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Family Law Decision

The Valuation Law Review is a joint publication of the Canadian Institute of Chartered Business Valuators and Harrison Pensa LLP and this issue summarizes family law decisions of interest to business valuators. The Valuation Law Review is not intended to provide legal advice and readers should not act on information in the publication without seeking particular advice on matters that are of concern to them. Readers are cautioned against relying upon the decision abstracts contained herein, which are edited and in outline form only, and are directed to the full report of the reasons of the Court.

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THE VALUATION LAW REVIEW — FAMILY LAW EDITION

By Terry Hainsworth

Cove v. _Cove._ December 10, 2010. Dellapina J. (N.S.S.C.).
The parties were married in 1980 and separated in 2008. Despite the duration of their separation, they were unable to resolve issues of property divisions, child support and spousal support.

The husband was a chartered accountant who carried on business through his professional corporation. The wife had been a homemaker. There were three children in university, all pursuing first degrees and all having attained the age of majority. Three years before the marriage, the wife inherited funds that she originally placed in RRSP's but later de-registered and placed in term deposits. The parties jointly owned a matrimonial home. The husband owned a 25% interest in a building in Amherst, Nova Scotia. The other owners were the wife's relatives. The building produced "paper profits" which were never distributed. The proceedings were conducted under the Nova Scotia *Matrimonial Property Act* which distinguishes between "matrimonial assets" and "business assets". "Matrimonial assets" are to be divided equally unless such a division is "unfair or unconscionable" by virtue of certain enumerated circumstances found in s. 13 of the Act.

a) The asset division

1. the wife's term deposits: The court considered their division to be "unfair" having regard to the recent timing of the inheritance. They were excluded from the division.
2. the husband's interest in the Amherst property: It was a "business asset" as defined by the Act. It was an investment that generated no actual income purchased for a long-term gain.
3. the matrimonial home: Despite a disagreement over value and a lack of independent appraisal evidence, the court granted the wife an option to purchase the husband's interest at a fixed price.

b) the husband's income
The husband's income was primarily in the form of dividends declared from his professional corporation. He had employment income of $10,000, actual dividends of $60,000 (reported as $75,000 on his return) and $2,000 "paper" income from the rental property.

The court noted that s. 19(1)(h) of the *Child Support Guidelines* allowed the Court to impute additional income to a spouse if a significant portion of the spouse's income is derived from dividends, capital gains or other sources of income that are taxed at lower rates than employment income.

In the usual case, expert evidence is led to "convert" or "translate" dividend income into equivalent income. In this case, however, the court performed the actual calculations itself. It noted that the $60,000 dividend attracted about $5,239 of tax if it were his only source of income, while $60,000 of employment income would attract

$14,363 of tax (after credit for personal credits, E.I. and C.P.P.). The difference would be $9,124/annually.

The court then took judicial notice of the Nova Scotia marginal rate on dividends (17.26%) and on employment income (38.67%) on $60,000. It took the reciprocal of 38.67% and divided it into the $9,124, coming up with $14,876. It added that sum to $60,000 to arrive at an equivalent income of $74,876, adding the reported employment of $10,000, and ignoring the $2,000 "paper rental income". The court concluded that the husband's income was $84,876.

The corporation had a retained earnings deficit of $46,600. That deficit had been created over the last three years. The husband argued that the court should recognize that the dividends exceeded the income that the company actually generated. He argued that the court should look at the corporation's pre-tax profits under s. 18(a) of the *Child Support Guidelines*. The court rejected the argument. He was the sole decision-maker in the corporation. If he chose to take "income" from the corporation for himself, the court saw no reason to "temper the amount…[it would] impute to …[him]."

c) child support

Ordinarily, where children are over the age of majority and attending school elsewhere, the calculation should be budget-based by virtue of s. 3(2) of the *Child Support Guidelines*. Having regard to the absence of a budgetary analysis and a large RESP, the award of child support was restricted to the table amount of $1,443 monthly.

d) spousal support

Both the husband and the wife had urged the court to develop a "creative" distribution between spousal and child support to maximize the tax-savings (presumably by ordering more spousal support and less child support). The court declined to do so. The court ordered $1,100 monthly, retroactive to January 1, 2009 to afford the husband retroactive tax relief for one year and the current year. Due to the length of the marriage, the court declined to impose any time limit. Support was to be secured by designating the wife as beneficiary of the husband's life insurance.

***Hodgkinson* v. *Hodgkinson.* May 13, 2011. Grauer J. (B.C.S.C.)**

The former spouses separated and divorced 10 years earlier. Their separation produced a long court battle involving a nine day trial and an appeal taken to the Court of Appeal. The outcome was that the former husband was ordered to pay child support of $2,700 monthly and all of their daughter's private school expenses (about $8,000 yearly). The parties' assets were determined to be $6.6 million and were to be divided equally, with the former wife receiving their substantial home and vacation property. The husband kept his business assets. Due to the size of the property award, no spousal support was awarded at trial. On appeal, she was awarded a lump sum of $150,000.

In 2008, the daughter left the local private school to attend a very expensive boarding school in California. The actual costs were not dealt with in the judgment.

The former husband asked that the $2,700 child support payments be cancelled in lieu of his incurring all of the costs of boarding school (and presumably because his daughter no longer was a member of the former wife's household). The former wife, in turn, sought an increase in child support retroactive for several years alleging that the former husband had failed to disclose his substantial income.

The husband's income and business arrangements were complex. He was a venture capitalist. He provided financing (through debt and equity) to early stage and gas companies. He had royalty interests in producing and non-producing exploration companies. He was the CEO of a listed publicly-traded corporation. His dealings were through several corporations. In this respect, the court noted that the complexity of his business interests arose from the nature of the businesses and not from any particular design of the former husband.

The husband alleged financial reversals in 2008 and 2009 due to the general economic conditions, the "credit crunch" and the stock market collapse. He alleged that the shares in his publicly-traded company fell by 90%, that he had to inject personal funds and borrowings into his companies to keep them afloat, and he was at great personal economic risk. The former wife alleged that he financed a lavish lifestyle through his corporations. She tendered, in evidence, a statement of the husband's net worth that he had provided to a prospective lender in which he disclosed assets totalling $17 million. She pointed out that he travelled first-class, had the use of a Bentley motor car and had other lifestyle indulgences.

Each hired experts who testified that his "available" income, including corporate income attributed to him under s. 18 was as follows:

2006		$3,785,000
2007	537,459	1,993,000
2008	(95,899)	128,000
2009	$118,956	1,918,000

The reason for the divergence of opinion between the experts was simple. The former wife's expert merely attributed all of the corporate profits to the husband. By contrast, the former husband's expert testified that none of the corporate profits were "available" to pay child support as every penny was needed to provide working capital to sustain the corporations.

As an aside, the expert for the husband had been involved, years earlier, in a common law arrangement with the former husband's business partner. To make matters worse, while in the middle of cross examination, she was observed having dinner with the former husband and his second wife. Prior thereto, the judge had issued the usual warning that witnesses were not to discuss the case with anyone until their testimony was completed.

The former wife sought to have the expert's testimony excluded on the basis of a "reasonable apprehension of bias". The judge refused to do so accepting the expert's explanation that they had not discussed the case at supper but only "old times". The judge, however, stated, "I cannot understand why a sophisticated litigant represented by senior counsel would choose to retain an expert with whom he had a previous connection, regardless of the expert's abilities. It is a practice to be strongly discouraged… as the duty of an expert [is] to assist the court and not be an advocate". The court further added "I conclude that while I must approach her reports with caution, I should not reject her opinions out of hand".

The court went on to apply the law to the facts.

First, the court noted that the case before it was to vary the existing child support orders. Before a court can vary a prior support order there must be a "material change."

The classic definition of a “material change” is: “...a change that, if known at the time of the original order, would likely have resulted in different terms.” The court also noted that as a matter of policy, there must be a “sufficient” change in the parties’ overall financial situation. The “materiality” is intended to encourage certainty and stability and to discourage parties “from running to court over every temporary change”.

Second, the court analysed s. 18 of the *Child Support Guidelines*. That section allows the court to attribute corporate profits of “the preceding year” to a shareholding spouse. To do so, it must conclude that the spouse’s personal income does not reflect all of the money that is available (ie. that the corporate income is “available”). The court also noted that if a spouse’s personal income fluctuated or included non-recurring amounts, the court could average it (or disregard the non-recurring amounts) looking back over three years.

The court noted that the case law conflicted. Some cases held that the three year rule could not apply to corporate income as s. 18 spoke only to “the most recent taxation year”. Other cases held that the three years could apply to both personal income and attributed corporate income over a three year period. The court opted to follow the latter approach.

In so doing, the court held that there was no “material change”. Rejecting the extreme positions of both experts, the court held that the concept of “material change” had to be applied contextually. The speculative nature of the former husband’s business was always understood. Likewise, the calls, by the corporations, on their profits to maintain their viability would also vary from year to year. Thus, the wide swings in income were not changes as they were within the reasonable contemplation of the parties at the times the orders were made.

***Lamla* v. *Kowall.* June 10, 2011. Boyd J. (B.C.S.C.).**
The father was a physiotherapist. He sought a reduction in his child support obligation alleging that his income was $20,000 yearly. As a result of production orders, he was obliged to produce the banking records for his personal services corporation, his personal chequing account, his personal savings account and his credit card statements for 2008 and 2009.

The result of those investigations disclosed that $58,000 was deposited into the father’s personal bank account in 2008 and $46,000 in 2009. Moreover, his sworn financial statement showed his expenses were $3,344 monthly (about $40,000 yearly) but he had no substantial debt. His credit card showed travel, restaurant and other expenses well beyond a person of modest means. (He attempted to explain those expenses as being incurred by his mother—a woman without a credit card—and that some of the deposits into the personal accounts were her repayments). He allowed his mother to live rent-free in a condominium that he owned. Finally, the 2006 Canada Census showed that the average full time earnings for a B.C. physiotherapist (adjusted to 2010 dollars) would be $72,600 annually.

The court concluded that the father’s income was $76,000 annually. While the precise calculation was unclear, it was clear that:

a) the court concluded that the deposits into the personal account were, in fact, professional fees diverted from the corporation;

b) that the father’s claimed monthly expenses of $3,344 monthly probably reflected his lifestyle; and

c) some gross-up on the unreported income would be appropriate.

***Tilbury* v. *Tilbury (2011),* 90 R.F.L. (6th) 374 (Manitoba Master)**
Under Manitoba's *Family Property Act*, spouses and common-law partners are entitled to an accounting and equalization of assets upon the breakdown of their relationship. An exemption is created, in that process, by s. 4(2.2) of the Act for any asset acquired by the common law partner before the commencement of cohabitation. The "commencement date exemption" could be lost if the exempt property loses its identity or becomes mixed with family assets.

Mr. Tilbury was a grain farmer. His grain inventory, at separation in 2005, was valued at $695,000. Mrs. Tilbury properly claimed that its value should be included in the value of Mr. Tilbury's separation-date assets.

Mr. Tilbury, at the time that cohabitation began — July 1, 1990—had 3000 acres of crops growing in the fields. He claimed that the value of the 1990 "growing crops" should be "exempted" in the accounting process. In so doing, he faced two challenges—an evidentiary challenge in valuing the "standing crop" and establishing the exemption.

Dealing with the evidentiary challenge, Mr. Tilbury filed Manitoba government documents setting out the input costs for various crops. He also tendered in evidence a summary showing the actual 1990 crop production. The total crop value was $710,000. Although the Master noted that there was no evidence of the cost of harvesting, storing, transportation or marketing the crop, it had a substantial value by the date cohabitation began. The Master conceded that the "cost of production" evidence was "hindsight evidence"; its purpose was not to precisely value the standing crop but a factor that could confirm the assumption—in this case, a significant commencement date value.

The Master concluded that an exemption was also proven. There was no co-mingling with other assets. All of the 1990 crop was properly sold and none was intermingled with the 2005 crop. He established this through documents from the Canada Wheat Board.

Finally, the value of the exemption was determined. In so doing, the Master noted that a failure to grant any exemption could result in a $350,000 windfall to Mrs. Tilbury. To ignore the post-separation costs to store, transport and market the wheat would create an exemption that exceeded the value of the 2005 inventory. The Master concluded that both values should be equal. This conclusion, the Master noted, would have the effect of neutralizing any tax implications and also account for the fact that Mr. Tilbury bore an onus in producing the cost of sale calculations, but did not.

In determining the exemption, the court noted, in following the precedent of *Chamberlain v. Chamberlain* [1999] S.J. 550 (Sask. Q.B.) aff'd (2000) SKCA 20 (C.A.);

> *...it is the nature of inventory to be turned over on a regular basis whether that inventory consists of goods produced by a manufacturer, the vehicles by a dealer, the inventory of services (or work in progress of a professional person, or inventories of grain). Until it becomes actual income, or is deemed to become income under tax rules or is imputed as income by the courts... it remains an identifiable asset which is replaced by other inventory in the normal and ongoing operation of the business in question...*

***DeWolfe* v. *McMillan.* July 21, 2010. Gass J. (N.S.S.C. Fam. Div.)**
The parties were married in 1995 and separated in 2007. They entered into an agreement which would divide the husband's severance package as a "matrimonial asset" when he received it in the future. The division was to be on a *pro rata* basis in proportion to the years of cohabitation and years of service. The agreement required the husband to fully disclose all information and T-4's he might receive in the future concerning the future payment. It provided that if any part of the wife's share could be rolled into and RRSP, the husband would facilitate the rollover.

They had a dependent child. The agreement provided that the wife would have primary care of the child and the husband would pay child support.

In 2009, he received the severance package of $49,000. $11,000 was rolled into the wife's RRSP and $38,000 rolled into the husband's RRSP.

The severance package was a contractual entitlement payable to department employees as an award for long service. As a benefit of employment, it was subject to taxation as income, and T slips were issued.

a) the husband's argument

- the severance pay or benefit was a capital asset, not truly income
- it was already divided. To consider it as income again would be "double–dipping"
- it was a non-recurring amount
- it was not used as income but placed in a RRSP

b) the wife's argument

- it is prima facie income. T slips are issued and it is accounted for as income in the T-1 General
- "double dipping" applies only to spousal support. It does not apply to child support.
- children should benefit from any changes in parental income.

c) the court's decision
There is a distinction between severance to compensate for the loss of future income incurred by the loss of employment (subject to costs of job search, and moving expenses which may be deductible). "Income replacement" is treated as "income" for child support purposes.

Likewise, pension income is treated as income for child support purposes as it is actual income that the pensioner receives on a recurring basis.

RRSP income is less clear. If the RRSP income supports the redeeming party's lifestyle, it is income. If used to acquire a capital asset such as a house (ie. an asset transferred to another asset), the court may exercise a discretion based on its non-recurring nature and its purpose.

In the end, the court declined to "double dip", for several reasons, primarily its non-recurring nature

- it was not a bonus
- it did not change the husband's lifestyle
- it was paid into an RRSP to provide a later income supplement or future security

Under s. 17 of the *Child Support Guidelines*, the court was entitled to disregard non-recurring amounts in determining what is "fair and reasonable". In so doing, the court applied, generally, the considerations of *Ewing* v. *Ewing* (2009), 67 R.F.L. (6th) 280 (Alt. C.A.)

***Murdoch-Woods* v. *Zywina.* January 28, 2011. J. dep. Wright J. (Ont. S.C.J.)**
The husband was laid off in 2007 when his employer closed the mill at which he was employed. His 2007 income was $49,667 which included $12,381 as a severance benefit. The severance benefit was rolled into a RRSP and the husband cashed out $9,584 from the RRSP in 2008. In 2009, he went to a community college for retraining. He received a T-4 for $12,900 being the E.I. benefit for the amount that the government paid directly to the college in 2009.

In 2008, the court, on an interim basis, fixed his income for 2007 at $49,667, being the total amount of his T-4 incomes. The court imputed $49,667 to him for 2008 (and, presumably, thereafter). The court fixed his interim child support obligation, based on his 2007 actual income and his imputed income at $749.00 monthly. By trial, of course, he was dramatically in arrears.

There was no dispute as to the father's 2007 income of $49,667.

The Court held that the RRSP collapse of $9,584 in 2008 was a "double count". The receipt of the severance benefit in 2007 having been brought into income once did not permit the RRSP withdrawal to be brought into income a second time. It was a non-recurring amount under s. 17 of the Guidelines. Therefore his 2008 actual income was $34,780. The court disregarded the imputation of income found at the prior interim hearing in favour of the actual income earned.

In calculating the 2009 income, the court disregarded the governmental payment of $12,900 as a retraining allowance. It was paid directly to the institution. The husband never saw it. It was never at his disposal. It was a "capital amount" and not an income receipt. Thus, his 2009 income was $16,420.80 rather than $29,320.80 when the retraining allowance was omitted from income.

A disagreement then arose as to when the variation should occur—when the actual income was known or based on the actual income as it was. This issue arose due to the fact that the parties agreed that in the future, child support would be based on the husband's actual income for the preceding calendar year, adjusted on July first in each year. If applied retroactively, the six-month lay would produce a larger amount of arrears for each year 2008, 2009 and 2010.

The court calculated the arrears under each method and split the difference.

***Vanos* v. *Vanos.* December 21, 2010. Simmons, Cronk & MacFarland JJ.A. (Ont. C.A.)**
The Ontario Court of Appeal dealt, seriatim, with a number of grounds of appeal raised by the husband.

a) *lump sum support:* Applying *Hickey* v. *Hickey*, [1999] 2 S.C.R. 518, there was no error in principle or misapprehension of the evidence by the trial judge. Moreover, the evidence supported an award because:
    1. the husband had recently lost his employment;
    2. he had defaulted on previous support orders;
    3. he required the wife to resort to the provincial enforcement agency even though he had sufficient resources to make the payments at the relevant time;

4. in the words of the trial judge, "...he put his own interests ahead of the wife and children";
5. he did not disclose in a timely fashion; and
6. he resented paying support because of his estrangement from his children.

b) *the retroactive award of spousal support:* Spousal support can run from the date the prospective payor is put on notice of the claim: *MacKinnon* v. *MacKinnon* (2005), 13 R.F.L. (6th) 221 (Ont. C.A.). He had notice of the wife's claim from the date of her answer, in late 2006. The wife's delay in moving for interim support for over a year and a half was no defence as she had need, he had the ability to pay and his voluntary payments were inadequate.

c) *Phantom stock payment:* The net amount received by the husband in 2007 was equalized as it had been included in the husband's net family property. The court rejected an argument based on "double dipping". Rather, the court held that in calculating retroactive child support for 2008, the *actual* 2008 income of the husband should be employed, not the prior 2007 income.

The court distinguished between retroactive income analysis and prospective income analysis. In retroactive income analysis, the previous year's income is *actually* known. Absent issues under s. 17, s. 2(3) requires that the most current information be used.

In prospective income analysis, income from a prior year may be used to calculate child support if the actual income for the upcoming year is incapable of exact determination.

d) *2008 tax refund:* Where a spouse creates a tax saving post-separation (in this case a post-separation RRSP deposit) the tax saving is not to be equalized. The trial judge erred in including a tax refund of $37,000 in the husband's net family property where the deposit of $75,000 (presumably to catch up life time contributions) was made post-separation and from funds which had been equalized.

e) *costs:* The court fixed the wife's costs at $15,000 and "designated... [$10,000]... as attributable to support..."

***McCulloch* v. *McCulloch.* June 23, 2011. McFadyen, Watson, Bielby JJ.A. (Alta. C.A.)** The parties' divorce judgment in 2003 dealt with spousal support and the husband's retirement. It provided that the husband would pay $9,000 monthly support, subject to review upon his retirement. His retiring allowance contemplated an ultimate division *in specie* with the administrators paying her share directly to the wife. If not, the husband would hold her share in trust for her and elect a joint and survivor option in consultation with her. If he remarried, the trust would continue as against his future wife.

The husband did, in fact, remarry. He chose a joint and survivor option with respect to himself and his second wife (not having the option to create such a pension with his former wife). This left a gap in the pension payments if both the husband and his second wife died before the former wife, as all payments under the retiring allowance would cease.

Anticipating his retirement, the husband applied to terminate spousal support. The former wife sought additional security in relation to her share of the retiring allowance.

The judge hearing the competing motions made orders that:

a) support would not be terminated but that it be reduced by the amount of the retiring allowance received by the former wife (ultimately this was about $5,000 monthly);

b) that the support variation be stood over to April, 2012 (after the parties filed their 2011 tax returns);
c) that the husband provide some form of "additional security" in respect of the retiring allowance such as an annuity or life insurance.

The husband appealed arguing that:

a) the motions judge should have made a final order;
b) the continuation of support was an unfair "double dip";
c) the trial judge erred in providing additional security to the former wife.

[*Ed. Note:* Other issues on appeal have not been canvassed in this summary.]

a) final order

The motions judge was justified in making what was, in effect, an interim order. The evidence required under s. 17 of the *Divorce Act* was incomplete. The former wife's needs and future income were not before the court. The husband's anticipated future investment income was uncertain.

The award, should the former wife be overpaid, could be adjusted retroactively. There was no concern about her ability to repay any possible overpayment.

b) double dipping

The husband argued that he was subject to two double-dips:

1. support would have to be paid from investments already divided; and
2. support would have to be paid from the residue of income generated post-divorce which income had already been used as a source of funding the spousal support paid to date.

Both arguments were rejected.

Unlike a pension which self-liquidates, the income from other divided assets continues. The capital value of the (investment or business) asset is not diminished, as is the case with a pension.

Second, double-dipping is not triggered where the ongoing spousal support is earned from income saved or invested post-divorce. Where the capital assets did not exist at the time of the initial division, no issue of "double dipping" arises.

c) the order for additional security

The motions judge lacked jurisdiction to order additional security under the *Alberta Matrimonial Property Act*. The initial order, once issued and entered, was incapable of variation (in the absence of legislation clearly permitting variation).

Thus, although the security order was set aside, the court noted that the former wife could possibly seek an order securing any ongoing spousal support under the *Divorce Act*.

***Savonarota* v. *Savonarota.* August 15, 2011. Gilmore J. (Ont. S.C.J.)**

The parties, who were living separate and apart but under the same roof, were engaged in highly acrimonious commercial and matrimonial disputes. The family law trial took eight days. The husband, a custom home builder, also sued his wife for over $500,000 in a construction lien action. That action remained unresolved as of the date of the family law trial.

At the valuation date, three separate residential properties were at issue. The matrimonial home was owned solely by the wife. Real estate appraisers were called as witnesses and gave conflicting evidence as to the value of the home. Ultimately, the court ruled that the property had a valuation date value of $675,000. At issue were notional disposition costs claimed by the wife.

9 Lancer Drive was owned by the husband's operating company. The parties had purchased the property intending to tear down the older bungalow on the lot and build their dream home.

Title was originally taken in the wife's name. However, 16 Lancer Drive came on the market and the parties decided to buy it. 9 Lancer Drive was sold to the husband's construction company and the sale proceeds used to purchase 16 Lancer. 9 Lancer was carried on the construction company's books at the valuation date. Notional tax and disposition costs were in issue. The court found its value to be $490,000 at the valuation date.

It appeared that the husband's construction company continued to tear down and construct the dream home on 16 Lancer Drive even though the parties separated. The husband's construction company invoiced the wife for over $500,000. About $75,000 of invoices occurred just prior to the separation date. At issue was how this corporate asset and the wife's personal liability should be treated. Also, tax and disposition costs were at issue as the improved property may have been worth $950,000 by the time of trial. The parties agreed that its valuation date value was $430,000.

The husband controlled three corporations—his construction company and two holding companies. At issue were earnings for a "stub period" between the corporate year end and the valuation date and notional tax and disposition costs.

The corporations had substantial retained earnings due to the fact that the husband, historically, drew less out of the companies than their profits. At issue was whether the corporate profits should be attributed to the husband under s. 18 of the *Child Support Guidelines*. Also at issue was whether the tax cost to remove any funds from the corporation to fund the equalization payment should be included in his income for support purposes (the "double dipping" issue).

a) the construction loan/corporate asset issue

The wife claimed to be indebted to the husband's construction company and asserted that the company had a corresponding asset on the date of separation. The court disregarded it entirely, as the ultimate issue would be determined in the construction lien action. A party may not claim a liability for equalization purposes if he or she may not be called upon to repay it.

b) the "stub period" income

The company's year end was April 30th. The valuation date was July 1, 2009. Thus, there was a "stub period" of 2 months following its year end. In fiscal 2010, the company booked substantial "profits". The wife's valuator argued that 2/12th of the 2010 profits should be added to the company's valuation date value. The husband's valuator argued that during that two month period no actual profits were earned or received. The "profits" booked were largely due to the invoices issued to the wife by the company for post-valuation date construction. The reality of those "profits" was dependent upon the outcome of the construction lien action.

No addition of "stub period" profits were added to the valuation date value of the corporations.

c) the wife's claim for notional disposition costs

The wife claimed that she should be entitled to notional disposition costs in respect of both 16 Lancer and the matrimonial home. The parties generally agreed that realtors' commissions would be 4.5%. The court concluded that $1,200 in legal fees would also be a notional deduction. On the valuation date, only G.S.T. of 5% would be exigible on realtor's commissions and legal fees. By trial, H.S.T. on commissions would be exigible at a rate of 13%.

The court concluded that notional disposition costs should be crystallized as of the valuation date. Thus, the tax on the services would be at the 5% G.S.T. rate.

The wife argued that the notional disposition costs of 16 Lancer should be calculated on its current list price of $950,000. The court rejected her argument allowing disposition costs based on its v-day value of $430,000.

The husband argued that any disposition costs with respect to the sale of the matrimonial home should be deeply discounted as there was no evidence of any immediate sale. The wife testified that she planned to sell it and "downsize" within the next year (when the youngest child completed high school). The court accepted her testimony and declined to discount the notional disposition costs.

d) the husband's claim for notional disposition costs

Curiously, there were three different positions adopted. The wife claimed that no notional disposition costs should be allowed. There was no evidence that the husband intended to sell the construction companies.

The valuators agreed that the likeliest disposition would be an asset sale by the corporations (as opposed to a share sale by the husband). Thus, to access the sale proceeds, the husband would have to "dividend out" the money from the corporations to himself, thereby attracting tax.

His valuator argued that such a large dividend would attract the maximum tax rate of 31%. The wife's valuator argued that the money would likely be removed from the company periodically over time. Thus, it would attract less than the highest rate of tax.

The court concluded that the husband, who was 50, would likely retire at age 65. He had no pension (although he did have RRSP's). As his retirement and the disposition were foreseeable and probable, a notional disposition deduction was permissible.

The court also agreed with the position of the wife's valuator—namely, that the corporations would sell the assets, pay the taxes then exigible, and the husband would draw dividends in small amounts as needed. Rather than applying a 31% rate of tax, the court applied a 20% rate of tax. The tax costs were further discounted by 50%. The allowance was $211,000 (as opposed to $319,000 calculated by the husband's valuator).

e) funding the equalization payment

The court found that the equalization payment due to the wife would be $344,352. It was clear that the wife wanted it to be all cash (rejecting any rollover of RRSP funds). Thus, the only way the husband could pay it would be to extract the funds form his corporation. Thus, there was no doubt that the tax cost of the extraction would be at the 31% rate. The tax cost would be 31% or $107,782. To equitably share the cost, the equalization payment could be notionally reduced by half of that amount or $53,819 (leaving a balance of $290,461 to be paid).

This would result in double counting, however, as contingent disposition costs were already included in the value of the corporations. Thus, only the difference between the "extraction" costs and the notional contingent disposition deduction should be allowed (i.e. the difference in the tax rates of 31% and 20%). This cost should be shared.

The difference was $38,755 (being the difference between 31% of $344,352 and 20% of $344,352). Divided by two, the equalization payment was reduced by $19,377. The reduction would only occur if the husband actually paid out a dividend to fund his equalization obligation.

f) "double dipping"

The court specifically directed that any dividend or other income reported by the husband from his companies to fund the equalization payment shall be excluded from his 2011 income for support purposes. The court held that it would be impermissible "double dipping".

g) imputing income to the wife

The court imputed income to the wife at Ontario's minimum wage of $10.25 hourly for 35 hours weekly. The court reviewed her marital and work history and concluded that she could reasonably find such employment.

h) income attribution to the husband

The court determined that 50% of the annual profits of the corporations should be attributed to the husband in the future. In so doing, the court disallowed a corporate expense for a "home office" and added back certain travel, cell phone, vehicle and healthcare premiums to his income. The court also held that they should be "grossed up" for tax.

In attributing a portion of the corporate income to the husband, the court specifically noted that:

1. there was a history of retaining profits to enable the companies to self-finance;
2. the retention of capital by the companies after separation, however, will inure only to the husband's benefit. It should not be financed by the wife or children through a reduction in reasonable support;
3. there were no bank covenants or other restrictions on the husband's ability to withdraw funds from his business;
4. he has total control of all of the corporations
5. the attribution will not impose a burden on the corporations.

i) retroactivity

The wife claimed retroactive child and spousal support. Her claim was dismissed. The husband contributed to the parties' joint bank account and she was paid a salary from the corporations. She did not advance a claim for interim support. They both lived in the same house.

j) The Spousal Support Advisory Guidelines

The Court set spousal support at the low end of the range noting that the wife was capable of employment and that the children did not require care (the 3 children ranged between 17 and 25 years age). The children had income resources of their own—investments and part-time employment, and the husband was required to pay table-based child support.

***Shannon* v. *Shannon, 2011.* BCCA 397 (B.C.C.A.)**

The wife appealed the decision of the trial judge who valued the family business at $500,000. She alleged that the trial judge failed to give adequate or sufficient reasons for how he arrived at his valuation of the asset.

The business in question was a B.C. hardwood sawmill. It was corporately-owned by the husband. He and three of their children of the marriage were employed in the business. The company owned the land from which it operated and most of its equipment. At the time of trial, the hardwood lumber industry was in a very depressed state. However, in the two years preceding the separation, the husband had made large capital investments in the company of $200,000 and $167,000 respectively.

The trial judge observed that "…[the company] has maintained its position in hard times due to the acumen of its principal, his investments and the support of the family's combined talents and hard work…[He] has created a niche in the hardwood business market and has been able to sustain it through a difficult period".

Each spouse retained a business valuator. The husband's valuator provided an "Estimate Valuation Report". The wife's valuator provided a "limited critique" report. The critique report was not an independent valuation of the shares. Rather, it challenged the approach employed by the husband's valuator and a number of the assumptions.

The underlying assets of the corporation were appraised. The real estate had a value of $773,000. The equipment had a liquidation value of $154,000 but a going concern value of $505,000 according to the conflicting values of the appraisers hired by each party.

The husband's valuator used a liquidation approach, assuming a sale of the realty, equipment, and inventory. He concluded that this would notionally generate $744,000 in proceeds which, after tax and disposition costs, would leave $390,000. He relied on the fact that the industry was depressed, there were few, if any, buyers of the business and the company had lost money in 2 of its past 5 years.

The wife's valuator said a "going concern" approach was more appropriate. He pointed to the following factors:

1. the company's prospects were improving, despite prior losses;
2. a purchaser would look forward rather than backward;
3. the 2009 profit margin showed an increase;
4. the husband invested capital in 2007 and 2008 demonstrating an intention to continue operations; and
5. the land could be retained and leased (rather than sold).

Based on his approach, the wife's valuator concluded that the equipment should be appraised at "fair" value and the inventory valued at market (as opposed to liquidation). Virtually all of the tax and disposition costs would be avoided. He suggested that this approach could result in a value as high as $862,000.

The trial judge specifically concluded that the business would not, on the facts, be sold. However, he specifically held that its "going concern" value was "limited to the Shannon family", and not the marketplace in general.

a) the duty of a judge to give reasons:

1. a judge has a duty to give adequate or sufficient reasons for his or her decision. A failure to do so is an error of law;

2. the function of reasons for judgement is to explain *what* the trial judge decided and *why* he or she reached that decision.
   i) the "what" is the decision, itself; and
   ii) the "why" is the basis for the decision.
3. the reasons for the duty:
   i) to justify and explain the result;
   ii) to tell the losing party why he or she lost;
   iii) to provide the losing party with informed consideration of any potential grounds for appeal; and
   iv) to satisfy the public that justice was done.
4. what is "sufficient"? Reasons will be sufficient if they are responsive to the case's live issues and the parties' key arguments;
5. there is no "free standing" right of appeal on the adequacy or sufficiency of a judge's reasons
   i) the judge need not recite or survey all the evidence. The test is whether there is "reasoned belief that the judge forgot, ignored or misconceived the evidence in such a way that it affected his or her conclusion."
   ii) even if the reasons are inadequate, if the basis for the decision is obvious on the face of the record, appellate intervention is unwarranted.

b) the result

The trial judge's reasons were adequate. Faced with a potential range of values for the shares, calculated by two different approaches, he made a decision. It was clear that he started from the husband's valuator's opinion as it was the only opinion provided. Thereafter, he preferred the critical analysis of the wife's valuator that the evidence indicated that the business would not be sold and the proper approach would be as a going concern. At the same time, he accepted the unique features of this business but tempered it with the uncertainties that clouded the overall industry.

Thus, the reasons were sufficient and adequate within the overall context of the evidentiary record.

The appeal was dismissed.

***Cooke* v. *Cooke*, 2011. BCCA 444**

The parties separated in 2005. They equally owned two Tim Hortons franchises—one in Richmond and one in Tsawwassen. Although it was their intention that the husband would acquire one of the franchises and the wife the other, for the first two years of their separation, the husband ran both. The trial judge found that in so doing, the wife was disadvantaged as her transition to a sole owner/manager was impaired. In essence, the trial judge ordered the husband to pay both retroactive and prospective spousal support for the period from 2008 to 2012.

The parties had hired a valuator to value the franchises. He used a multiple of approximately 4 times discretionary cash flow. On that basis, he valued the Richmond operation at $850,000 and Tsawwassen at $295,000. He was unaware of a term in the franchise agreement that empowered the franchisor to set the sale price of a franchise. In fact, Tim Hortons did just that—imposing a value of $440,000 for the

Richmond operation and $285,000 for Tsawwassen. In due course the wife took over the Tsawwassen operation and the husband took over Richmond.

In reapportioning the assets, the trial judge noted that the husband was acquiring an asset worth $850,000 and the wife an asset worth $285,000. Concluding that the Tim Horton's imposed valuation was unfair, the trial judge awarded 100% of the value of the family home to the wife. This achieved a rough equality of value.

Although the husband's T-4 showed an income from his employment at the coffee shops of $86,000, the court concluded that the discretionary cash flow or pre-tax corporate profits would otherwise be close to $300,000. The trial judge fixed the husband's income at $250,000, employing s. 18 of the *Child Support Guidelines*. Section 18 of the Guidelines allows the court to attribute the corporate pre-tax profits to a shareholder if the court is of the opinion that they can and should be available for child support.

a) the asset valuations

The trial judge properly valued the businesses. The parties, themselves, had agreed that the businesses were not to be sold to third parties. Thus, the imposed "sale price" fixed by Tim Horton's was both unfair and inappropriate. By allocating all of the value of the home to the wife, equality was achieved.

b) income attribution

The trial judge appropriately determined the husband's income to be $250,000 despite the fact that he only drew $86,000 employment income.

The evidence indicated that from 2005 to 2007, the parties drew approximately $250,000 per year from the businesses. Thus, there was evidence that the business could sustain such removal of its profits.

In not attributing the entire profits, to the husband, the company would still be growing its balance sheet creating a reserve for anticipated demands on its profits—in this case a renovation that could cost between $250,000 to $325,000.

c) spousal support

The concept of "double dipping" is not confined to pensions. If businesses are divided as assets, the business income should not be counted again for the purposes of spousal support.

However, in this case, there was not a true "double dip" as the wife was awarded compensatory support. Compensatory support is awarded to redress the economic disadvantage that a spouse suffers from a marriage or its breakdown.

As the husband had run both businesses in the two years following the marriage breakdown, the wife's transition to financial independence was impaired. Thus, the support award did not duplicate the asset division which was premised on both businesses carrying on as going concerns.

d) child support

The husband calculated his time with the children as being 41.5%. Thus, he felt that the trial judge erred in assessing a full table-based amount for child support.

The Court of Appeal noted that the trial judge had specifically directed her mind to s. 9 of the Guidelines as she had stated that "there is a tendency for [the husband] to count the time that the children are with him with exact precision in order to demonstrate that he has the children more than 40% of the time…".

The Court of Appeal concluded that s. 9 is not simply an accounting exercise. The trial judge considered the economic needs of the children and the dynamics of the family relationship in a lengthy trial that probed the financial and non-financial circumstances.

Thus, there was no reason to disturb the exercise of discretion by the trial judge.

***C. (J.)* v. *W. (L.A.).* December 17, 2010. Harris J. (B.C.S.C.)**
An appeal was taken by the husband to a single justice of the British Columbia Supreme Court from the decision of a judge of the Provincial Court.

The husband was the majority shareholder of A. Co. His wife was the other shareholder. A Co. held all the shares of V. Co, the operating company. V. Co. acquired certain assets from a numbered company for $420,000. The purchase price was the issuance of 420,000 voting shares of V. Co. Simultaneously, A. Co. bought the 420,000 shares and entered into an asset purchase loan with the numbered company to pay the purchase price of $420,000. The repayments under the loan are about $105,000 annually.

In 2008, V. Co's net profits were $114,000. Its retained earnings were $105,000. However V. Co paid dividends up to A. Co. to fund the payments to fund the $420,000 purchase.

The trial judge found that the transactions were *bona fide* and specifically found that the retained earnings of V. Co. were dedicated to paying off the share acquisition. However, the trial judge held that as the support obligation pre-dated the transactions all of the retained earnings would be attributed to the husband under s. 18 of the *Child Support Guidelines*.

The Supreme Court Justice allowed the appeal and directed that a new trial be held. The basis for overturning the trial judge was the judge's failure to recognize that the retained earnings were dedicated to paying off the purchase price of the shares of V. Co. by A. Co. As the debt was real and *bona fide*, the retained earnings might have to be paid out as dividends to A. Co. to enable A. Co. to meet its debt obligations.

The Supreme Court Justice reviewed the operation of s. 18 of the *Child Support Guidelines*. In such cases, the Court must consider evidence of the legitimate business needs to determine what, if any, corporate profits should be attributed to the shareholding spouse. The trial judge accepted that the loan obligations were legitimate demands on V. Co.'s profits and that the retained earnings were dedicated to that purpose. Thus, if so dedicated, they could not be income available for child support purposes.

A new trial was ordered. The trial judge, in simply ordering that all of the retained earnings be attributed, failed to take into account the extent that their retention was necessary.

***More v. Shurygalo.* July 12, 2011. Sandomirsky. J. (Sask. Q.B.)**
The parties entered into consent judgments in 2008. One such judgment required the husband to pay spousal support for three years subject to a review as to quantum and duration at the expiration of the three year period. Another judgment required the husband to pay $250,000 as an equalization payment. The third judgment required the husband to pay child support.

Because spousal and child support were at issue, the husband's income had to be determined by the court. Since the last judgment, the husband's corporation sold the land and buildings from which the business operated for $1.6 million. This resulted in a capital gain of $1.1 million for the company. The company, however, had operating losses of $400,000. The wife sought to add the $700,000 in corporate net income to

the husband's personal income pursuant to s. 18 of the *Child Support Guidelines* for the purposes of both child support and spousal support.

Section 18 allows the court to attribute corporate profits to a shareholder's income if the personal income approach "...does not fairly reflect all of the money available for child support".

The husband took the position that only his personal income of $68,000 (a three-year average) should be employed for support purposes. Moreover, he argued that spousal support should be terminated.

The court declined to attribute the corporate profits to the husband. The company was still in debt and had operating losses. Section 18 of the *Child Support Guidelines* expressly permits the court to look at s. 17 which talks of income fluctuations and non-recurring amounts. The $700,000 profit was the result of a non-recurring event. Moreover, the wife had received an equalization payment as part of her share of the family property division. To include it in income a second time would be an impermissible "double dip." As a result, the court concluded that using only personal income "fairly reflected all the money available [for support]. Thus, s. 18 was not engaged at all.

The court lamented upon the fact that the "consent review" did not delineate the contemplated event or events that were to be reviewed. Moreover, the review was to determine quantum and duration. It did not expressly deal with entitlement. Thus, while a review is a "fresh look" at matters without the necessity of a material change in circumstances, the issue of entitlement would require changed circumstances. In other words, the entitlement issue would be conducted under s.17 of the *Divorce Act* as it was not a consideration for review—only duration and quantum.

The court limited the duration of spousal support. The wife had secured reasonable full time employment. She had health issues that were known at the time of entry into the consent order. Likewise, her cohabitation with another man was known at the time. The husband's personal income had not changed. Thus, there were no material changes to engage the operation of s. 17 of the *Divorce Act*.

However, these factors could be part of the "review". As the parties' marriage had lasted for 15 years, the Spousal Support Advisory Guidelines would call for a duration of 7 ½ to 15 years. Her cohabitation and her employment would place her at the lower end of the scale. Support for a further three and a half years was ordered. At that point it would end.

Hurst v. Gill 2011 NSCA 100

[*Ed note:* For those of you unfamiliar with the Land Titles system, it differs from the old "notice" system of the *Registry Act.* The Land Titles System is founded upon the concept of the "parcel register". The parcel register is a complete statement of title to the parcel and all instruments that affect the parcel. No search of title is needed to establish a chain of title. Rather, the parcel register will be conclusive proof of title and what affects title.]

At issue was the priority to be given to the wife's claim and a law firm's claim to the husband's share of the proceeds of sale of the parties' jointly held matrimonial home. There was not enough money to pay each in full. One or the other of them was going to come up $46,000 short.

To make a long story short, the total proceeds were $139,000. The wife's entitlements were her half—$69,500, an equalization award of $46,000 and costs of $5,000. Total

$121,000 [*Ed note:* my numbers differ slightly from the precise numbers of the judgment due to certain "rounding" and editorial liberties.].

The law firm had a judgment against the husband for $67,500 in unpaid fees. Thus, their judgment would, if satisfied, leave the wife with a shortfall. If the wife had priority (which the trial judge did) the law firm would in essence, lose all its fees.

The law firm represented the husband in the early stages of the matrimonial litigation. About a year later, they ceased to be solicitors of record. In a hotly contested assessment, they were ultimately awarded $67,500. They filed execution against the matrimonial home in August of 2009. Their execution created a valid charge against the husband's interest in the matrimonial home.

The trial judge gave judgment in 2010. For various reasons, she concluded that the wife had priority over the law firm. They appealed. Other aspects of the appeal are not reported.

By a 2/1 split, the Court of Appeal reversed the trial judge thereby giving the law firm priority. The dissenting judgment is not reported as the dissenting judge based his decision on statutory differences between Ontario's *Family Law Act* and Nova Scotia's *Matrimonial Property Act*.

a) The Land Titles System and the Execution

The parcel register is a complete statement of all interests affecting the parcel. Upon the registration of an execution, the owner's interest is effectively charged.

Thus, the execution, once registered, represented a valid charge upon the husband's half interest in the jointly-owned matrimonial home, effective August 5, 2009.

b) property law and family property law

The Court reviewed the interplay between the law of property referring to both authorities such as Robert A. Klotz's *Bankruptcy, Insolvency and Family Law* (2nd ed.) Carswell and reports from Ontario's Law Reform Commission observing that:

a) during marriage, except for the matrimonial home, each spouse is free to dispose of or alienate his or her property;

b) in particular parties may use their credit-worthiness and assets as justification for creditor confidence in that spouse's promise of repayment;

c) creditors should be protected in their dealings with husbands and wives. Thus the matrimonial property regime should not impair this ability;

d) therefore, prior debtor/creditor arrangements will normally rank ahead of subsequent spousal debtor/creditor arrangements. Spouses will normally become deferred creditors.

c) the nature of the wife's interest and when it arose

The issue was dealt with by the Supreme Court of Canada in *Maroukis* v. *Maroukis*, [1984] 2 S.C.R. 137. In that case, the parties separated and the wife applied for a division of assets. While the action was pending, a bank obtained judgment against Mr. Maroukis. Once the case came on for trial, the trial judge made a vesting order in favour of Mrs. Maroukis, vesting the matrimonial home in her, free from any claim of the bank and its execution. Reversing the trial judge, the Supreme Court held that the family law legislation did not create property rights in spouses. Rather, it gave them a right to equalize or divide property. Until that right crystallized in a judgment, the separate property regime prevailed. Thus, the vesting order was subject to the execution.

Accordingly, the wife had no proprietary right in her husband's half interest until the trial judge so decided in October, 2010. The law firm's lien attached in August, 2009.

d) Notice

The trial judge held that the husband's law firm had "notice" of her potential claim to an unequal division of the matrimonial home. However such "notice" does not create an equitable right. An equitable right must be an existing right. The property was owned jointly, thus there was no presumption of each owner's intention. No rights arise, under family property law until the court declares those rights.

Thus, notice of the wife's claim was not sufficient to enable her to jump the queue.

e) was the execution an encumbrance

Section 8 of the *Matrimonial Property Act* [and s. 21(1) of Ontario's *Family Law Act*] provide that no spouse shall "dispose of or encumber" an interest in a matrimonial home except in limited circumstances such as consent, a court order, a release in a separation agreement...etc.

The majority ruled that the verbs "dispose" and "encumber" refer to spousal conduct. In other words, there must be active conduct on the part of the disposing or encumbering spouse [*Ed Note:* it was on this interpretation that the minority dissented]. It would not apply where the encumbrance is the indirect result of a commercial transaction and the action is taken by the creditor: *Bank of Montreal* v. *Bray* (1997), 36 O.R. (3d) 99 (C.A.); *First City Trust* v. *McDonough* (1993), 15 O.R. (3d) 586 (Gen. Div.); *Ferguson* v. *Ferguson* [1994] O.J. No. 1975 (lawyer's execution upheld).

The situation could be contrasted with two later Ontario decisions. In *Boyd* v. *Boyd*, [2008], O.J. No. 180, the assessment of the solicitor's account was unopposed, and, simply put, the judge "smelled a rat". In *Waldula* v. *Bell*, [2004] O.J. No. 3071, the wife's sister loaned the wife large sums of money to finance the matrimonial litigation. The trial judge found that the wife either could not or would not be expected to repay her sister. Thus, the loans were tantamount to an "encumbrance."

No possible mala fides occurred in this case. The assessment of the solicitor's account was "actively opposed."

To interpret the concept of "encumbrance" and notice of a matrimonial home broadly would impair the ability of spouses to obtain credit and create classes of creditors—it would mean that lawyers, plumbers, renovators, or other tradespersons would be prejudiced—creating different classes of creditors. It ignores the policy of favouring commercial creditors over spousal creditors and it is inconsistent with the interpretation of similar legislation in other provinces.

f) notice of assessment

The trial judge held that the wife should have had notice of the assessment by virtue of s. 8(1) of the *Matrimonial Property Act* by which a court may authorize an encumbrance of the matrimonial home. Again, the Court of Appeal concluded that the results of the assessment and subsequent filing of an execution were not an "encumbrance." It was not her bill being assessed—thus it was doubtful that she had any right to notice or any standing on the assessment.

g) conclusions

Neither property law, matrimonial law or equity could afford the wife a remedy as:

a) she had no property right until the trial judge conferred it upon her;

b) matrimonial law does not permit the re-arrangements of property interests to the detriment of third parties; and

c) equity did not come into play as the law firm had no notice of a proprietary interest of the wife prior to the registration of its execution.

Willcocks v. Lien. **2011 ONCJ 433**

The situation before the Court is a common one in Ontario. The high school period of studies is four years, from grades 9 through 12. Many students spend a 5th year in high school either because they lack sufficient credits to graduate or simply to earn better grades for college entry, or simply to gain maturity before college entry. The practice is so prevalent that it is called a "victory lap." It produces a great deal of litigation—especially where the child is not taking a full load of six credits. The outcomes vary. This case represents one outcome.

In this case, the child turned 19 in April of 2011. She was a full time student for the first semester of 2010-11, which ran from September 2010 to the end of January, 2011. She was taking only one course for the 2nd semester, February to June, 2011. The parties' separation agreement provided that child support would end upon the child "ceasing to be in full-time attendance at school".

The father stopped paying child support in January, 2011, relying on the terms of the separation agreement.

The mother asked for continued child support, payment of arrears and a determination of the parties' ongoing child support obligations in September 2011 when the child entered post-secondary education. The evidence indicated that the child would attend school in another city, but generally return to the mother's home during school breaks and some weekends. The motion was for interim relief pending the final determination of the issues.

a) the agreement

Under s. 56(1) of Ontario's *Family Law Act*, the court is empowered to disregard any provision in a domestic contract if "...in the opinion of the court it is in the best interests of the child".

It did so.

b) the child's continuing status as a "dependent"

The court appeared to conclude that there was a continuum of full-time attendance despite the *hiatus* during the second semester. The court equated this period as merely equivalent to an extended summer vacation. Thus, the child's *entitlement* was not affected though the *quantum* of child support would be.

c) quantum

As she was taking only one course, the court was prepared to impute income to her. She should have a part-time job. Unfortunately, no evidence was led in that respect. The court, noting that the child lived in a small town of 4,500 people with no public transit in a tough job market for youth, did not reduce the quantum. He ordered full table support, directing that when her earnings were ascertained, the matter could be further addressed.

Thus, for the period February to August, the father was ordered to pay $623 monthly—the table amount based on his annual income of $67,200.

d) ongoing support while in college
[*Ed note:* Normally, this is addressed by the custodial parent and the child developing a budget for the 8 months that the child will spend away from home. The child's contribution to the budget will be determined and the "shortfall" will be shared proportionally by the parents].

The parents had not filed a budget so most expenses were estimated. The court found the first year costs to be $14,200, the parental income to be $67,200 to the father and $39,000 to the mother. The court allocated 60% of the expense to the child. Thus, she would be responsible to contribute $5,680 to her expenses. The shortfall of $8,520 was to be shared pro rata. This required the father to pay $5,393 yearly or $449.00 per month.

The mother argued that her home would be the child's "home base". The court agreed and ordered 20% of the table amount (which would be $623.00 monthly) or $124.60 additional support to be paid monthly.

e) observations by the Court about the Guidelines
The policy under which the Guidelines were created aimed at the replacement of a complex, lengthy and uncertain case-by-case model, with the certainty of a fixed model that allows for few departures. They are designed to provide a speedy and certain resolution.