
CANADA / JUDGMENT

Ortynski v. Ortynski

2014 BCSC 73

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 73 Ortynski v. Ortynski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ortynski v. Ortynski,

2014 BCSC 73

Date: 20140117

Docket: 48602

Registry: Vernon

Between:

Krystal Leanne Ortynski

Claimant

And

Todd Edward Donnald Ortynski

Respondent

Before: The Honourable Mr. Justice Barrow

Reasons for Judgment

Counsel for the Claimant:

C.R. Christiansen

Counsel for the Respondent:

P. Daltrop

Written submissions:

January 18, 28, and

February 1, 2013

Place and Dates of Trial/Hearing:

Kelowna, B.C.

December 17-20, 2012

Place and Date of Judgment:

Vernon, B.C.

January 17, 2014

Introduction

- [1] The parties began a common law relationship in 2002. They married on May 20, 2006, and separated on June 29, 2011. They have two children: Sydney Paige Ortynski, who was born on April 9, 2007; and Ashton Duane Ortynski, who was born on December 2, 2008. Shortly before the trial, the parties agreed on the parenting arrangements for their children. In particular, they agreed that they would share their parenting responsibilities equally. The only outstanding issue relating to parenting is whether a parenting co-ordinator should be appointed.
- [2] Both parties seek a divorce on the basis that they have lived separate and apart for more than one year, and there will be an order to that effect.
- [3] The primary issues are the determination of each party's income for support purposes and the division of family assets.

Background

- [4] Ms. Ortynski was born on March 29, 1982. She is now 31 years old. Mr. Ortynski was born on August 2, 1978 and is now 35 years old. They met in Calgary in February 2001 and began dating. Ms. Ortynski was then 18 years old. She had completed high school the previous June. She worked as a waitress and cashier until the fall of 2001, when she began a 12-month program leading to a certificate in tourism offered through the Southern Alberta Institute of Technology. Sometime in 2002, she moved in with Mr. Ortynski, who was at the time a student at the University of Calgary pursuing a Bachelor of Commerce degree. After spending some time in Australia, during which Mr. Ortynski completed the semester of his degree program.

- [5] The couple returned to Calgary and took up residence in the condominium that Mr. Ortynski had purchased. Ms. Ortynski returned to a waitressing position but, in January 2004, was hired by WestJet as a flight attendant. Mr. Ortynski returned to the University of Calgary and completed his degree, graduating in the fall of 2003. He then began work as an insurance broker in Calgary. In June 2005, the parties purchased a home on Stradwick Way in Calgary. Mr. Ortynski's parents assisted them with a gift of \$100,000.
- [6] The parties married in May 2006, and by August of that year, Ms. Ortynski was pregnant. Mr. Ortynski's job required him to work long hours. The couple decided that they would relocate to Kelowna and pursue employment that allowed for a work/life balance better suited to their long-term desires. The move would also bring them closer to family - Ms. Ortynski's family was in Kamloops and some of Mr. Ortynski's family, although not his parents, lived in the Kelowna area. Although they decided to make the move, Mr. Ortynski did not have a job awaiting him in Kelowna and his future in that respect remained uncertain. Ms. Ortynski planned to remain employed by WestJet but as a customer service representative instead of a flight attendant. In anticipation of this move, the parties purchased a home on Franwill Road in West Kelowna and took up residence there upon their arrival. They sold the Stradwick Way home and realized a significant profit on the sale. The profit was partly due to the rising real estate market and partly due to the significant renovations they had undertaken on the home. They applied some of the profit from the sale of Stradwick Way towards the purchase of the Franwill Road home. The remaining profit was used to complete renovations on the Franwill home and to purchase a BMW motor vehicle for Ms. Ortynski's use.
- [7] Ms. Ortynski suffered some medical difficulties during her first pregnancy, and as a result in the fall of 2006, she took a medical leave from her employment with WestJet. Mr. Ortynski devoted most of his time in the fall of 2006 and the first several months of 2007 towards completing renovations on the Franwill Road home. Sometime prior to the birth of the parties' first child in April 2007, they decided to purchase a retail floor covering business in Vernon. The business was operated as a franchise under the trade name "End of the Roll". The End of the Roll franchise in Vernon is one of 56 franchises granted by a company that is owned by Mr. Ortynski's father Duane Ortynski, his brother Cory Ortynski, and two other partners. The purchase of the Vernon franchise was completed through the purchase by the parties of the shares in 0721036 B.C. Ltd. (the "numbered company"), the company through which the franchise had been operating under the previous owners. They paid \$108,002 for the shares. They each acquired 600 voting common shares and 300 non-voting preferred shares. The transaction closed on March 23, 2007. The parties each became directors and officers of the numbered company. The funds to purchase the shares came from a combination of Duane Ortynski and the proceeds of sale of the Chadwick Way property.

- [8] The parties' first child was born two weeks after they purchased the End of the Roll franchise. Mr. Ortynski devoted his energies almost exclusively to the operation of the newly acquired business. He often worked seven days a week and, inclusive of his commute from West Kelowna to Vernon, was frequently away from home 12 hours a day. Ms. Ortynski took some time to recover from the medical issues she experienced during her pregnancy and to cope with depression she experienced in the aftermath of Sydney's birth.
- [9] In March 2008, Ms. Ortynski returned to work as a customer service agent with WestJet. She only worked for about a month before terminating her employment. She testified that she stopped working because Mr. Ortynski would not help with driving Sydney to or from daycare. She said that the parties jointly agreed that she would be a stay-at-home mother.
- [10] In an effort to reduce the commute that Mr. Ortynski was required to make, the parties purchased a lot on Capistrano Peaks Crescent in a subdivision some distance north of Kelowna. They set about arranging for the construction of a home on that lot, and by November 2008, the home was completed to the point where the parties could move in. Ms. Ortynski had become pregnant with the parties' second child in the spring of 2008, and Ashton was born a week after they moved into the Capistrano home.
- [11] The Franwill property home did not sell as quickly as the parties had hoped. They were also caught in the midst of the broader economic slow-down. In the result, they rented the Franwill property for about a year before it sold.
- [12] By October 2010, when the Franwill property sold and the proceeds applied to the various debts the parties had incurred in acquiring and constructing the home on Capistrano Peaks Crescent, the parties were left with a mortgage in excess of \$700,000. They had two young children and only one source of income. Eight months later, no doubt in part due to the strain that their financial circumstances and the demands on Mr. Ortynski in attempting to run a profitable business and on Ms. Ortynski in attempting to raise two young children largely on her own, the parties' marriage broke down. Ms. Ortynski left the matrimonial home on June 29, 2011, and the parties have lived separate and apart since. During the summer of 2011, Ms. Ortynski lived with family members in Kamloops while the couple explored the possibility of salvaging their marriage. When she realized that the marriage was not going to be salvaged, she moved into a home owned by her aunt and uncle in Vernon. Although she agreed to pay rent, she was unable to do so because she was only working intermittently. In 2012, she moved into a two-bedroom townhouse condominium in Lake Country. She remains living there today.
- [13] Mr. Ortynski remained in the family home following the parties' separation. They eventually agreed to list it for sale, but as of the trial, it had not sold.

Parenting Issues and Child Support

[14] Both of the parties' children have attended the Aberdeen Hall School for several years. At the time of the trial, Sydney was in Kindergarten there and in school from 8:30 a.m. until 3 p.m. daily. Ashton began preschool there in January 2012. Aberdeen Hall School is a private school. Tuition for the children is being paid by Mr. Ortynski's parents.

[15] The arrangement that the parties reached regarding the parenting of their children is as follows:

Custody, Access and Guardianship of the Children - Agreed Shared Parenting Regime:

1. The parties will have joint custody and joint guardianship of the children of the marriage, namely Sydney Paige Ortynski, born April 9, 2007 and Ashton Duane Ortynski, born December 2, 2008.
2. The parties will share equally the parenting of the children on the basis of the current parenting schedule namely:
 - (a) Week One: Mr. Ortynski will have the children from Thursday morning at 8:30 am until Sunday morning at 10:00 am and Mrs. Ortynski will have the children from Sunday morning at 10:00 am until Thursday morning at 8:30 am.
 - (b) Week Two: Mr. Ortynski will have the children from Thursday morning at 8:30 am until Monday morning at 8:30 am and Mrs. Ortynski will have the children from Monday morning at 8:30 am until Thursday morning at 8:30 am.
 - (c) The transfers on Sundays, holiday Mondays and holiday Thursdays will be at the Tim Horton's restaurant at Winfield unless otherwise agreed in writing.
 - (d) The transfers on school days will be at Aberdeen Hall Preparatory School in Kelowna unless otherwise agreed in writing.
 - (e) In the event that one part [sic] is working on his or her day with the children, the children shall be with the other parent. The parties shall consider alternative arrangements if it is in the best interests of the children.
 - (f) The parties will share equally the holiday periods which will include the Christmas school holiday period, the school spring break holiday period, and the school summer holiday period.
 - (g) Each party will be at liberty to travel with the children for a period not exceeding 14 days unless other [sic] agreed in writing, and either party will be at liberty to take the children outside of Canada for that holiday unless the parties otherwise agree in writing. Mr. Ortynski will take the necessary steps to obtain passports for the children and Mrs. Ortynski will cooperate in the application, failing which, Mr. Ortynski will be able to apply for the passports without Mrs. Ortynski's signature. Each party will cooperate to sign the necessary travel documents to ensure that the children are able to travel outside of Canada for holiday

purposes. Each party will hold one of the children's passports and both parties will be listed as emergency contacts on the children's passports. When either party travels with the children, he or she shall notify the other party where the children will be located and the parent not travelling with the children will have telephone access to the children twice per week, unless otherwise agreed in writing.

- (h) The children will continue to attend their present school at Aberdeen Hall in Kelowna provided that either Mr. Ortynski's parents are willing to continue to pay the fees and tuition. The school fees will not be a Section 7 expense.
 - (i) Neither party will schedule activities for the children on the other parent's parenting days without that parent's written consent.
 - (j) Neither party shall change the children's residence outside of the Kelowna/Lake Country/West Kelowna and Vernon geographical area without the other party's written consent or court order.
 - (k) The parties will make their best efforts to agree on the important decisions involving the children, failing which the parties shall retain a parenting coordinator to assist them in resolving disputes regarding the children. The parties shall share equally the costs of the parenting coordinator. The parent coordinator shall not deal with the following matters:
 - (i) The children's schooling, provided that Mr. Ortynski's parents or Mr. Ortynski continue to pay the tuition and fees so that the children can attend their current school, and
 - (ii) The children's residence will not be changed by either party outside of the Kelowna/Lake Country/West Kelowna and Vernon geographical area.
- [16] There will be an order that the parties have joint custody and joint guardianship of the children. Subsequent to reaching their agreement in December 2012, the parties agreed to change the parenting arrangement when Ashton began Kindergarten. Effective September 1, 2013, they agreed to a week-on/week-off parenting arrangement with transitions occurring on Sunday mornings at 10 a.m. There will be an order by consent in the foregoing terms.
- [17] The arrangements for the parenting of the children have worked reasonably well over the past year with the exception of the Christmas holidays in 2013. When they were unable to agree on the parenting schedule over the holidays, Mr. Ortynski brought an application which was argued on December 18, 2013. I made various orders that day resolving the parenting schedule. Ms. Ortynski, in her response to Mr. Ortynski's application, invited the court to order the appointment of a parenting co-ordinator. Mr. Ortynski opposes the appointment of the parenting co-ordinator on the basis that, for the most part, they have been able to resolve the issues relating to the parenting of their children directly between themselves.

- [18] I am not prepared to order the appointment of a parenting co-ordinator for two reasons. First, there is no application for such an order. Second, even if there were an application, I am not persuaded that the circumstances of this family have deteriorated to the point where, in their limited financial circumstances, the expense of a parenting co-ordinator is warranted. I recognize that there have been some problems relating to the parenting of their children. For the most part, these problems arose in the context of the disagreement over the Christmas parenting schedule. Aside from those issues, the parties have been able to co-parent their children in reasonably difficult circumstances. The arrangement they settled upon in December 2012 necessarily involved significant co-operation. The arrangement has worked and that is to the parties' credit. If anything, the change the parties agreed to in September 2013 requires less in the way of interaction and co-operation.
- [19] Although I am not persuaded that a parenting co-ordinator should be appointed, Ms. Ortynski raises concerns which, to the extent the circumstances giving rise to those concerns exist, ought to be addressed. Ms. Ortynski has deposed that Mr. Ortynski refuses to discuss "the caregivers he was leaving the children with, including for overnights". If either party is leaving the children overnight with a third party, they should inform the other of the identity of the third party and the time during which the children will be in that person's care. Next, Ms. Ortynski has deposed that Mr. Ortynski has sought a letter allowing him to take the children on holidays out of the country without first providing her with an itinerary for his proposed travel. If that is occurring, Mr. Ortynski should provide a detailed travel itinerary when making the request. Finally, Ms. Ortynski points to an incident that took place in front of the children on December 2, 2013, involving the parties. I make no determination as to whether that event took place. I simply note that it is unlikely that a parenting co-ordinator would not have averted the event if it occurred.
- [20] There are two issues relating to the question of child support. The first is determining the parties' incomes. The second is fixing the amount of child support and, in order to do that, determining whether to simply set off the parties' respective obligations or fix the amount of child support in some other way.
- [21] Mr. Ortynski argues that Ms. Ortynski's income should be imputed at \$30,000 per year. She was, at the time of the trial, working three days per week. Mr. Ortynski argues that she should be working full-time, and if she were to work full-time, she could reasonably expect to earn \$30,000 per year.
- [22] Ms. Ortynski argues that she can only realistically expect to earn about \$20,500 per year until she obtains the education and training necessary to pursue a more lucrative career.
- [23] Ms. Ortynski argues that Mr. Ortynski's income is not what he claims it to be. She argues that he is paid by a company that he controls. Moreover, he obtains significant benefits not reflected in his income, but which ought to be valued for purposes of determining his child support obligation. She argues that once account is taken of these things, Mr. Ortynski should be imputed with an income of \$75,000 per year.

- [24] Because the parties share the parenting of their children, the amount of child support is to be determined under s. 9 of the Federal Child Support Guidelines. That section provides as follows:
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.
- [25] The Supreme Court of Canada addressed the approach to be taken in determining the appropriate amount of child support in shared custody situations in *Contino v. Leonelli-Contino*, 2005 SCC 63. Chappel J. in *Kerr v. Pickering*, 2013 ONSC 317, provided a useful distillation of the principles expressed by Bastarache J. in *Contino*. At para. 32, Chappel J. noted the following:
- [32] The Supreme Court of Canada addressed the issue of how child support calculations should be approached in shared custody situations in *Contino v. Leonelli-Contino*.¹⁰ In that case, the Supreme Court made the following significant comments regarding the interpretation of section 9 and the manner in which child support calculations should be approached in shared parenting scenarios:
- a. The court emphasized that in shared parenting arrangements, there is no presumption in favour of the parent who has less time with the child paying the Table amount of child support. Rather, the court must determine the quantum of child support in accordance with the three factors listed in section 9.
 - b. A finding that a shared parenting arrangement exists does not automatically dictate a deviation from the Table amount of child support. The court emphasized that in some cases, a careful review of all of the factors set out in section 9 may lead the court to conclude that the Table amount remains the appropriate figure.
 - c. None of the three factors listed in section 9 prevail over the others. In reaching an appropriate child support figure, the court must consider the overall situation of shared custody, the costs to each parent of the arrangement and the overall needs, resources and situation of each parent. The weight to be accorded to each of the three factors set out in section 9 will vary according to the particular facts of each case.

- d. The court emphasized that the purpose of section 9 is to ensure a fair and reasonable amount of child support. It concluded that in adopting section 9 of the Guidelines, Parliament made a clear choice to emphasize the need for fairness, flexibility and the actual condition, means, needs and circumstances of each parent and the child, even if this meant sacrificing to some degree the values of predictability, consistency and efficiency.
- e. The calculation of child support pursuant to section 9 involves a two step process. First, the court must determine whether the 40% threshold has been met; second, if the threshold has been met, the court must consider the factors outlined in section 9 to determine the appropriate quantum of support.
- f. With respect to section 9(a), the amounts set out in the applicable Tables for each parent, the court stated that the simple set-off approach outlined in section 8 of the Guidelines may be a useful starting point, as a means of bringing consistency and objectivity to the child support determination. This is particularly so in cases where the parties have provided limited information and the incomes of the parties are not widely different. However, the court emphasized that the simple set-off approach has no presumptive value in carrying out the support calculation. It cautioned against a rigid application of the set-off approach, noting that the set-off figure may not be appropriate when a careful examination of the respective financial situations of the parties and their household standards of living raises concerns about the fairness of a drastic reduction in child support to the recipient.
- g. The court held that the court has the discretion to modify the simple set-off 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."¹¹ It emphasized that the court should insofar as possible strive for a result that avoids the child experiencing a noticeable decline in their standard of living as they move between households.
- h. The court highlighted as one consideration in carrying out the section 9 analysis whether one parent is actually incurring a higher share of the child's costs than the other, such as costs relating to clothing and activities.
- i. With respect to subsection 9(b), the court emphasized that this section does not refer only to the increased expenses which the payor parent has assumed as compared to the expenses that they would be incurring if they had the child less than 40% of the time. This subsection recognizes that the total global cost of raising the child in a shared custody arrangement may be higher than in a primary residence arrangement. It requires the court to consider the total additional costs attributable to the situation of shared custody. In carrying out this analysis, evidence of necessary duplication of fixed costs arising due to the shared child care arrangement may be important.
- j. The court recognized that not every dollar spent by a parent who has the child over the 40% threshold is a dollar saved by the recipient parent. It stated that in the absence of evidence to the contrary, it is possible to presume that the recipient parent's fixed costs have

remained the same, and that their variable costs have only marginally decreased by the other parent's increase in time with the child. The court stated that where no evidence respecting the increased cost of shared custody is adduced, the court "should recognize the status quo regarding the recipient parent."

- k. Financial statements and /or child expense budgets are necessary in order for the court to properly carry out the child support analysis pursuant to section 9. The judge should not make assumptions regarding additional costs attributable to a shared parenting arrangement, but must apply the evidence relating to the additional costs.
- l. The court's discretion under section 9 is sufficiently broad to bring a parent's claim for section 7 expenses into the analysis under that section, taking into consideration all of the factors outlined in section 9.

[26] Ms. Ortynski argues that to apply the simple set-off approach would result in a significant variation in the standard of living experienced by the children as they move back and forth between their parents' homes.

[27] I will deal first with the issue of the parties respective incomes and then turn to the determination of the appropriate amount of child support.

[28] Ms. Ortynski had not worked outside the family home for several years as of the date of the parties' separation. She testified that she suffered from depression intermittently for several years before the separation. She said that she was an "emotional wreck" by the summer of 2012 and that her mental health did not improve as she attempted to come to grips with the fact of the end of her marriage and her new role as a single parent sharing the care of her two young children.

[29] Her short-term plan involved becoming recertified to teach aqua fit classes, something she had done when the parties lived in Calgary. In addition, she planned to complete a number of high school science courses with a view to pursuing further education in the health care field. She said that while she had completed these courses in high school, because she had been out of school for more than five years, she was required to retake the courses in order to be eligible for admission into programs such as nursing. She said that she enrolled in these courses online in 2012 but was unable to complete them. She testified, and I accept, that her already fragile emotional state was such that she could not cope with working part-time, parenting part-time, and pursuing her educational upgrading at the same time. Although she was unable to complete the courses, she did set about obtaining counselling in an effort to regain her emotional equilibrium. At the time of the trial, her plan was re-enroll in the necessary courses to complete her upgrading and then pursue further education either as a radiology technician or in some related field.

- [30] Ms. Ortynski's income in 2012 was derived from two sources. First, she earned \$617 teaching aqua fit classes. In late August 2012, she obtained employment at KurSpa in the Sparkling Hills Wellness Hotel near Vernon. She earns \$15.50 per hour as a receptionist. She initially worked three days per week, 10 hours per day, but in November 2012, as business at the spa slowed for the winter, her hours were reduced to eight hours per day. She earned just over \$7,600 from this employment as of December 1, 2012.
- [31] I accept that Ms. Ortynski intends to complete her high school upgrading and I accept that that is a reasonable goal. Assuming she pursues it, working 30 hours per week in addition to discharging her responsibilities as a co-parent of the parties' children is reasonable. If Ms. Ortynski were to work 30 hours per week, she will earn approximately \$24,180 in 2013. In my view, that is a reasonable income and it is the income I will use in determining child support.
- [32] In Mr. Ortynski's second financial statement sworn on November 5, 2012, he deposed that his income for child support purposes in 2012 was \$51,230. In argument, Mr. Daltrop conceded that a further \$5,379 should be added to Mr. Ortynski's income to reflect the fact that the numbered company pays his gas expense, cell phone expense, and contributes towards his vacation. In the result, his position is that for child and spousal support purposes, his income should be fixed at \$56,610.
- [33] Ms. Ortynski argues that Mr. Ortynski's income should be imputed at \$75,000 per year. She argues that this is reasonable because in 2011, the numbered company paid Mr. Ortynski \$65,000 in salary. He reduced his income in 2012 to about \$53,000 per year, in part because the company needed to repay a loan advanced by Mr. Ortynski's father's company. Ms. Ortynski argues that the timing of the repayment of this obligation is suspect and that if it is ignored, it is reasonable to infer that the company can continue to pay Mr. Ortynski that which it paid him in 2011. In addition, she argues that the company makes cash sales and those cash sales are not recorded in the company's accounts. Further, she argues that the amounts that the company pays on behalf of Mr. Ortynski (cell phone, vehicle expenses, and a portion of vacations taken by Mr. Ortynski) are greater than those Mr. Ortynski argues should be included. In all of these circumstances, Ms. Ortynski argues that Mr. Ortynski should be imputed with an income of \$75,000 per year.
- [34] I will deal first with the expenses that the company pays on Mr. Ortynski's behalf. The amounts of these expenses are all based on the expense reports generated by Mr. Ortynski for the company for the months of December 2009 and January and February 2010. Based on those expense reports, the company paid on average \$302 per month in cellular telephone expenses. In addition, the company paid, by my calculation, an average of \$2,173 per month in vehicle expenses. These latter expenses include a \$721-per-month lease expense for the pickup truck that Mr. Ortynski drives. Finally, the company paid \$2,720 for a trip to Anaheim, California, in February 2011. Although this trip involved attendance at a business gathering, Mr. Ortynski allows that it also served as a family vacation.

- [35] Mr. Ortynski takes the position that 50 percent of the vacation expense should properly be reflected in his income for child support purposes. He argues that only 25 percent of the cell phone and vehicle expenses should be reflected in his income because 50 percent of the total of those expenses are properly viewed as business expenses, and of the remaining 50 percent, half is attributable to Mr. Ortynski's usage and the other half to Ms. Ortynski's usage. The company was paying for both his and her cell phones and his and her vehicle expenses.
- [36] I think it reasonable to impute an additional \$1,000 in annual income to Mr. Ortynski to reflect the fact that the company pays his cell phone expenses. In addition, I think it reasonable to impute an additional \$10,000 to account for the fact that the company pays his vehicle expenses. Assuming that the vehicle expenses are properly divided equally between the company and personal use, it is first appropriate to notionally attribute to Mr. Ortynski one-half of the lease payment (\$727 per month). Of the remaining monthly expenses (roughly \$1,446), half is attributable to the parties personally. Mr. Ortynski was driving a newer model pickup truck and Ms. Ortynski was driving a Dodge Caravan. I think it reasonable to allocate 60 percent of the fuel expense to Mr. Ortynski. In combination, the lease and fuel expenses amount to approximately \$800 per month. I have rounded the annual cost to \$10,000. Finally, I think it reasonable to impute to Mr. Ortynski an annual amount for the vacations he is able to expense to the company. I estimate that amount at \$1,500.
- [37] The next issue relating to Mr. Ortynski's income is the question of cash sales made by the business. Both Mr. and Ms. Ortynski testified that from time to time, the business sold products or services for cash. Mr. Ortynski testified that all of these cash sales were properly accounted for in the company's books, and thus there is no basis to impute an income to him as a result of these sales. Ms. Ortynski testified that, although her knowledge of the business was not particularly detailed, she knew the business conducted some transactions for cash. She testified that the cash from these transactions was kept in a particular drawer at the store. She said that, as far as she knew, the money was never deposited to the company's bank account and that although from time to time a portion of it would be earmarked for the purchase of supplies, a portion of it was always simply available for the couple's living expenses. She said that sometimes there was as little as \$200 in the drawer, but on other occasions, there was as much as \$5,000 there.
- [38] As noted above, Mr. Ortynski maintains that the cash transactions were all properly accounted for in the company's records. He testified that from time to time customers, including in particular friends of his and Ms. Ortynski's, request cash deals on the basis that the product being purchased would be less expensive because it would be unnecessary to pay GST or other taxes. Mr. Ortynski said that he agreed to do cash sales but only so that it would appear to the customer that the price was being reduced. He said that he would record the transaction and thus pay the necessary taxes. The result of all of this was that the company ended up selling the product at a discount, but the customer was given the

impression that the discount was due to the fact that various taxes were not being paid. Mr. Ortynski testified that in keeping with this ruse, the customers were not given an invoice. Mr. Ortynski was unable to say how many such transactions he orchestrated but allowed that there were "quite a few". He said that these transactions were sometimes done for friends, sometimes for relatives, and sometimes for complete strangers.

- [39] While it may be that Mr. Ortynski accepted cash for the sale of products in order to give customers the impression they were receiving an illegitimate discount, I do not accept that he did that on a regular basis or on most occasions in which product was sold for cash. Particularly in the case of sales to friends and relatives, simply telling them that the business would pay the GST and PST, or HST as the case may be, would be the common sense way to proceed. First, the customer would recognize that Mr. Ortynski was giving them a discount on the basis that they were a friend or relative. Second, doing it in that fashion would not leave them with the impression that Mr. Ortynski was prepared to avoid his obligation to pay taxes. Third, the customer would receive an invoice which may be valuable for warranty or other purposes. As for transactions with strangers, while it may be understandable why Mr. Ortynski would not wish to extend discounts in those circumstances, it seems even more improbable that he would create the appearance of a discount while not actually providing one.
- [40] Because I reject the assertion that all cash transactions made by the business were properly recorded in the books of account, I think it reasonable to impute an amount to Mr. Ortynski to reflect these receipts. The amount that should be imputed can only be broadly estimated because neither party was able to quantify the dollar value of cash sales. In 2012, the numbered company did \$1.225 million in gross sales. In 2011, it did \$1.373 million in gross sales. If between one and two percent of the company's sales were conducted on a cash basis and if the cost of those sales amounted to about 50 percent, then it would be appropriate to impute \$9,000 in income to Mr. Ortynski. I consider that to be a reasonable amount to impute.
- [41] Ms. Ortynski argues that there should be an additional amount imputed to Mr. Ortynski on the basis that he has artificially reduced his income. The argument is that the decision by Mr. Ortynski to repay a loan advanced by a company controlled by his father was taken to reduce his potential support obligations. Duane Ortynski testified that he advanced money to his son for purposes of ensuring that the numbered company was current in its obligations to the finance company that finances the inventory of most, if not all, of the End of the Roll franchises. Duane Ortynski testified that he wanted the loan repaid at a particular rate and his son agreed. For reasons I will detail below, I am satisfied that this loan was, in fact, made and that Duane Ortynski required that it be repaid. It may be that his request for repayment was made for reasons associated with this litigation. The fact remains, however, that he is entitled to be repaid, and given the demand nature of the loan, he can demand payment in any fashion he considers appropriate. I am not persuaded that there should be any adjustment to Mr. Ortynski's income to reflect the fact that this loan was being repaid.

- [42] In summary, I find that for purposes for child support, Mr. Ortynski's income is \$72,730 (\$51,230 of declared income, \$12,500 imputed to account for personal expenses paid for by the company, and \$9,000 imputed to account for cash sales).
- [43] The next issue is determining the appropriate amount of child support having regard for s. 9 of the Child Support Guidelines. The starting point for this determination is the amount which results from setting off the parties' respective child support obligations (s. 9(a)). Mr. Ortynski's child support obligation based on an income of \$72,730 is \$1,103 per month. Ms. Ortynski's obligation based on an income of \$24,460 is \$383 per month. Setting off these amounts would result in Mr. Ortynski paying to Ms. Ortynski \$720 per month in child support.
- [44] The parties have relatively few special or extraordinary expenses relating to the children. Both children are attending private school, but the cost of that schooling is being paid for by Mr. Ortynski's father. Although Mr. Ortynski claimed that expense in his November 2012 financial statement, Duane Ortynski testified that he and his wife will continue to pay the expense and not seek reimbursement. Because the parties have been able, after an unfortunate court application, to arrange their work hours such that there is little need for any child care, beyond that provided by the private school, no additional expense must be accounted for in that regard. Mr. Ortynski has deposed in his financial statement that Sydney participates in gymnastics and attends a dance studio. In addition, there is the cost of medical and dental insurance premiums. These amount to approximately \$200 per month. In addition, there has been about \$178 in medical or dental expenses over and above the insurance coverage for Sydney. As for Ashton, Mr. Ortynski pays the medical and dental insurance premiums as well as gymnastics fees. These expenses amount to about \$85 per month. Were the parties to share these special or extraordinary expenses in proportion to their incomes, Ms. Ortynski's obligation would be about \$72 per month, and Mr. Ortynski's would be about \$213 per month.
- [45] I do not consider that it is appropriate in the circumstances of this case to simply off set the Guideline support that would otherwise be payable. First, there is a substantial disparity in the parties' respective incomes. That disparity will be all the more apparent given the modest income that Ms. Ortynski is now able to earn. Second, Ms. Ortynski will, for the most part, be responsible for her own expenses and the expenses she incurs on behalf of the children. Mr. Ortynski has the benefit of wealthy and generous parents. I recognize that Mr. Ortynski's parents have no legal obligation to contribute towards their grandchildren. I also recognize, however, that they have done so in a generous way in the past and will likely continue to do so in the future. Although it is Mr. Ortynski's income that is the primary factor in determining child support, s. 9(c) requires that the court take into account "the conditions, means, needs and other circumstances of each spouse". This phrase is broad, sufficiently broad to capture the entirety of Mr. Ortynski's domestic circumstances. I am satisfied that the appropriate amount of child support payable by Mr. Ortynski to Ms. Ortynski commencing January 1, 2013, is \$1,000 per month.

- [46] The parties will be responsible for the children's special and extraordinary expenses in proportion to their incomes. Ms. Ortynski is responsible for 25 percent of those expenses, and Mr. Ortynski is responsible for 75 percent. The expenses are those noted above.
- [47] Before leaving this aspect of the matter, Mr. Ortynski was ordered to pay \$1,050 in child support on an interim basis commencing November 1, 2011. He made some small and irregular payments to Ms. Ortynski in the four months between the date of separation and November 1, 2011. I will address those later in these reasons. For now, I simply note that there is no reason why Mr. Ortynski should not have been paying child support from July 1, 2011. I am satisfied that Ms. Ortynski is entitled to support at the rate of \$1,050 per month for those four months. The result is that, subject to offsetting the payments that Mr. Ortynski actually made prior to November 1, 2011, he owes \$4,200 for child support for that period.

Division of Family Assets

- [48] As noted above, neither party seeks an unequal division of family assets. In addition, the parties agree on which assets are family assets and they agree generally on the value of the assets and how they should be divided. Their significant disagreement relates to the numbered company. I will deal first with the other family assets and then address the questions involving the numbered company.
- [49] The parties' home on Capistrano Peaks Crescent was listed for sale as of the trial, and had been for about a year. Its appraised value as at November 1, 2012, was \$638,000. The mortgage was outstanding as of about that date in the sum of \$665,335. In spite of a number of price reductions, the property had not sold. The parties agree that the matrimonial home should continue to be listed for sale, and upon sale, any equity or shortfall should be shared equally. There will, therefore, be a declaration that the former matrimonial home is a family asset and that the parties will share equally the equity (or bear equally any deficit). Third, there will be an order that the property remain listed for sale until sold. The parties will have joint conduct of the sale.
- [50] The parties agree that the Canada Pension Plan credits they accumulated during the course of their relationship should be divided equally. There will, therefore, be an order that they may apply to the Plan for a division of those credits.
- [51] The parties have a number of deposit and investment accounts. Mr. Ortynski has an RRSP with RBC Dominion Securities (Account No. xxxxx803). The value of that plan, for purposes of the division of assets, is \$3,830.92. In addition, Mr. Ortynski has a tax-free savings account at the Royal Bank of Canada (No. xxxxxx539). Its balance, for purposes of the division of assets, is \$3,312.46. Further, Mr. Ortynski has a GIC account at Scotiabank (Account No. xxxx365). For purposes of the division of assets, the balance in this account is \$5,855.57. Finally, Mr. Ortynski has a Royal Bank of Canada direct investment account that has a balance of \$2,556.

- [52] Ms. Ortynski has a Royal Bank of Canada direct investment account in which there is \$10,353. As part of her employment with WestJet, Ms. Ortynski received shares in that company. Subsequent to the parties' separation, she redeemed those shares and received \$5,695. The only other asset, aside from household furnishings, that Ms. Ortynski has is a 2003 Dodge Caravan. She estimates this vehicle to be worth \$1,500. Mr. Ortynski valued it at \$10,000 in his property and financial statement. I am satisfied that for purposes of the dividing the family assets, its value is \$1,500.
- [53] There will be an order that each party is entitled to retain the assets that are now in their names. Notionally, to equalize this division, Ms. Ortynski would be required to pay \$1,000 to Mr. Ortynski.
- [54] There are two other investments. The first is a Registered Education Savings Plan (Account No. xxxxxx076). This account has a balance of approximately \$6,292. It is not clear to me in whose name the account is held. There will, however, be an order that neither party is entitled to withdraw any funds from this account except with the written consent of the other. The parties intend to maintain this account for the benefit of their children. The second asset is a Sun Life Financial Insurance policy, which has a cash surrender value of approximately \$7,536. The policy pays a death benefit of \$46,000 and the children are designated as the beneficiaries. The parties are content to leave this policy in place provided that the children remain the beneficiaries. There will, therefore, be an order that the children are to remain the beneficiaries of this policy, and that neither party is to withdraw from or borrow against the policy without the prior written consent of the other.
- [55] Aside from the mortgage that is secured against the matrimonial home, the parties have various personal debts. Ms. Ortynski has a line of credit with the Toronto Dominion Bank (Account No. xxxx039). As of the trial, the balance outstanding on this line of credit was \$15,083. When the parties separated, the account had a balance of just over \$5,000. It is Ms. Ortynski's position that, except for a \$3,000 withdrawal on November 30, 2011, all of the amounts withdrawn from the account subsequent to the parties' separation were withdrawn by Mr. Ortynski. Mr. Ortynski acknowledged that he made \$500 withdrawals on a number of occasions between August 1 and October 3, 2011. I am satisfied that Mr. Ortynski made all of the withdrawals charged to this line of credit subsequent to the parties' separation, except for the specific withdrawal noted above. I reach that conclusion for several reasons. First, Ms. Ortynski denied making the withdrawals and I accept her evidence. Second, although Mr. Ortynski was not sure he made all of the withdrawals, he acknowledged making 12 of them and charging the purchase of gas to the account.
- [56] I digress at this juncture to note that in general when the evidence of Ms. Ortynski and Mr. Ortynski conflicts, I am inclined to accept the evidence of Ms. Ortynski. I found Mr. Ortynski generally somewhat evasive but more particularly, I am unable to accept his account of the cash transactions at the End of the Roll, and I am unable to accept his evidence regarding the disposition of some winter tires and a pair of snowboarding boots and a snowboarding helmet. The sale of these items is not particularly important but Mr. Ortynski's explanation

about the circumstances surrounding the sales is. On November 15, 2011, the master made a restraining order prohibiting the parties from disposing of family assets. On December 12, 2011, Ms. Ortynski came across an advertisement for the sale of a pair of women's snowboarding boots and a women's snowboarding helmet on the Castanet website. The seller was identified as Todd Ortynski. Ms. Ortynski testified that the boots and helmet (both of which were photographed in the listing) were hers. Mr. Ortynski testified that they were not hers but rather were his sister's, and he was simply selling them on her behalf. He said that he "could not recall" Ms. Ortynski ever snowboarding. Mr. Ortynski offered no explanation for why he, as opposed to his sister, listed the articles for sale. He explained that his sister did not need them anymore, but that did not address why he was selling them as opposed to her. Next, Mr. Ortynski was asked about the sale of some winter tires that were for the BMW motor vehicle that Ms. Ortynski drove. Mr. Ortynski admitted that he sold the tires but said that they belonged to his father. Duane Ortynski testified that he bought the tires in question but that he bought them for his son and Ms. Ortynski. The thrust of his evidence was that they were a gift to his son and daughter-in-law. I accept that Duane Ortynski purchased the tires and gave them to his son and daughter-in-law. I reject Mr. Ortynski's evidence that he thought the tires belonged to his father when he sold them.

- [57] Returning to the question of personal debt and dealing with the Toronto Dominion Bank line of credit, I am satisfied that \$11,000 of that debt is the joint responsibility of the parties - \$5,000 was accumulated before the parties separated, and Ms. Ortynski withdrew \$3,000 subsequent to the separation. Mr. Ortynski is notionally entitled to a similar amount. The excess, totalling \$4,083 is Mr. Ortynski's responsibility alone.
- [58] Ms. Ortynski has a number of other personal loans, including a \$21,500 loan to her aunt and uncle, Mr. and Mrs. Rothlander; a further \$15,600 to the Rothlanders in the way of rent from August 2011 to September 2012; a MasterCard debt of \$4,853; and an American Express credit card debt of \$1,956. In addition, she has a Visa debt of \$19,869.
- [59] Although Ms. Ortynski argues that these debts should be "considered" in the division of family assets, she acknowledges that the balances due on those various credit cards were either zero or nominal at the time of the parties' separation. Indeed, a substantial portion of the debt due to the Rothlanders was spent on legal fees, including the cost of a business valuation for the End of the Roll franchise.
- [60] Ms. Ortynski is, as between the parties, solely responsible for these debts. Mr. Ortynski is responsible for his RBC Visa debt, his two American Express credit card debts, and any balance due on his HBC MasterCard.
- [61] There is one other significant aspect to the parties' financial situation, and it involves Duane Ortynski's contribution to the purchase of the parties' Stradwick Way home in Calgary. Mr. and Mrs. Ortynski Sr. provided \$100,000 to the parties to aid in the purchase of that home. Mr. Ortynski has listed a debt to Duane Ortynski on his November 2012 financial statement of \$87,200. Although he has not specifically attributed that debt to the purchase of the

Stradwick Way home, the date that he claims it was advanced corresponds with that purchase. Duane Ortynski testified that this was a gift. I am satisfied that this was a gift and can be ignored for purposes of this litigation.

- [62] The final issue involving family assets relates to the numbered company and the End of the Roll franchise. As noted above, the parties acquired the numbered company in a share purchase transaction from Hans Heinrich Schnoor and Marlene Elisabeth Schnoor. They paid \$108,200 for the shares which they took equally. The purchase price was based on the value of the shareholders' loans due to the Schnoors.
- [63] Ms. Ortynski commissioned a valuation of the company by BDO Canada LLP. Bruce Plaxton undertook the valuation and reported his findings on January 31, 2012. In preparing his report, Mr. Plaxton had the numbered company's financial statements for the years ending January 31, 2008 through and including January 31, 2012. He concluded that the most appropriate method of valuing the company was as a going concern. Although he found that the shares in the company had no value, he concluded that the amounts due to the shareholders had value, and that value was approximately \$157,277. This amount is about one-half of the amount due the shareholders as recorded on the company's January 31, 2012 financial statements. He discounted the loans heavily to reflect, among other things, that not all of the amounts due the shareholders would be recoverable.
- [64] Ms. Ortynski argues that she should be awarded compensation of \$75,000 in satisfaction of her claim to an interest in the numbered company.
- [65] Mr. Ortynski makes two broad points in relation to the numbered company. First, he argues that \$100,000 of the \$157,277 discounted value of the shareholders' loans is, in fact, a loan made by Carpet Direct Holdings Ltd., a company controlled by Duane Ortynski, to the numbered company. It was treated as part of the shareholder loan account for purposes of the business valuation because, as Mr. Plaxton pointed out, it was a loan from a related party. Having said that, however, it is, according to Mr. Ortynski and Duane Ortynski, a loan that must be repaid. If the remaining balance on that loan (\$77,000) is accounted for, then the value of the shares in the company may be about \$80,000. The second broad point made by Mr. Ortynski is that, in order to compensate Ms. Ortynski for any interest she may have in this company, it would be necessary to sell the company. The parties have no other assets. Sale of the company is unlikely for a number of reasons. Duane Ortynski testified that no End of the Roll franchise had been sold otherwise than to relatives of the principals of the parent company or individuals who have operated the franchise on behalf of owners. There have been no sales to unrelated third parties who have not have had previous involvement with the franchise. Further, the franchise agreement stipulates that the franchisor must approve any proposed sale. These things make it unlikely that the company would be sold if offered for sale on the open market.

- [66] Ms. Ortynski argues that the parties' interest in the company should not be discounted to reflect the \$100,000 loan to Carpet Direct Holdings Ltd. She argues that there are a number of features to this loan which should cause the court to doubt its existence or perhaps its timing. In addition, she argues that while selling the company may be difficult in view of the limitations contained in the franchise agreement, it is open to the court on the authority of *Chapman v. Summer*, 2007 BCCA 103, to order that Mr. Ortynski pay her one-half of the value of the shareholders' loans.
- [67] As to this latter proposition, Mr. Daltrop argues that compensation was possible in *Chapman v. Summer* because there were sufficient other family assets to permit that to be done. That is not so in the matter at hand. In addition, Mr. Daltrop argues that *Seabrook v. Seabrook*, 2012 BCSC 606, is instructive. As to the advance made by Carpet Direct Holdings Ltd., Mr. Daltrop's position is that the advance is precisely that which Duane Ortynski testified it was, namely, a loan made in order to allow the numbered company to pay MEGA Financial, which is the company that finances the numbered company's inventory. It is a term of the franchise agreement that franchisees remain in good standing with MEGA Financial. He testified that the numbered company had fallen into arrears and that his partners asked him to address the situation. He said that he did by making an advance through his company, Carpet Direct Holdings Ltd.
- [68] I am satisfied that Duane Ortynski, through Carpet Direct Holdings Ltd., lent the numbered company \$100,000 in or about February 2009. I reach that conclusion because the documentation surrounding that loan supports that conclusion. That documentation includes a promissory note, a loan agreement, and a cancelled cheque payable to the End of the Roll Vernon from Carpet Direct Holdings Ltd. dated February 2, 2009, and cashed shortly after that date.
- [69] Ms. Christiansen, on behalf of Ms. Ortynski, makes two arguments about this transaction. First, she disputes the timing of the loan. Second, she disputes the bona fides of the repayment. As to the first argument, the documentation relating to the loan is all dated as of February 2, 2009. Included in that documentation is a director's resolution which shows Mr. Ortynski as the "sole director of the company". As with the other documents, it was signed as of February 2, 2009. Ms. Christiansen points out that Ms. Ortynski was a director and officer of the numbered company until she was removed in 2011. Further, she points out that the \$100,000 loan did not appear on the internally generated monthly balance sheets that the numbered company was required to prepare and forward to the franchisor's head office until after the parties separated. More specifically, the May 2011 balance sheet showed shareholders' loans of just over \$320,000 and no debt due to Carpet Direct Holdings Ltd. The June 2011 balance sheet, generated on July 20, 2011, shows the shareholders' loan account reduced by \$100,000 and a corresponding debt to Carpet Direct Holdings Ltd. of \$100,000. On the other hand, the picture that emerges from the balance sheets prepared by the company's accountants is less clear. For the year ended January 31, 2009, the company had current accounts payable of just under \$332,000. Shareholders' loans were outstanding at

just under \$250,000. The balance sheet for the year ended January 31, 2010, reflects an increase in the shareholders' loans of just over \$100,000 and a decrease in the current liabilities of the company of about \$180,000. The statements do not reflect any payment due to Carpet Direct Holdings Ltd.; however, that may be so for the same reason that Mr. Plaxton treated the same loan as part of the shareholders' loan account, rather than a loan due an unrelated third party.

- [70] I am satisfied that the loan was made on or near February 2, 2009. I am satisfied that it must be taken into account in valuing the parties' interest in the numbered company.
- [71] By its terms, the loan from Carpet Direct Holdings Ltd. is payable on demand. It may be, as noted above, that Duane Ortynski demanded payment with a view to reducing the numbered company's ability to pay Mr. Ortynski a salary. The effect of that would be to reduce Mr. Ortynski's potential obligation to pay spousal or child support. Whether that is so or not, Carpet Direct Holdings Ltd. is entitled to repayment and could demand payment in full at any time. In the result, it is appropriate to treat the repayment as legitimate and to take account of it both in determining Mr. Ortynski's ability to pay support and in determining the value of the numbered company.
- [72] I find that the numbered company is worth, for purposes of this analysis, \$80,277 as of December 1, 2012. I based this value on Mr. Plaxton's estimate of value at \$157,277, less the balance due to Carpet Direct Holdings Ltd. as of the date of trial of \$77,000.
- [73] The next issue is whether, and if so how, the parties' interest in the numbered company should be disentangled. Ms. Ortynski takes the position that there should be a compensation order in her favour equal to one-half of the value of the company, or \$40,138. Mr. Ortynski argues that the asset should be divided in specie and that the parties should simply retain the shares they presently have. To do otherwise would be to compel Mr. Ortynski to pay an amount he has no present ability to pay.
- [74] I accept that ordering the company to be sold on the open market is neither realistic nor practical. As noted above, the franchisor must approve any would-be purchaser. Duane Ortynski candidly testified that the franchisor would be better off to simply open another outlet and allow the numbered company to wither rather than approve a sale to a third-party purchaser.
- [75] The options, therefore, are to order that the parties retain their interest in the company or make a compensation order. The trial judge in *Chapman v. Summer* held that the parties to that litigation were entitled to equal shares in the family assets. A significant family asset was the interest of the parties in two privately held companies. The trial judge vested the shares in the husband's name. He declared that one-half of those shares were held in trust for Ms. Chapman. Mr. Chapman appealed, and in addressing the affect of the order the trial judge made, Huddard J.A. observed at para. 42:

- [42] The inability to realize on her continuing interest in those assets, by way of return of capital or income from their investment, provides good reason for the respondent's submission that the practical effect of the trial judge's order was to permit the appellant to retain indefinitely all the family assets in specie for his exclusive use and without payment for their use. This recalls the concern expressed in *Blackett* that cash in the pocket is real money while expert's values are mere opinions. Exclusive use of property has real value while a beneficial interest in what are non-income producing assets is a mere notion until the other owners are persuaded to sell.
- [76] The Court of Appeal varied the outcome determined by the trial judge in a number of ways. On the issue of the compensation for Ms. Chapman's interest in the two privately held companies, the Court of Appeal ordered that she be paid for her interest in annual instalments extending over six years. Ms. Christiansen argues that a similar order ought to be made in this case if an order for full and immediate compensation is not made.
- [77] Mr. Daltrop argues that *Chapman v. Summer* is distinguishable on the basis that there were sufficient family assets in that case to compensate Ms. Chapman. He argues that this case is more akin to the circumstances in *Seabrook v. Seabrook*. In that case, the parties owned two pieces of real property and other readily transferable assets. They also owned an interest in a valuable privately held company. One solution put to the trial judge was to transfer to Ms. Seabrook all of the assets save for the shares in the privately held companies. Those shares would be transferred to Mr. Seabrook, who would then be required to pay compensation of about \$450,000 to his former spouse. Adair J. accepted that to order compensation would place Mr. Seabrook in a difficult position. In addition, there was some uncertainty as to the company's future, and Mr. Seabrook would be left shouldering that entire risk. Further, Adair J. recognized that it is preferable not to leave an ex-spouse as a minority (or even an equal) shareholder in a company whose day-to-day operations are controlled by the other spouse (see para. 79). In spite of those concerns, she ordered that Mr. Seabrook hold 50 percent of this shares in the two companies there at issue in trust for Ms. Seabrook.
- [78] Although the compensation that would otherwise be due to Ms. Ortynski is much less than that which was at issue in *Seabrook*, it represents a much more difficult threshold for Mr. Ortynski to meet. He has significant personal debt. The parties are at risk of being left with a significant shortfall upon sale of the former matrimonial home. Neither Mr. Ortynski nor the company has any realistic prospect of borrowing the funds necessary to pay compensation.
- [79] In the result, and recognizing it is not the preferred solution, I am satisfied that the only practical outcome is to direct that the parties retain the shares they have in the numbered company. I order that for as long as Ms. Ortynski maintains a shareholding in the company, she is entitled to access any and all financial records of the company, and Mr. Ortynski is required to produce to her those records upon her reasonable request. Further, there will be an order that Mr. Ortynski personally indemnify Ms. Ortynski in respect of any debt due MEGA Financial. The parties were required to personally guarantee advances by MEGA

Financial. There will be an order that, as between the parties, Mr. Ortynski is to indemnify Ms. Ortynski in relation to any debt due MEGA Financial or any other debt or obligation relating to the company for which she may be held personally liable.

Spousal Support

- [80] Ms. Ortynski is seeking spousal support. She argues that she is entitled to support both on the basis of need and as compensation for the role she assumed during the marriage. She argues that, with the exception of one brief period, she has been a stay-at-home mother since the birth of their first child in 2007. Mr. Ortynski was thus able to devote his time to the retail business, a business he remains working in today.
- [81] Mr. Ortynski takes the position that Ms. Ortynski is not entitled to spousal support on either compensatory or non-compensatory grounds. She has not foregone any career opportunities. Further, she chose not to search for work for much of the first year following the separation.
- [82] Both parties have provided Spousal Support Advisory Guideline calculations. Ms. Ortynski's are based on incomes of \$75,000 and \$20,400 and a 9-year relationship with Mr. Ortynski paying set-off child support of \$807. With those variables, the Guidelines suggest a range of between \$588 and \$1,084 with a mid-point of \$837. Mr. Ortynski's calculations are based on incomes of \$56,610 and \$30,000 and a 7-year relationship and child support of \$395. The range given those variables is between zero and \$213.
- [83] I find that Ms. Ortynski is entitled to spousal support. She assumed the lion's share of the child care responsibilities until the parties separated. I accept that she did that in part because, as between the two, it made more sense for her to remain at home than for Mr. Ortynski to do so. I accept also that Ms. Ortynski did experience emotional difficulties both before and following her pregnancies, and those difficulties made it difficult for her to cope with the demands of a young family in the circumstances the parties found themselves in after they purchased the flooring store.
- [84] Using incomes of \$72,730 for Mr. Ortynski and \$24,460 for Ms. Ortynski and a relationship of 9 years, and with Mr. Ortynski paying child support of \$1,000 per month, the Spousal Support Advisory Guidelines suggest a range of spousal support of between \$340 and \$355, with \$355 also being the midpoint. I am satisfied that Ms. Ortynski is entitled to spousal support in the amount of \$350 per month effective January 1, 2013.
- [85] As noted, her plan is to return to school with a view to becoming qualified to work in the health care field in some capacity. There will be an order that she may seek a review of spousal support if she elects to return to school on a full-time basis. Further, there will be an order that either party may seek a review of spousal support after January 1, 2017. I fix that date on the basis that, by then, it will be appropriate to review the extent to which Ms. Ortynski's ability to become economically self-sufficient has progressed.

- [86] Ms. Ortynski has significant debt, the details of which are set out above. A significant portion of that debt was incurred following the parties separation and before Mr. Ortynski began paying child or spousal support. He was ordered to pay spousal support of \$500 per month beginning on November 1, 2011. As far as I am aware, he has made those payments. Ms. Ortynski was entitled to spousal support from and after the parties separated. In fact, her need then was much more acute than it is now or was in the fall of 2012. I fix her entitlement for those four months at \$750 per month bearing in mind that she was not working and had no real prospect of working during that period. Notionally, Mr. Ortynski is in arrears of spousal support for those months in the total amount of \$3,000.
- [87] There are two amounts that should be offset against these arrears. First, assuming he has paid spousal support pursuant to the interim order then, given my conclusions as to his ongoing spousal support obligation, he has overpaid \$1,950 (13 months x \$150 per month). Second, he did make some payments to Ms. Ortynski in the immediate aftermath of the separation. The evidence is not entirely clear as to the amounts but I am satisfied they totalled no more than \$500. I recognize that he has also been paying the costs of the former family home. Although he is living in it, I accept that it was and is more home than he needs or wanted. He had no option than to remain living there and paying the significant expenses associated with ownership of it. The mortgage payments and taxes total about \$3,200 per month. I think it reasonable to credit Mr. Ortynski with the balance of the notional spousal support arrears and all but \$1,000 of the child support arrears in consideration of his carrying this high housing cost since the date of separation.

Summary and Costs

- [88] The net effect of the foregoing is that both parties are to keep the assets now in their name and both parties remain responsible for the debts now in their name, except for Ms. Ortynski's contingent responsibility for any debts relating to the numbered company. As to those debts, there will be an order that Mr. Ortynski is to indemnify her for any and all amounts she may be called upon to pay.
- [89] Assuming that there are no matters touching on the question of costs about which I am unaware, I am satisfied that Ms. Ortynski is entitled to the costs of this proceeding, except for the cost of the business valuation which the parties are to share equally. Ms. Ortynski was successful on the issues associated with the imputation of incomes and successful on her claim for spousal support. She was not successful on her claim for compensation for the numbered company, but she was generally successful in establishing the value of the company, a step necessary to determining the options for division. The business valuation, while expensive, was necessary. As it turns out, Ms. Ortynski is not going to receive her interest in the company immediately, but the report provides the parties with a basis to disentangle their affairs should they choose to do so rather than remain as co-owners of the company. Moreover, I accept that Ms. Ortynski had reason to be suspicious about the value of the company, and an independent valuation was the only reasonable way to reach a value.

[90] Finally, I have not dealt with the special and extraordinary expenses. If the parties are unable to agree on those matters, both retrospectively and prospectively, they have liberty to apply.

"G.M. Barrow, J."

The Honourable Mr. Justice Barrow

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