he was not happy with the Belzil Order, as he had no income. He has not paid any support since November of 2007. He did, however, pay the children's expenses during 2007.

[14] Gordon left his position with ARTGP, which we will discuss later in these reasons. The daughter was concerned that he did not have a job, although he continued playing golf and travelling to places like Italy and Jasper. Gordon readily admitted that he had taken trips

following the parties' separation. However, he states that some of them were paid out of his savings, but most were for his daughter's ski races or to accompany his new partner, a physician, who attends medical conferences and seminars in which he pays nothing for his accommodations.

Gordon's Employment Situation

[15] Gordon has a high school diploma and began working for what is now ARTGP in October of 1974. It has been his only job. He worked his way up through the business from being a factory worker to a vice-president. He had a close relationship with the Thomson family socially and occupationally. In fact, he "idolized" Lisa's father, Allan Thomson ("Thomson"), who is the patriarch of the business.

[16] ARTGP is an operating general partnership. It is made up of corporate partners owned and controlled by various members of Lisa's family, including a corporation owned and controlled by Lisa and Gordon. Gordon and Lisa's partnership interest is through 550934 B.C. Ltd., a British Columbia corporation ("550934"). 550934 is wholly owned by L.L.T. Holdings Inc., an Alberta corporation ("LLT"). Gordon and Lisa hold all of LLT's issued and outstanding shares equally and they are LLT's directors.

[17] ARTGP allocated to 550934 a portion of ARTGP's net partnership income pursuant to a partnership agreement into which ARTGP's partners entered (the "Partnership Agreement"). 550934 used its net partnership income allocation from ARTGP to pay Gordon and Lisa a salary.

[18] The parties presented much testimony as to whether Gordon left ARTGP voluntarily or was constructively dismissed. Thomson testified that there was no intention on ARTGP's part to terminate its relationship with Gordon. ARTGP and, in particular, Thomson and his son, Jim Thomson, felt that Gordon was one of its key employees and they wanted to "keep him on board." In fact, Thomson felt that Gordon would still be part of ARTGP had he wanted to remain with the organization. Thomson also testified that he had other former sons-in-law who continued working for ARTGP.

[19] Thomson and some of ARTGP's employees noticed a change in Gordon's attitude following the parties' separation. Gordon was upset and depressed, so the other partners offered to give Gordon a paid leave. Thomson knew Gordon "was hurting" and that this was interfering with his work.

[20] In May of 2006, ARTGP retained Anderson & Associates International to conduct a review of its "people assets." It had no intention of restructuring the business to alienate Gordon. It simply wanted to undertake a restructuring to make the business run more efficiently. Gordon agreed with this process.

[21] Gordon felt that his role in ARTGP was deteriorating. He felt that he was doing less and losing his authority. As a result, he did not feel he could continue working with ARTGP. As

well, he felt that Thomson was meddling in his marital situation. He discussed with Thomson and Jim Thomson the possibility of his being "bought out."

[22] In July of 2006, Thomson and Jim Thomson met with Gordon to discuss ARTGP's possibly buying-out Gordon. After speaking with ARTGP's in-house accountant, ARTGP offered Gordon $750,000, which he refused to accept, as he felt the offer was too low. Thomson testified that this figure was based on the formula stated in the Partnership Agreement for exiting partners, being five times earnings. He further testified that ARTGP's value has nothing to do with any payout. Gordon was seeking approximately $1,100,000. He was given a buy-out agreement that ARTGP's lawyers, McCarthy Tétrault, prepared, but he refused to sign it. Gordon did not speak with Thomson after this meeting. Jim Thomson and Gordon agreed that Gordon would leave the ARTGP in August of 2006. Although Gordon wanted to deal with his exiting the business and his separation from Lisa in one package, Jim Thomson did not want to deal with Gordon's personal issues.

[23] Gordon continued his role in ARTGP until his departure on August 11, 2006, for which he received employment income. Lisa testified that she had done nothing to prevent Gordon from working for ARTGP. She was shocked that he felt he had to quit that job and felt that Gordon did this to spite her. From August 11, 2006, when Gordon stopped providing his services to ARTGP until the end of May 2007, ARTGP continued to provide 550934 with a portion of its net partnership income as a cash distribution. Gordon was adamant that he was fired, as the "severance settlement" that ARTGP offered him was insufficient. ARTGP wanted to give him 12-months and Gordon wanted 24-months. They settled on 18 months.

[24] In October of 2006, ARTGP wanted Gordon to sign a promissory note acknowledging the debt that Gordon and Lisa incurred to finance the building of the matrimonial home. Gordon refused to sign the promissory note. Thomson testified that ARTGP was simply trying to reconcile all of ARTGP's finances and advised Gordon to "talk to your lawyer." Gordon said he was committed to repaying this amount, but Thomson was not convinced.

[25] Up to the end of May of 2007, the amounts 550934 received from ARTGP were calculated in a manner consistent with that to which Gordon would have received had Gordon continued to provide his services to ARTGP. ARTGP considered the payments it made to 550934 as a form of severance to tide Gordon over until he found other work. Thomson acknowledged that ARTGP stopped making payments to 550934, as it felt that Gordon was working with two of ARTGP's former employees through Quantum Industries. In fact, Thomson saw an email from Gordon which showed the Quantum Industries' email address.

[26] After he stopped working with ARTGP, Gordon started looking for a business he could buy, although he was "in no hurry" to find a new position. He also did not know the money from ARTGP was going to stop; he thought he had 18 months. He acknowledged that he maintained an office at Quantum Industries and had an email address from that entity. He testified that he neither performed services nor got paid by Quantum Industries. After the payments from ARTGP stopped, Gordon "got serious" about finding a job or buying a business.

[27] Gordon did not want to be an employee, so he started contacting those who possibly had businesses for sale. He contacted the principal of Hydro-Flex Hose (Western) Ltd. He had contacted others, but they wanted too much money for their businesses. Thus, he began his negotiations with the principal of Hydro-Flex Hose (Western) Ltd. Although there was correspondence between counsel for ARTGP and Gordon concerning Hydro-Flex Hose (Western) Ltd.'s possible competition with ARTGP, Gordon decided to proceed with the purchase, even in the face of this possible issue. He purchased these assets on November 1, 2007, through a corporation he formed and named Hydroflex Solutions Limited ("Hydroflex").

[28] Gordon used none of his own money to purchase the assets of Hydro-Flex Hose (Western) Ltd. Since purchasing the assets of Hydro-Flex Hose (Western) Ltd., Gordon has made some changes to the business and its operations, but "it's been tough." He feels optimistic about it, though. He did not pay himself anything for the first two months, but now he is paying himself $75,000 per year. By paying himself this much, he testified that he could "break even" for this year.

Parties' Knowledge of the Financial Situation of 550934 and LLT

[29] While Gordon was with ARTGP, neither Lisa nor Gordon asked for or received any financial statements for 550934 or LLT, as they were "doing great" financially. Gordon denied, however, that he did not want the financial information. As well, neither of them ever approved the financial statements and were asked, for the first time, to approve the 2007 financial statements. Gordon refused to approve them.

[30] Although there were some transfers in and out of LLT and 550934, Gordon confirmed that 550934 has not received funds from ARTGP since May of 2007. He wants to commence an action against ARTGP to obtain financial details and recover unpaid monies.

[31] On July 24, 2007, counsel for the parties, as well as counsel for KPMG, ARTGP's accountants, appeared before Sulyma J. Among other things, Sulyma J. ordered that KPMG provide Gordon with copies of financial statements for LLT and 550934 for the period ending June 30, 2006 (the "Sulyma Order"). The Sulyma Order contained an element of confidentiality in the sense that Gordon and Lisa were to keep the financial statements confidential and use them only for the purpose of this action, unless Gordon obtained the consent or further order of the court authorizing him to use the financial statements for any other purpose. The reason for the confidentiality provision was that Thomson was concerned that Gordon might give the financial statements to a competitor. Thomson also testified that any partner in ARTGP could look at the financial statements, as they are always maintained at ARTGP's head office. He also testified that Gordon had no desire to review the financial statements before he sought the Sulyma Order.

[32] Lisa testified that she has read only parts of the Partnership Agreement, but claims she knows little in terms of the ARTGP's partnership arrangement with its partners. When questioned whether she would assist 550934 in obtaining money from ARTGP, she testified that

she would neither consent to nor object to any such proceedings. This was borne out in the recitals contained in the Sulyma Order.

Issues

[33] This Court will not address issues of retroactive child support or retroactive spousal support, as the parties have agreed to waive those issues pursuant to their Minutes of Settlement and Matrimonial Property Agreement, a draft copy of which the parties provided to this Court at the opening of the trial. As well, this Court will not address other matrimonial property issues related to a commercial condominium located in Delta, British Columbia or other matrimonial property assets, as the parties have resolved those issues. Finally, this Court will not address issues concerning the intercorporate and shareholder loans and transactions involving LLT and ARTGP and ARTGP's partners. Those issues are left for another day.

[34] The parties have asked this Court to deal solely with the issue of prospective child and spousal support. The sub-issues arising from this are:

(a) whether Lisa is entitled to spousal support,

(b) whether Gordon has been unemployed or underemployed through his own choosing,

(c) whether this Court should impute income to Gordon,

(d) the amount of that imputed income,

(e) based on the foregoing findings, the quantum of any spousal support, and

(f) the amount of child support and determining the relative contribution each parent should make to the children's section 7 expenses.

[35] During his argument, Gordon's counsel conceded that Lisa had an entitlement to spousal support and Gordon recognized that he would have to pay child support in accordance with the *Federal Child Support Guidelines*, SOR/97-175 ("*Guidelines*"). That concession came as a surprise to this Court and Lisa's counsel, as that concession was not made until argument began. Although some of the evidence that Lisa's counsel presented will be of assistance to this Court in establishing the quantum of the spousal support and child support, much trial time could have been saved with an earlier concession.

Legislation

[36] The legislation relevant to a determination of the issues are sections 15.2 and 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) ("*Act*") and sections 7, 9, 15, 16, 17, 18 and 19 of the *Guidelines* . For ease of reference, the applicable sections are appended to these reasons.

Analysis

Whether this Court should impute income to Gordon

[37] Lisa argues that Gordon's pattern of conduct and current situation are such that this Court should find that he voluntarily was unemployed and is currently underemployed to make himself child and spousal "support-proof." This terminology emanates from *Guidelines* s. 19(1), but it also helps us determine Gordon's condition, means and circumstances under the *Act* s. 15.2(4).

[38] Could, or should, Gordon have remained with ARTGP following the parties' separation? His remaining with ARTGP would have provided him with the income the parties enjoyed during their marriage. The fact that Gordon agreed with Anderson & Associates International's analysis of ARTGP's business structure and "people assets" after the parties separated shows that he did not feel he was being squeezed out of the business. He left the business before the analysis was even completed. This Court finds that he left primarily because of the discomfort he felt in remaining with an organization that the parties referred to as the "family business" and that he was not constructively dismissed, as he suggests. ARTGP wanted Gordon to stay involved in its business.

[39] Even if he were constructively dismissed, must he continue working for ARTGP? In ***Evans v. Teamsters, Local 31***, 2008 SCC 20 ("***Evans***"), the court held that he must. The court said at para. 28 [emphasis original]:

> In my view, the courts have correctly determined that in some circumstances it will be necessary for a dismissed employee to mitigate his or her damages by returning to work for the same employer. Assuming there are no barriers to re-employment ... requiring an employee to mitigate by taking temporary work with the dismissing employer is consistent with the notion that damages are meant to compensate for lack of notice and <u>not</u> to penalize the employer for the dismissal itself.

When the employee leaves of his own accord, this principle is even stronger.

[40] The court in ***Evans*** at para. 30, provided a number of examples of the "barriers" to which it referred, including, where the employee would be working in an atmosphere of hostility, embarrassment or humiliation or where there is a stigma and loss of dignity on the employee's part. This Court finds that Gordon would not be facing any of those barriers had he stayed with ARTGP. The court in ***Evans*** also provides us with the other side of the ledger when it said that an employee should be expected to continue to work for the dismissing employer when the salary offered is the same, the working conditions are not substantially different or the work demeaning, where the personal relationships involved are not acrimonious, whether the employee has commenced litigation and whether the employee was still working for the employer when the

employer made the offer of re-employment. In the situation with which this Court is dealing, all those factors favoured Gordon remaining with ARTGP.

[41] With respect to the issue as to whether ARTGP's review of its "people assets" would change this Court's analysis of this issue, the court in ***Evans*** said at para. 31:

> I note that the nature of this inquiry increases the likelihood that individuals who are dismissed as a result of a change to their position (motivated, for example, by legitimate business needs rather than by concerns about performance) will be required to mitigate by returning to the same employer more often than those employees who are terminated for some other reason. This is not, however, because these individuals have been constructively dismissed rather than wrongfully dismissed, but rather because the circumstances surrounding the termination of their contract may be far less personal than when dismissal relates more directly to the individuals themselves. This point is illustrated by [*Michaud v. RBC Dominion Securities Inc.*, 2002 BCCA 630] in which a bank executive was constructively dismissed as a result of an organizational restructuring. The evidence showed that the bank offered the employee another executive position and was anxious to have him continue working for them. Importantly, there was no evidence that the relationship between the employee and the bank was acrimonious or that he would suffer any humiliation or loss of dignity by returning to work while he looked for new employment. As a result, mitigation was required.

In the case with which we are dealing, Thomson testified that he and other members of management were anxious to keep Gordon in ARTGP, as they felt he was a "key employee." Accordingly, Gordon was required to mitigate by remaining with ARTGP.

[42] The analysis of this issue cannot stop there, however, inasmuch as Gordon chose not to continue working at ARTGP and, in any event, the parties have not asked this Court to impute income for the purposes of retroactive support. After Gordon stopped receiving his portion of the net partnership allocation, he started looking for a business he could buy. While so doing, he maintained an office at Quantum Industries. He denies that he worked with Quantum Industries and there was no evidence, other than suspicion, to show that he did. This Court finds that he did not.

[43] As well, there was much discussion about whether Gordon had received a job offer as a salesperson that could pay him $150,000 per year. Although some of the senior salespersons could earn that amount, Gordon testified that he did not feel he had that potential and was not interested in that job, in any event. The starting salary was $3,000 per month plus commissions. Lisa produced no evidence that Gordon had received such an offer. Inasmuch as Gordon was a senior executive with ARTGP, it would be difficult to imagine that he would enter a junior sales position. This Court finds that he received no such offer and even if he did, it would have been reasonable for him to refuse to accept it.

[44] Gordon formed Hydroflex in the Fall of 2007, purchased the assets of Hydro-Flex Hose (Western) Ltd. on November 1, 2007 and started paying himself a salary of $75,000 per year from Hydroflex commencing January 1, 2008. This, of itself, is not remarkable. What is remarkable is the loan structure Gordon used to purchase these assets. Hydroflex borrowed $650,000 from R.J.M. Corp. Hydroflex provided R.J.M. Corp. with a loan agreement, promissory note and security. Hydroflex is paying this loan by making monthly payments of $6,500 (interest only) to R.J.M. Corp. Hydroflex made its first payment on this loan on December 1, 2007. The principal amount that Hydroflex owes to R.J.M. Corp. is due in its entirety on February 1, 2009. Hydroflex used $100,000 of the money it borrowed from R.J.M. Corp. as initial working capital that it required to commence its business operations.

[45] Hydroflex purchased Hydro-Flex Hose (Western) Ltd.'s assets for $800,000. Hydro-Flex Hose (Western) Ltd. provided Hydroflex with vendor take-back financing of $250,000. The vendor take-back financing was adjusted downward once Hydro-Flex Hose (Western) Ltd. conducted a physical inventory count following Hydroflex's purchase of Hydro-Flex Hose (Western) Ltd.'s assets. The parties determined that the Hydro-Flex Hose (Western) Ltd. vendor take-back financing would be $215,035. Hydroflex is paying the vendor take-back financing by way of monthly payments of $6,838.06 over 36 months which commenced on May 1, 2008. The interest on the vendor take-back financing is 9% per annum.

[46] What all this means is that Gordon is paying these creditors $13,338.06 per month. This Court recognizes that it is difficult for a start-up business to obtain financing. However, this Court has a concern that Gordon and his creditors chose to structure the financing so that it is "front-end heavy." In other words, at least with respect to the vendor take-back financing, the parties' daughter might no longer be a child of the marriage and the parties' son could be one-year away from that same situation, once the vendor take-back financing is fully paid.

[47] This Court was not presented with the Hydroflex's financial statements, interim or otherwise. This is not surprising inasmuch as Hydroflex had only been in business for 10 months when this matter was heard. However, this Court recognizes that with the debt load and salary it is paying to Gordon, it generates at least net income of $19,588.06 per month. It is likely much more than that and with capital assets of at least $100,000, this operating business will be able to secure conventional financing within the near future. This will be a successful business. Otherwise, Gordon, a savvy businessperson, would not have bought its assets. Because the R.J.M. Corp. financing requires payment on February 1, 2009, Gordon has likely started exploring this financing already, although this Court was not advised as such.

[48] A businessperson cannot starve his family to feed his business. Although this Court recognizes that the financing will have a cost, this business is not one that will be bled dry by maintaining the payments it is now making. At an interest rate of 5% per annum (which is above the prime rate by today's standards), interest-only payments will be $3,333 per month on a demand loan. Whether Gordon chooses to leave the balance in the business, pay down some of the principal on the loans or take all the money out as salary or dividends is his choosing, see *e.g.*

M.J.W. v. B.J.W., 2006 ABQB 19 at para. 49; ***Hauger v. Hauger***, 2000 ABQB 423 at para. 31; ***Adams v. Adams***, 2000 ABQB 153. Either way, he can take more out of the business than he is currently taking.

[49] Does all this answer the question whether Gordon was unemployed or underemployed through his own choosing? The case that will guide us through the analysis is ***Hunt v. Smolis-Hunt***, 2001 ABCA 229, [2001] A.J. No. 1170 ("***Hunt***"). The ***Hunt*** court begins by telling us when a court might impute income and on what it may rely in determining whether so to impute. It said at para. 42:

> The section should be interpreted to impute income where the obligor has pursued a deliberate course of conduct for the purpose of evading child support obligations. We read the section as requiring either proof of a specific intention to undermine or avoid support obligations, or circumstances which permit the court to infer that the intention of the obligor is to undermine or avoid his or her support obligations.

See also ***Crosby v. Crosby***, 2007 ABQB 31 at para. 22 ("***Crosby***"), which focused on the first branch of the ***Hunt*** test, when it said, "in order to impute income to a parent who is deliberately under-employed, the court must be satisfied that the parent's voluntary under-employment is undertaken for the purpose of avoiding child care obligations." The ***Crosby*** court did not need to deal with the second branch in the case with which it was dealing.

[50] The court in ***Hunt*** provides us with the factors a court should and should not consider when determining whether to impute income. These factors, although not exhaustive, include:

- that bad faith or a specific intent to evade child support obligations is not required (para. 47)
- whether the obligor has, in the past, avoided his or her support obligations (paras. 49, 73-75)
- whether underemployment or unemployment is required by the needs of the child or by reasonable educational or health needs of the obligor (*Guidelines* s. 19(1)(a) and para. 52)
- lifestyles or career choices (paras. 53 and 75)
- a parent is not required to earn the maximum they are capable of earning or assume more than one job (paras. 54-63)
- the fundamental importance of work to a person's life and the freedom to choose work which fulfills the needs and interests extending beyond the receipt of an income (para. 64)
- that the children's interests are paramount (para. 68)
- whether the obligor undertook a career, with *bona fide* intentions, before and not in contemplation of separation and with the agreement of his or her spouse (para. 69 and 83)

- the obligor's efforts to seek other employment or to upgrade his or her education or skills

[51] Other courts have added other factors that we might consider, including:

- whether the obligor recognizes that he or she has an obligation to support his or her children or spouse, ***Barnett v. Barnett***, 2006 CarswellAlta 1796 (Q.B.)
- whether the obligor's employment decisions are voluntary and whether these decisions are reasonable, ***Bercier v. Isaac***, 2008 CarswellAlta 827 at para. 26 (Q.B.)
- intention may be gleaned from the choices that the obligor makes inasmuch as unreasonable choices might reduce the support to which a child (or spouse) is entitled and the obligor might be found to have made those choices with the intention of reducing that support, ***Mercer v. Mercer***, 2004 CarswellAlta 962 at paras. 23-30 (Q.B.)

[52] The objective of the imputation of income is not to punish the obligor, but to ensure that the children (and spouse) have a fair standard of support, ***Bartel v. Evans***, 2002 CarswellAlta 974 at para.17 (Q.B.).

[53] There are a number of these factors that are not relevant to the case with which we are dealing. The children, in this case, have no needs that require Gordon to be underemployed or unemployed. Nor does Gordon have any particular health or educational needs. No one is asking Gordon to undertake a second job and he was not seeking to change jobs before or in contemplation of the parties' separation.

[54] ***Hunt*** tells us that bad faith is not required. Thus, although the parties dispute certain comments that Gordon made to Lisa concerning his views on support, this Court need not deal with those comments. As well, Gordon's counsel correctly points out that Gordon's conduct "in relation to the marriage" is not relevant. However, his conduct in relation to his support obligations is relevant, as the cases show.

[55] Has Gordon in the past avoided his support obligations? He was late in his child support payments, which prompted Lisa to register her claim with the Director of Maintenance Enforcement. As well, he was in arrears, which led to the Ouellette Order and he unilaterally stopped paying child support in June of 2007 because the ARTGP payments to 550934 stopped. Again, in February of 2007, Lisa was forced to register with the Director of Maintenance Enforcement, as Gordon stopped making any payments. Gordon testified that he has not paid child support since he purchased the assets of Hydro-Flex Hose (Western) Ltd., but that he did pay the children's expenses during 2007. While this Court recognizes that Gordon continued to pay for the children's skiing, this does not exonerate him from his obligations pursuant to court orders and legislation. Although he testified that he recognized an obligation to pay support and he "did not feel good" about terminating it, this Court finds that testimony to be disingenuous and does not accept it.

[56] Gordon has maintained a relatively extravagant lifestyle for one who has financial concerns. He acknowledged that he had made trips to Las Vegas, Texas, Italy, Jasper and the British Columbia interior and Lower Mainland since the parties' separation. Some of these trips are reflected in his credit card statements. As well, he maintained his membership at the Derrick Golf and Winter Club at a cost of approximately $4,000 per year and played golf elsewhere, locally or during his trips. His restaurant charges from January 2007 to the end of November of that year on his credit card alone were $8,284.02, not including his member lounge charges at the Derrick Golf and Winter Club which were $4,943.17 for the period covering May through November of 2007. As well, his hotel, entertainment and recreation charges on his credit card from January through November of 2007 were $3,832.09 and his transportation charges were $10,299.05. Thus, his expenditures for that period alone were $31,258.33. By the end of November of 2007, he still had $31,867.87 in his savings account.

[57] The only expenses that were directly related to the children involved skiing. These expenditures are extensive, especially in the case of the daughter who is an elite ski racer. Whether one can consider this to be treating the children's interests as paramount is difficult to reconcile given his lack of recognition that he missed or was late with his child support payments, all the while incurring expenditures for his personal use.

[58] Gordon readily admitted that he had taken these trips. He explains that he paid for them out of his savings, but most of them were for his daughter's ski racing. This Court finds the latter excuse to be an exaggeration, given the locales he visited. He also testified that he made many of his trips to accompany his new partner who is a physician. On those trips, he "stays for free," but he still has to find a way to get to those locations. He also testified that his membership at the Derrick Golf and Winter Club was important from a business promotion perspective, which has a ring of truth, but he tendered no evidence on exactly how much he benefited from this from a qualitative or quantitative perspective; especially when he maintained this membership for the period while he was unemployed. This Court recognizes that some of his expenditures, in particular, those involving restaurants, were spent while Gordon was with the children.

[59] One of the more important aspects of this analysis involves Gordon's employment decisions. This Court recognizes, based on ***Hunt***, that Gordon had the right to choose work that fulfilled his subjective needs and interests beyond earning an income. This is why this Court chooses not to criticize Gordon for wanting to operate his own business and not be an employee in an unsatisfactory position. In ***Rondeau v. Kirby*** (2003), 49 R.F.L. (5th) 189 (N.S.S.C.) *aff'd* 2004 NSCA 54, the court said at para. 12:

> People are generally free to make career changes. However, the fact that an ex-spouse is unlikely to have meaningful or any input in the decision places the burden squarely on the support paying separated or divorced spouse to make a decision to accept financial change that can be justified as being reasonable in light of his responsibilities to his dependents. Having said that, the decision

> making freedom of a divorced spouse should not be held to a higher standard of scrutiny than that of a spouse in an intact marriage.

Even though this Court will not hold Gordon to a higher standard of scrutiny, there are certain aspects of Gordon's choices that cause this Court concern. Although he had the choice to remain with ARTGP, he chose to leave it without having secured further employment or even exploring options that might have been available to him. Furthermore, he made the choice and acted on it with some haste, even though ARTGP was prepared to give him time to consider his actions. Gordon's decisions cannot be reasonable in the light of his responsibilities to Lisa and their children.

[60] After he left ARTGP, he made little effort to seek other employment. In fact, he testified that he was "in no hurry" to secure a new position and he only "got serious" once ARTGP stopped making its payments to 550934. These decisions were voluntary and unreasonable in the circumstances. They had the effect of reducing, or nullifying, his support payments. Perhaps the most damning aspect of these choices is the "front-end heavy" financing that Gordon obtained to finance Hydroflex. While this Court recognizes that a start-up business might have difficulty securing financing, it is unreasonable, and coincidental, that Hydroflex's financing issues might be resolved around the time that the children are no longer children of the marriage.

[61] Thus, this Court will impute income to Gordon. We can only surmise what Gordon's income would have been had he not left ARTGP, but we do know that ARTGP continued to pay 550934 its net partnership earning allocation as a cash distribution from August 2006 through May 2007. The payment was approximately $238,980, based on the Ouellette Order. Because 550934 was 100% owned by LLT and LLT was owned in equal shares by Lisa and Gordon, the starting point for the imputed income would be 50% of the net earnings allocation, or $119,490. This Court could impute income to Gordon from Hydroflex of $190,000, based on its rudimentary calculations of Hydroflex's net income based on the paucity of evidence it has on this issue. However, it is unrealistic to think that Gordon is in a position to refinance immediately the vendor take-back financing. He will have to refinance the R.J.M. Corp. loan in February of 2009.

[62] Although this Court finds that refinancing the vendor take-back financing is unrealistic, Gordon voluntarily made the decision to so structure it. He knew the consequences of this decision. This Court has no doubt that Gordon is likely attempting to refinance the vendor take-back financing, but no evidence was tendered with respect to this. Although this Court does not intend to calculate the vendor take-back financing at the same rate as the R.J.M. Corp. loan, it must consider the quantum of the vendor take-back financing in the light of the decision Gordon made with respect to it. As well, he might have been able to negotiate an interest-only payment on this amount until the children were no longer children of the marriage; even at the higher rate of interest. Be that as it may, Hydroflex is stuck with the vendor take-back financing and this Court finds that this amount is non-negotiable.

[63] For the foregoing reasons, this Court imputes Gordon's income at $124,000 based on Gordon's current income, the refinancing of the loan Hydroflex obtained from R.J.M. Corp. and the fact that Gordon must reduce his disposable income expenditures by at least one-half. If he is able to renegotiate the vendor take-back financing at a better rate or for a longer term, his imputed income will increase accordingly.

The Quantum of Spousal Support

[64] When conducting this analysis, we are guided by the *Act* s. 15.2, which provides us with the terms of entitlement, of which we are not concerned in this case, and the quantum of that entitlement. Of crucial importance are the objectives we are seeking to meet when determining the quantum of the spousal support to which Lisa is entitled.

[65] The objectives we are seeking to meet are set forth in the *Act* s. 15.2(6). When doing so, the *Act* s. 15.2(4) provides courts with matters they must consider when trying to meet these objectives.

[66] Of their nature, a consideration of these factors is fact-driven. Each case depends on its facts. The court in ***Corbeil v. Corbeil***, 2001 ABCA 220 at para. 3 ("***Corbeil***"), said awards of maintenance are not automatic as it "is still necessary to balance all of the objectives and consider the circumstances of the parties." Although the court was dealing with the entitlement to spousal support, this statement is applicable equally to a court considering the quantum of any such claim.

[67] ***Corbeil*** also provides us with the characterization of spousal support, as gleaned from the legislation and the cases interpreting that legislation. It said at para. 29:

> Spousal support in Canada is frequently referred to as (1) compensatory, (2) contractual, or (3) non-compensatory ... Compensatory support, premised on marriage being a joint endeavour, seeks to alleviate economic disadvantage by taking into account all the circumstances of the parties, including the advantages conferred on either spouse during the marriage. It is concerned with an equitable sharing of the benefits of the marriage. Contractual entitlement, on the other hand, flows from the express or implied agreements of the parties. Finally, non-compensatory support may be ordered where it is fit and just to do so.

[68] The parties in this case do not claim that there is an express or implied contract that deals with spousal support. The Plaintiff asked this Court, however, to consider awarding compensatory spousal support. Given the ***Corbeil*** court's description of non-compensatory spousal support, this Court will also consider non-compensatory elements as well.

[69] The leading case that deals with spousal support is ***Moge v. Moge***, [1992] 3 S.C.R. 813 ("***Moge***"), which continues to provide courts with guidance when addressing these issues. The court said at paras. 44 and 47 [emphasis original]:

> Spousal support in the context of divorce, however, is not about the emotional and social benefits of marriage. Rather, the purpose of spousal support is to relieve economic hardship that results from "marriage or its breakdown." Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party's economic prospects.
>
> ...
>
> Fair distribution does not, however, mandate a minute detailed accounting of time, energy and dollars spent in the day to day life of the spouses, nor may it effect full compensation for the economic losses in every case.

[70] Despite this, the objectives of spousal support require us to look at some of the emotional and social aspects of the marriage in the context of how one or the other effects "economic hardship" on the parties. The court in ***Moge*** recognized this approach when it said at para. 79, that the court must take "a broad approach with a view to recognizing and incorporating any significant features of the marriage or its termination which adversely affect the economic prospects of the disadvantaged spouse."

[71] Courts are required to weigh the objectives without giving undue weight to any particular objective, ***Moge*** para. 53; ***Corbeil*** at para. 34. In particular, the court in ***Moge*** reminds us at para. 55, that the objective of self-sufficiency is "tempered by the caveat that it is to be made a goal only 'in so far as is practicable.'" As well, it said at para. 85, "As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution."

[72] In the later Supreme Court of Canada case, ***Bracklow v. Bracklow***, [1999] 1 S.C.R. 420 ("***Bracklow***"), the court provided us with an example of how we might analyze the various factors. It said at para. 36:

> Depending on the circumstances, some factors may loom larger than others. In cases where the extent of the economic loss can be determined, compensatory factors may be paramount. On the other hand, "in cases where it is not possible to determine the extent of the economic loss of a disadvantaged spouse ... the court will consider need and standard of living as the primary criteria together with the ability to pay of the other party": Ross v. Ross (1995), 168 N.B.R. (2d) 147 (N.B. C.A.), at p. 156, per Bastarache J.A. (as he then was). There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

Of importance to the case with which we are dealing is the comment the court made in ***Corbeil*** at para. 54, when it said [emphasis added], "Despite the varied types of contributions that can be made by spouses to a marriage, the focus of the inquiry is the effect of the marriage on the economic prospects of each party." In other words, this is a prospective analysis, not retrospective.

[73] ***Bracklow*** was concerned primarily with non-compensatory support, which the *Act* s. 15.2(4) speaks to when it refers to the "condition, means, needs and other circumstances " of the spouses. The court in ***Kuszka v. Kuszka***, 2006 ABQB 169 ("***Kuszka***"), provides us with a description of these factors, citing extensively from ***Bennett v. Bennett***, 2005 ABQB 984 ("***Bennett***"). The ***Kuszka*** court analyzed the "condition" of the spouses by looking at their ages, current physical and mental health, employment and capacity to take care of their children. It used ***Bennett*** court's description of the "means" factor at para. 32, when it said:

> The word "means" includes all financial resources, capital assets, income from employment or earning capacity and any other source from which benefits are received. In determining what spousal support, if any, should be paid, the court should consider the income earning capacity of each spouse, their income from investments, and their net worth generally, ***Bennett*** at para. 28 [citations excluded.

As well, the ***Kuszka*** court at para. 35, used the ***Bennett*** court's description of the "needs" factor which provides:

> The "needs" of a spouse are relative and may be determined, at least in part, by reference to the lifestyle enjoyed by both spouses during long-term matrimonial cohabitation and the payor's entitlement to a reasonable standard of living. In Riad v. Riad (2002), 317 A.R. 201, 2002 ABCA 254 the Court at para. 33 described "needs" in this way:
>
> > ... need cannot be defined as an absolute quantity. It is relative to the standard of living enjoyed prior to the collapse of the marriage and can be equated to reasonable expectations: Brown v. Rae, [2001] A.J. No. 1516 (Q.B.) at para. 55; Lake v. Lake (1997), 210 A.R. 358 (Q.B.) at paras. 44-45. Need is a flexible concept and is not confined to a subsistence lifestyle: Myers v. Myers, [1995] B.C.J. No. 2300 (BCCA) at 228. Spousal support is intended to provide economic stability and a predictable level of income that would allow the recipient to budget, plan, and move forward along the road to self-sufficiency, beyond mere subsistence living: Morrison v. Morrison (1993), 139 A.R. 124 (Q.B.). As this court stated in Corbeil v. Corbeil "[a] long-term spouse who has enjoyed a high standard of living because of a high-earning spouse need not work and live at minimum wage": [2001] A.J. No. 1144 (C.A.) at para. 47.
>
> ***Bennett*** at para. 29.

[74] The parties were married almost 18 years. Through a mutual choice, Lisa stopped working in April of 1992, during her pregnancy with the daughter. At the time she quit her job, she was earning approximately $28,000 per year. She was a full-time mother from that time to the present and enjoyed that role. Although the court in ***Moge*** at para. 42, asked courts to eschew the use of the term "traditional" marriages, the marital relationship between Gordon and Lisa was indeed traditional, in the sense that Lisa tended to the home and children, while Gordon pursued his occupation. This was a logical choice for this couple, but Lisa sacrificed her career goals. She obtained her degree and wanted to develop her career before having children.

[75] Lisa is now 44 years of age and is physically and mentally healthy. For some time after the parties' separation, Lisa did not work or attend school, as she needed time to think about what to do and the children were her first priority. She testified that she has chosen not to work in the field of recreation or recreation administration because it is too "physical." This is not an unreasonable self-assessment, as individuals graduating with recreation administration degrees are usually in their twenties. She has chosen a less physical career in home décor, but needs to obtain the necessary education and experience to fulfill this career objective. During the summer of 2006, Lisa decided to return to school to obtain a certificate in interior design from the University of Alberta. She had taken two courses of the nine she requires to complete this certificate program before the summer of 2007. Each course required her to attend three hours of class per week. As well, after the parties' separation, Lisa obtained employment with a home décor business known as Cozy Peaches. She was working 25 hours per week earning $10 per hour. She commenced her employment with Cozy Peaches during April of 2007. She is hopeful that the home décor business will pay her between $75 and $90 per hour once she completes the program. She had already secured two clients in this business.

[76] Gordon is 52 years of age and is physically and mentally healthy. In fact, he appears much younger than his age. From his testimony, Gordon does not lack ambition and has proven himself in his employment field. This is not a case like one finds in ***Crosby*** at para 23, where the court found that the respondent "appears to have had, during the whole of the marriage, a commitment to an alternative life style." In Gordon's case, it is just the opposite. We have spoken extensively about Gordon's current employment situation.

[77] Both parties are capable of caring for their children. Gordon's role in the children's lives before the parties separated was limited, because of his work and recreational activities. He has become more involved with them since the parties separated. Before their separation and since, both parties have participated and supported their children's skiing. Both were involved in taking the children to skiing venues and Gordon continues to be involved with the daughter's skiing. The daughter is an elite skier who is heavily involved with ski racing.

[78] At the outset of his argument, Gordon's counsel presented this Court with a balance sheet showing each parties' assets and liabilities. Lisa's counsel pointed out certain inaccuracies with this statement, as it did not reflect all of Lisa's liabilities and Gordon's assets. Gordon's counsel responded by saying that he simply wanted to use the financial statement "to set the stage in

terms of where these people are at the end of the exercise." In other words, he was intending on using the statement in a macro-sense and this Court accepted the statement in that sense, being aware that it was not completely reflective of the parties' entire financial circumstances.

[79] Unlike many of the cases that come before this Court, the asset to liability ratio of these parties is strong. It is interesting to note, however, that most of the parties' assets are capital assets that do not "put food on the table." Although one could make the argument that Lisa should dispose of some of her capital assets to accomplish this, one could make the same argument with respect to Gordon. As well, Lisa testified that she was cashing in some of her registered retirement savings and using her line of credit to meet her day-to-day living expenses. The parties capital assets are not significantly different from each other.

[80] The difference lies in the "income from employment or earning capacity" of the parties. There is little likelihood that Lisa will attain the financial standard of living she enjoyed before the parties separated. Even once she completes her home décor programme, her earning capacity, which Gordon did not challenge, will be between $75-$90 per hour. Once Hydroflex pays its creditors, Gordon has a significant earning capacity.

[81] Both parties acknowledge that they had a very good financial lifestyle before their separation. By her own admission, Lisa testified that she did not have to work as "there were no money issues." As well, Gordon testified that they were "doing great" financially. Marriage breakdown results in sacrifices on the part of both parties. They are maintaining two households instead of one. However, those sacrifices must be shared equally or, more positively, "compensatory support intends that both spouses profit from the joint venture of marriage" and it "is not intended to compensate for a bad marriage, but to provide an equitable sharing of the results of the advantages conferred on one spouse as a result of the efforts of another," ***Corbeil*** at paras. 45-46. The reasonable expectations of Gordon and Lisa are not to encroach on their savings and go into substantial debt to maintain a reasonable standard of living. While this Court recognizes that Gordon might incur some debt to meet the requirements of this judgment, that debt will be short term in the view of this Court's expectations of Hydroflex, as reflected in the evidence. As well, this Court recognizes that Lisa must move to a condition of self-sufficiency, which she has acknowledged by pursuing a career in home décor.

[82] Another circumstance of which this Court has taken notice is the effect of the corporations in which the parties hold interests and those corporations' positions vis-à-vis ARTGP. This Court has not taken into account any monies the parties might receive involving LLT or 550934 and any actions against ARTGP or others. The parties hold equal shares in LLT and the parties will share equally any proceeds LLT or 550934 might realize. To that end, Lisa is a director of LLT and, pursuant to section 122(1)(a) of the *Business Corporations Act*, R.S.A. 2000, c. B-9, she must "act honestly and in good faith with a view to the best interests of the corporation." Thus, she must assist in the pursuit of any action that would further LLT's best interests. The result could be of benefit to her and Gordon equally in the short-term and the long-term.

[83] The court in ***Bracklow*** said at para. 53:

> While some factors may be more important than others in particular cases, the judge cannot proceed at the outset by fixing on only one variable. The quantum awarded, in the sense of both amount and duration, will vary with the circumstances and the practical and policy considerations affecting particular cases. Limited means of the supporting spouse may dictate a reduction. So may obligations arising from new relationships in so far as they have an impact on means. Factors within the marriage itself may affect the quantum of a non-compensatory support obligation ... Finally, subject to judicial discretion, the parties by contract or conduct may enhance, diminish or negate the obligation of mutual support.

Both parties are in new relationships. This Court was provided with little information about the new partners each has chosen, except that Gordon's new partner has provided him with some financial support and Lisa's new partner lives in Vancouver. Accordingly, very little turns on these factors, because of the paucity of information with which this Court must deal.

[84] The court in ***S.M.B. v. L.M.B.***, 2006 ABQB 141 at para 141, *aff'd* 2007 ABCA 232, said "It is not possible to adopt a formulaic approach to a spousal support application; rather the Court must consider all of the factors and objectives ... in the context of the parties and their respective circumstances." In the view of the foregoing, this Court awards Lisa $2,300 per month in spousal support commencing October 1, 2008 and ending October 1, 2014. The parties' son will turn 18 years on October 19, 2012. Inasmuch as there is a shared custody arrangement between the parties, Lisa will be in a position to continue and complete her home décor programme and have two years within which to reach a point of self-sufficiency.

[85] This Court has not arbitrarily chosen this number. It has imputed Gordon's income at $124,000 per year and has evidence that Lisa had income of $33,937 per year for 2007. Adding the $2,300 per month to Lisa's income and reducing it correspondingly from Gordon's income leaves Gordon with taxable income of $96,400 and Lisa with taxable income of $61,537. As discussed below, from his income, Gordon's must pay a further $15,132 for child support. As ***Moge*** mandates, this amount is intended to effect a fair distribution, not full compensation.

Shared Custody

[86] The parties acknowledge that this is a shared custody arrangement, which *Guidelines* s. 9 addresses. ***Contino v. Leonelli-Contino***, 2005 SCC 63 at para. 5127 ("***Contino***") provides us with the objective of *Guidelines* s. 9, which is "to the extent possible, to avoid great disparities between households ... As far as possible, the child should not suffer a noticeable decline in his or her standard of living." Based on the income this court has imputed to Gordon, the *Guidelines* say that Gordon must pay $1,753 per month for child support. Lisa's income for 2007 was $33,937, which would result in a set-off of $1,261 per month. ***Contino*** at para. 27, however, said

that in the case of shared custody, courts cannot use the set-off amount as the sole criterion. It acknowledged at para. 30, however, that the set-off amount could remain the proper amount of child support, but it exhorted courts to review the other factors set forth in *Guidelines* s. 9.

[87] *Guidelines* s. 9(b) is an unusual provision, as the total cost of raising two children in two households, of its nature, results in increased costs, particularly to the payor parent. The ***Contino*** court at para. 52, suggested that courts look at the budgets and actual expenditures incurred by the parents to determine whether shared custody has resulted in this increase. In the case with which we are dealing, Lisa provided this Court with her estimated monthly costs but Gordon did not. However, the parties, in their Statement of Agreed Facts acknowledged the shared parenting arrangement since their separation. Thus, since their separation both parents have budgeted for this increase in total costs, so this factor is of little importance in this case.

[88] *Guidelines* s. 9(c) requires an analysis of the "conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought." We have already examined the conditions, means, needs and other circumstances of Gordon and Lisa in the context of spousal support and have determined that Lisa has a need for spousal support based on those factors. The analysis under *Guidelines* s. 9(c) is slightly different and it should rely primarily on the financial statements and child expense budgets that the parties provide to the court. From the evidence, this Court has received information sufficient to determine the financial situations of the parties. ***Contino*** tells us at para. 57, that if the parties do not provide this information, the court may adjourn the matter to allow the parties to provide that information. That case makes it very clear that courts must not rely on "common sense assumptions" about costs. Despite this, when one looks at the conditions and fixed financial condition of the parties, they do not substantially differ one from the other, with the exception of the income from employment or earning capacity factor. We have addressed that matter earlier in these reasons. Provided this Court makes an appropriate child support award, "the standard of living of the [children] in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances" should not be affected, ***Contino*** at para. 68. This is not a situation where one parent left the marriage in an impecunious state, while the other continued to live a lavish lifestyle.

[89] There are differences, however, as Gordon currently has an income and Lisa's income is not substantial. During the parties' separation, Lisa testified that Gordon continued to pay for the children's skiing. She also testified that Gordon told the children that she was not paying for their skiing and she felt that this diminished her value as a mother. The court in ***Archibald v. Archibald***, 2007 ABQB 486 at para. 22, was dealing with a similar situation when it said:

> ... there is a disparity in the standard of living which the children enjoy with each parent. She testified that the children notice this disparity. She cannot keep up with what the children are exposed to with their father. She believes that as parents, the two are not sharing the experiences which they have with their children. In short, she wishes to be able to provide some of the experiences which [the father] is able to provide for the children.

[90] Because of the circumstances in which the parties find themselves, one cannot treat child support in a vacuum without considering spousal support. In other words, if one were to award sufficient child support and appropriate proportionate sharing of *Guidelines* s. 7 expenses, all the while recognizing "the presumptive claim to equal standards of living upon its dissolution," ***Moge*** at para. 85, then this Court has accomplished the objectives set forth in the *Act*.

[91] In these circumstances, the set-off amount is the appropriate level of child support in this shared custody arrangement. As well, each party will pay their proportionate share of *Guidelines* s. 7 expenses.

[92] Should the daughter's skiing costs be included in the *Guidelines* s. 7 expenses? Neither party disputed the fact that the daughter is an elite skier. Gordon estimated that the expenses in maintaining the daughter in this programme would be approximately $25,000 per year, less the subsidies of about 20% to 30%. Lisa did not contest this amount. As well, there is little doubt that this programme will benefit the daughter, that she has a special talent and that it is an extraordinary expense, whether one takes an objective view of the expense or a subjective view, taking account of the parties' means.

[93] The question becomes one of whether the expense is reasonable "in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation." The parties involved their children in skiing before their separation and the children continued their skiing after the parties separated. Gordon was adamant that the daughter remain in the elite skiing programme and Lisa did not contest this. This Court has found that although the parties incomes are limited, they have relatively substantial fixed assets. They are intent on allowing the daughter to continue in this programme. This expense will form the subject of a *Guidelines* s. 7 expense and the parties will pay their proportionate share of it. Gordon alone will not pay these expenses, as Lisa is concerned with how Gordon reflects these payments to the children, *Guidelines* s. 7(2).

[94] Gordon also testified that the daughter received subsidies for this expense of between 20% and 30%. He did not provide this court with particulars of these subsidies, but they will be deducted from the expense before the parties calculate their respective proportionate shares. As well, the parties must assist the daughter in trying to obtain sponsorships and other subsidies that will reduce this expense. The parties must exchange receipts to prove that they have incurred the expense.

[95] In summary, Gordon is required to pay Lisa the following monthly amounts:

Child support	$1,261
Spousal support	$2,300

He will pay these amounts to the Director of Maintenance Enforcement in Edmonton, Alberta.

[96] As well, the parties will pay their proportionate share of *Guidelines* s. 7 expenses and on or before June 1 in each year, they will exchange complete copies of their income tax returns and any notices of assessment and reassessment that Canada Revenue Agency issues to them. Gordon's financial information will include the financial statements for Hydroflex. At this time, this Court is not ordering that Hydroflex obtain audited financial statements, as the cost involved in obtaining those could be better used for the benefit of the parties' children. However, this Court is not precluding the possibility that audited financial statements be required in the future. This Court is hopeful that with the exchange of financial information, the parties will not have to return to this Court to settle their differences on child support and spousal support.

[97] As Lisa has been substantially successful in her pursuit of this matter, she will have her taxable costs in accordance with Schedule C, Column 1.

Heard on the 24th day of September, 2008 to the 26th day of September, 2008.
Dated at the City of Edmonton, Alberta this 8th day of January, 2009.

K.D. Yamauchi
J.C.Q.B.A.

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Appendix

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

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.

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim 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, pending the determination of the application under subsection (1).

(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.

(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.

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

(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.

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or

(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

...

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

...

(6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

...

(7) A variation order varying a spousal support order should

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

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

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

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

...

Federal Child Support Guidelines, SOR/97-175

7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

...

(f) extraordinary expenses for extracurricular activities.

(1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

(i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court

has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child or children,

(iv) the overall cost of the programs and activities, and

(v) any other similar factor that the court considers relevant.

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

(3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent 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 support is sought.

15. (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

...

16. Subject to sections 17 to 20, a 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.

17. (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the 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.

...

18. (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the 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 spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse; . . .