CITATION: Gilmore v. Gilmore, 2023 ONSC 5333
COURT FILE NO.: FS-22-00044855-0000
DATE: 2023-09-21

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kathryn GILMORE, Applicant

AND:

Michael GILMORE, Respondent

BEFORE: Kurz J.

COUNSEL: Nancy Deskin, for the Applicant

Elliot Vine, for the Respondent

HEARD: April 5,6,7,11,12, 13, 14, 26, 28, 2023.
Written submissions of May 11, 2023

ENDORSEMENT

Introduction

[1] The parties to this proceeding have settled all of their parenting issues, leaving their financial issues to this trial. I set out those remaining issues immediately below.

[2] The Applicant wife, Kathryn Gilmore ("Kathryn"), applies for an order as follows:

a. Immediate partition and sale of the jointly owned matrimonial home (the "Home");
b. A declaration that she has a 50% interest in three timeshare units whose title is held in the name of the Respondent husband, Michael Gilmore ("Michael"), and a transfer of a one-half interest in those units to her;
c. The imputation of an income of $149,000 per year to Michael on the basis of intentional underemployment and unemployment;
d. A finding that her income for support purposes is $50,000 per year, despite her current employment contract that pays her at a higher rate;

e. Retroactive and ongoing child support including s. 7 expenses, shared on a 62% (Michael)/38% (Kathryn) ratio;
f. Retroactive and ongoing spousal support;
g. The payment by Michael of $25,478 in net post-separation adjustments;
h. An equalization payment by Michael of $170,084.47[1].

[3] Michael seeks an order as follows:

a. Partition and sale of the Home, not to occur before July 2, 2023, following the end of the children's school year;
b. That all payments owing to him under my order come out of Kathryn's 50% share of the net proceeds of sale of the Home;
c. A determination that Kathryn's annual income for support purposes is $91,000; and that Michael's annual income be imputed at $85,000 per year;
d. No retroactive and ongoing spousal and child support based on the similar incomes for the parties that Michael requests the court to find;
e. Both parties to maintain the children on any extended health benefits available to them through employment;
f. An equalization payment by Kathryn of $72,233;
g. The payment by Kathryn of $97,148.22 in post-separation adjustments as of August 2023, less payment by Michael of $7,026, for a net payment by Kathryn of $90,122.22;
h. An equal division of the children's RESP's (although that issue was never raised at trial);
i. An equal division of the household contents of the Home, with Michael obtaining the first four picks (although that issue in general and Michael's requested preferential choices was never raised at trial);
j. An equal sharing of s. 7 expenses until June 2024;
k. The dismissal of Kathryn's claims other than as set out above;

[1] While Kathryn originally sought an unequal division of net family properties, her final submissions seek only an equal division.

l. A divorce.

[4] On July 26, 2023, I ordered the listing and sale of the Home upon certain terms. I did so because I had not yet completed these reasons and because the parties were in agreement that the Home be sold (although Michael did not wish it to be sold before July 2, 2023). I have subsequently had to issue an endorsement regarding the terms of the sale of the home. As of the date of completion of this endorsement, I have not been informed that the Home has been sold.

[5] During the course of the exchange of materials regarding the sale of the Home, Michael served a Notice of Change of Representation and now represents himself.

Background

[6] Kathryn describes this matter as a non-complicated family law matter. In many ways that is true, particularly regarding legal principles. But it raises numerous factual issues and questions of credibility. As I set out below, I have reasons to question the credibility of each party in regard to particular issues. However, I have greater concerns with that of Michael for reasons set out below.

[7] The parties were married on September 1, 2007 and separated on July 3, 2021. They have four children, aged between six and twelve years old. After separation, the parties agreed to a nesting arrangement with a 2-2-3 parenting schedule. On January 4, 2023, the parties ended the nesting arrangement and entered into a week-about parenting schedule. They finally settled all parenting issues, with that week-about parenting schedule on April 4, 2023.

[8] The parties met in university, where each played collegiate soccer. Kathryn is a public health nurse, who took approximately 18-month terms of maternity leave following the birth of each child. Michael is an engineer who worked his way up the corporate ladder to a management position at Rogers Communications. He left Rogers early in 2019 after about 15 years of service. His highest level of annual income came in 2019, the year he left Rogers. That year, he earned approximately $159,000. Some of that income represented a brief overlap between his income from Rogers and his new

employment at a communications firm called Evertz Microsystems Ltd (“Evertz”). Kathryn says that Michael’s average income at Rogers was $149,000. That may be an exaggeration but Michael’s notice of assessment for 2018, the year before he left Rogers, showed his income to be $149,964.12.

Michael’s Employment and Income After Leaving Rogers

[9] Michael’s employment and income subsequent to leaving Rogers is somewhat fuzzy and his narrative has holes. He says that he joined Evertz in February 2019 at a salary of $125,000 per year and a further $5,000 annual bonus. He testified that he did so because he and Kathryn had issues with finances, and he was thinking that if he made more money they would not have to worry about finances. Yet he took a job which paid him about $19,000 less than his previous job and involved more travel than his previous job. As set out below regarding Innovacom, a corporation titularly owned by Kathryn but in reality controlled by Michael, there may have been other reasons for Michael to leave Rogers and join Evertz.

[10] Michael’s employment at Evertz only lasted about 1 ½ years, until September 2020. He blames the loss of his Evertz job on Kathryn’s social life. He asserts that she began to go out to bars in May 2019, accompanied by the children’s nanny. She did so about twice per month, returning at about 3:00 a.m. leaving him to care for the children. He says that she justified this conduct by saying that she had not had a proper maternity leave for her last child as she was also caring for her ailing mother, who was in palliative care.

[11] Michael asserts that Kathryn engaged in her nocturnal outings without her wedding ring on her finger. He claims that this became an issue for his employer, Evertz, which is a local Halton company. The employer’s purported concern was not merely the missing ring but Kathryn being out at a bar at night without Michael. He claims that a number of executives and employees of Evertz mentioned Kathryn’s errant social habits to him.

[12] Michael says that he and Kathryn discussed the issue of her evening attendance at drinking establishments in May 2019, but the issue remained unresolved. Then in July 2019, his boss, Romolo Magaleri[2], the CEO of Evertz, disclosed another incident in which Kathryn, sans wedding ring, was spotted at a public house.

[13] Why Michael's bosses at Evertz would concern themselves with his wife's social habits let alone allow them to affect his job standing is both baffling and unexplained. Of course, for those Evertz officials to have spotted Kathryn at a bar means that they would have attended themselves. Equally curious is the extent of the powers of observation of the unnamed person(s) from Evertz, who were able to spot the absence of a wedding ring on Kathryn's unadorned finger in a tavern at night.

[14] Michael testified that Mr. Magaleri's July 2019 disclosure led to a downward spiral in his mental health. He says that he contemplated suicide and was hospitalized overnight at CAMH. He was given an unspecified prescription by his family doctor and referred to an unnamed psychologist. By September 2020, his employer was so concerned with his work performance that it offered him an ultimatum: leave his wife or quit his job. Because of his refusal to accept the first choice, the result was his termination. Thus, he asserts that he chose his wife over his job.

[15] I stop to point out that none of this evidence is corroborated, whether by anyone at Evertz or any medical/psychological treatment provider. He even failed to identify his heath care providers.

[16] All of Michael's evidence of Kathryn's extra-marital behaviour is hearsay other than the fact that she went out of the home without him on occasion. Not only was he unable to offer his own firsthand evidence of her alleged nocturnal conduct, he failed to call any of the superiors, who allegedly observed her behaviour, to testify. He never explained that failure. Kathryn was not even cross-examined regarding these assertions.

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[2] Spelling uncertain

[17] The failure to call anyone from Evertz is compounded by the fact that the Evertz termination letter, dated November 12, 2020, contradicts Michael's oral evidence. The letter is signed by both Michael and Douglas Moore, Chief Financial Officer of Evertz. The letter states that Michael "acknowledges and agrees to" the contents of the termination letter. Those agreed upon contents include two references to the termination of Michael's employment with Evertz as a "mutual separation", effective September 30, 2020.

[18] Despite the alleged ultimatum and "mutual separation", Michael continued to work on a part-time basis for Evertz. He did so through a consulting contract between Evertz and with his corporation, More Solutions Inc. ("More Solutions"), dated October 29, 2020. Michael testified that Evertz still required his consulting expertise despite its disapprobation of Kathryn's social habits. He consulted with Evertz for about twelve months after his termination. Ultimately, Evertz "internalized" the services that he had provided. By October/November 2021 Michael was no longer doing consulting work for Evertz. Nonetheless, More Solutions continued to earn residual payments from Evertz throughout 2021 and 2022, based on historical sales he had made while with Evertz.

[19] Michael gave evidence of a tangled web of corporations that he owned or controlled around the time of separation. At some point during the marriage, Kathryn owned the shares of a company called Innovacom, which Michael arranged to incorporate in 2015.

[20] Nonetheless, Michael contends that Innovacom was Kathryn's corporation. He points to the fact that she was the titular owner of the shares of Innovacom. But she was the owner in name only.

[21] Innovacom was incorporated in 2015 while Kathryn was on maternity leave. Michael claims that she started the company because she was looking for something to do on her maternity leave. That claim is hard to believe. Kathryn was home with her third child in less than five years. Innovacom offered software services, which is

Michael's field of expertise and not that of Kathryn. Recall that Kathryn is a public health nurse. Kathryn testified that she did not even know what Innovacom did.

[22] Michael answers Kathryn's lack of technical expertise by asserting that she had "business acumen". Yet the *technical* acumen that was presumably the *raison d'etre* of Innovacom was within Michael's exclusive domain. His evidence in regard to Innovacom is simply not credible. I accept Kathrine's evidence that he controlled the company.

[23] In 2019, Innovacom purchased another company, Optimal Methods Inc. ("Optimal"). On February 23, 2019, Michael had Kathryn write a cheque for $230,000 from Innovacom's bank account to his numbered company, 6030033 Canada Inc. ("603"). He explained that this was part of the purchase price for Optimal and that this was to minimize capital gains tax. Yet he also testified that 603 was his inactive bottling company. No further explanation was offered for this set of transactions. As a result of these transactions, Kathryn carried a capital gain of $146,438.00 for 2019, in addition to her actual income of $40,501.

[24] Later in 2019, Innovacom (along with Optimal) was sold to Evertz for either $1.2 or $1.6 million (the evidence is not clear). While Kathryn was unable to explain the transaction, Michael nonetheless ascribed it to her, exclusively. He spoke of Kathryn as the mastermind of the transaction by a corporation which he effectively controlled, which owned another company whose intellectual property he had developed and/or controlled, all of which was sold to his future employer. Again, that claim is simply not credible.

[25] As set out below, Yuri Demchenko, an acquaintance or friend of Michael, later came to be the owner and controlling mind of Optimal. Michael and Mr. Demchenko had previously worked together at Rogers. How Mr. Demchenko obtained his interest in Optimal from Evertz[3] was not disclosed to the Court. Yet on January 19, 2023, Mr. Demchenko, on behalf of Optimal, signed an independent contractor agreement with

[3] Which had purchased Innovacom and Optimal, as set out above.

Michael's company, More Solutions. Under that agreement, More Solutions offers unnamed contractor services to Optimal in return for $7,000 per month. As if that were not sufficiently opaque, Michael nonetheless testified at trial that he has yet to provide those services.

[26] To add to the confusion, on February 12, 2023 Michael signed an Assignment and Agreement with Optimal. In that document, he stated that he had transferred certain, unspecified, proprietary rights to intellectual property to Optimal. That intellectual property was described as being "developed [by Michael] in contemplation of being used, whether directly or indirectly, by [Optimal] in connection with the carrying on of the business of [Optimal]". The documents contain non-disclosure and non-competition terms. Neither Kathryn nor anyone from Optimal signed the document.

[27] Kathryn attempted to subpoena Yuri Demchenko in order to clear up the relationship between Michael, Optimal, Evertz and the transactions described above. From the evidence, Mr. Demchenko refused to attend court despite being aware of the request to have him attend. While I granted an order confirming service of a summons to witness on him and set a date for his trial attendance by Zoom, Mr. Demchenko simply failed to attend. Rather than adjourn the trial in the hopes of enforcing his attendance, Kathryn ultimately chose to continue with the trial in Mr. Demchenko's absence.

[28] Michael chose not to call Mr. Demchenko as a witness despite his awareness of the issues set out above. I would have thought that Mr. Demchenko's evidence could have straightened out the arrangements set out above and even potentially confirmed Michael's narrative. I accept that Kathryn attempted in earnest to obtain the evidence of Mr. Demchenko. But Michael, Mr. Demchenko's ostensible employee (by way of contract between their corporations), did no such thing.

The Second Mortgage on the Home

[29] Michael testified that in 2021 he and Kathryn decided to work on their marriage without the distraction of employment. Accordingly, in March 2021 they took out a

second mortgage on the Home for $897,000. The parties were to split these funds and live on them while they sorted out their relationship. Yet Michael arranged for the entire mortgage proceeds to be paid exclusively to him. He held on to those joint funds for the last four months of their marriage. He had yet to provide her with one cent of those funds until after the parties separated on July 3, 2021.

[30] A few days after separation, Michael handed $340,000 to Kathryn. That was not 50% of the $897,000 mortgage proceeds which is $448,500. Michael left her $148,500 short of her half.

[31] Michael justifies this shortfall by offering what his counsel described as a “kitchen table” equalization calculation. His informal calculation showed him that Kathryn owned more RRSP’s than him at the time that he received the joint funds. He does not say that he consulted with Kathryn about the withholding of her share of the proceeds or the subsequent shortchanging of her. There is no evidence that he even consulted with her regarding his unilateral “kitchen table” equalization calculation.

[32] Michael utilized some of the unshared joint second mortgage funds to place $75,500 in his Tax-Free Savings Account in May 2021. He then purchased Bitcoin with all but $285 of that account. He earned a profit of $9,382.52 on that speculative investment, which he sold on July 27, 2021. Inasmuch as he does not provide a date of separation value for the Bitcoin investment, I find that the $9,382.52 figure is the best estimate of the value of Michael’s Bitcoin profit on the date of separation. He shall account for the $9,382.52 Bitcoin profit on his side of his net family property statement.

[33] If I am incorrect in that regard, I find that the funds which Michael used to make that Bitcoin purchase can be traced to joint funds that Michael chose to solely hold and control. Thus, he was holding half of those funds (and profit) in trust for Kathryn.

[34] At this stage of my decision, I cannot ignore the pattern of financial control which this episode discloses. Michael assumed exclusive control of joint funds which the parties had agreed to equally distribute. Yet Michael refused to give Kathryn her half-share for four months, until after they separated. Even when he decided to distribute

those funds, he unilaterally withheld $148,500 from Kathryn's share. This conduct aligns with his exclusive control of Kathryn's ostensible corporation, Innovacom, and the various transactions undertaken by that corporation at his behest.

Michael's Unemployment from the Time of the Second Mortgage Onward

[35] Michael contends that he was effectively unemployed from the time that he arranged for the second mortgage to trial. He offers various explanations for that state of affairs. They include the psychological effects of the parties' separation, his desire to retrain, his shared parenting responsibilities, and the fact that he was earning income through More Solutions. I will have more to say about those explanations when I consider the imputation of income, below.

[36] Michael's narrative of employment has not been consistent throughout this litigation. In his sworn Form 13.1 financial statements of March 7, July 7 and October 21, 2022, prepared by his counsel, Michael described himself as "unemployed". He made no reference to any form of employment income in any of those sworn financial statements. But he did claim to have earned gross income of $38,717 in 2021. He also claimed "interest and investment income" of $1,275 per month or $15,300 per year. He did not offer any evidence on the source of that income, although he stated that he had bank accounts, savings, securities and investments of: $517,938 in his March 7, 2022 financial statement; $339,966.80 in his July 7, 2022 statement; and $282,912.88 in his October 21, 2022 financial statement. He said nothing about money earned through More Investments.

[37] In his February 6 and March 15, 2023 sworn financial statements, Michael described himself as "employed" even though he had started no new employment. He stated that he was earning $2,000 per month in self-employed income, net of $2,245 per month before taxes. His bank accounts, savings, securities and

investments had increased to $351,646.15.

[38] Michael explained that his self-employed income came through More Solutions earning residuals from Evertz. He claimed that while he originally checked off “unemployed” on his initial sworn financial statements, he eventually understood that “self-employed” better reflected his circumstances in light of Evertz’s residual payments to More Solutions. At that time, he decided to list his corporate income divided by twelve as his personal income in his financial statement. He felt that this notation would most accurately reflect his actual income at the end of 2022. I am not persuaded by this explanation for Michael’s failure to accurately set out his circumstances in his sworn financial statement. I recall that he was represented by counsel at the time that he swore those financial statements.

[39] Michael’s Notices of assessment entered into evidence show the following reported income:

2018 - $149,964.12

2019 - $158,929.00

2020 - $96,569.00

2021 - $37,717.00

[40] Michael has placed no tax returns or notices of assessment for 2022 into evidence. In his March 15, 2023 sworn financial statement, he states that his income for 2022 was $35,000.

Kathryn’s Employment History

[41] Kathryn is a trained as public health nurse. She worked full-time in that field until the birth of the first of the parties’ children, in January 2010. Ultimately, the parties had four children in just over seven years, with their youngest born in February 2017. Kathryn took an approximately 18-month maternity leave after each birth and also took on responsibilities for her palliative mother in Ottawa. This led the parties to hire a

nanny for a period of time. Kathryn also worked part-time between the births of her children.

[42] Kathryn returned to work in 2018. She stated that she felt coerced by Michael to do so. While she spoke of that alleged coercion in very general terms, she offered no details. Other than my comments above, I am not in a position to make any further findings regarding those broad claims. She continued that work until she was sidelined by the pandemic. Her notices of assessment showed the following income:

2018 - $10,032.00
2019 - $40,501.00 (capital gain $146,438.00)
2020 - $49,953.00
2021 - $37,702.00

[43] Kathryn filed no tax information for 2022 during the course of the trial. However, her counsel attached a copy of her 2022 Notice of assessment, showing an income of $50,787, to her written trial submissions. Her counsel claimed that the introduction of that evidence accords with what she called the “fresh evidence rule”. Counsel cites no authority for that claim. Although Kathryn should have moved to reopen evidence to file that document, Michael did not object to the inclusion of the notice of assessment or question the quantum of Kathryn’s 2022 income.

[44] In her sworn financial statement of April 11, 2023, Kathryn claimed an annual income of $36,297.72, $14,489.28 less than she earned the previous year. She stated that she is “[n]ot working full-time schedule due to Court/Trial preparation, only received full pay cheque three times.” Yet her employment contract with the Region of Halton, dated August 10, 2022 shows that she has contracted to earn far more than $36,297.72 for the one year between September 6, 2022 and September 8, 2023. She contracted to work full time for 35 hours per week at an hourly rate of $51.18 per hour. That works out of $1,791.30 per week or $93,147.60 over a 52-week period. While Kathryn would not be expected to work a full 52 weeks, she is entitled to vacation pay per a collective agreement, which has not been provided to the court. Thus, I utilize the $93,147.60 annual figure moving forward.

[45] Kathryn argues that the court should not assume that her contract will be renewed. Yet she provides no reason to believe that her contract will not be renewed. There is a 910-hour probationary period set out in her employment contract, which works out to 26 weeks. The time would have expired in March 2023. This trial commenced in April 2023. No evidence has been provided to the court that Kathryn has failed to pass her probationary period.

[46] Based on the evidence before me, I see no reason to treat Kathryn's employment with the Region of Halton as contingent. At the very least it demonstrates her ability to earn income at the level of her present level of remuneration.

Child Support

[47] Kathryn seeks child support, both retroactively and prospectively, based on an imputation of $149,000 per year to Michael and a finding of income of $50,000 per year to her. The $149,000 figure represents Michael's approximate income at Rogers, before leaving for Evertz. The $50,000 annual figure for her is based on both her $50,787 figure for 2022 and her historical income, set out above.

[48] Michael asks me to base 2023 and ongoing child support on a $91,000 annual figure for Kathryn (based on his calculation of her current income) and an imputed $85,000 per year for him[4]. He asks me to treat the two figures as a set-off, meaning that there is no prospective or retroactive table support. He says that until 2023, I should treat the two parties as equally employed/unemployed and thus order no support. Special and extraordinary expenses since separation should be determined based on equal incomes.

Authorities Regarding the Imputation of Income for Spousal Support Purposes

[49] In *R.L. v. M.F.*, 2023 ONSC 2885, I recently set out the applicable authorities regarding the imputation of income to a spouse at paras. 337 – 345 as follows:

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[4] As set out in para. 94 of Michael's written final trial submissions.

337 The jurisdiction which allows a court to impute income to a spouse on the basis of intentional underemployment, as the Father claims, is found in s. 19(1)(a) of the *CSG,* which reads as follows:

> **Imputing income**
>
> **19(1)** The court may impute such amount of income to a parent or spouse as it considers appropriate in the circumstances, which circumstances include,
>
> (a) the parent or spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent or spouse;
>
> ...

338 The leading case regarding the imputation of income to a support payor remains the decision of the Ontario Court of Appeal in *Drygala v. Pauli* (2002), 61 O.R. (3d) 711. At paragraph 32 of that decision, the Court described the imputation of income as:

> ... [O]ne method by which the court gives effect to the joint and ongoing obligation of parents to support their children. In order to meet this legal obligation, a parent must earn what he or she is capable of earning.

339 In *Szitas v. Szitas*, 2012 ONSC 1548, at para. 56, Chappel J. explained the meaning of intentional underemployment, citing *Drygala v. Pauli*, as follows:

> The Ontario Court of Appeal has held that in determining whether to impute income on the basis that a party is intentionally underemployed or unemployed pursuant to section 19(1)(a) of the *Guidelines*, it is not necessary to establish bad faith or an attempt to thwart child support obligations. A parent is intentionally underemployed within the meaning of this section if they earn less than they are capable of earning having regard for all of the circumstances. In determining whether to impute income on this basis, the court must consider what is reasonable in the circumstances.

340 In reviewing the caselaw at para. 57, Chappel J. cites the following seven principles that apply to the imputation of income to a support payor:

1. There is a duty on the part of the payor to actively seek out reasonable employment opportunities that will maximize their income potential so as to meet the needs of their children.

2. Underemployment must be measured against what is reasonable to expect of the payor having regard for their background, education, training and experience.
3. The court will not excuse a party from their child support obligations or reduce these obligations where the party has persisted in un-remunerative employment, or where they have pursued unrealistic or unproductive career aspirations. A self-induced reduction of income is not a basis upon which to avoid or reduce child support payments.
4. If a party chooses to pursue self-employment, the court will examine whether this choice was a reasonable one in all of the circumstances, and may impute an income if it determines that the decision was not appropriate having regard for the parent's child support obligations.
5. When a parent experiences a change in their income, they may be given a "grace period" to adjust to the change and seek out employment in their field at a comparable remuneration before income will be imputed to them. However, if they have been unable to secure comparable employment within a reasonable time frame, they will be required to accept other less remunerative opportunities or options outside of the area of their expertise in order to satisfy their obligation to contribute to the support of their children.
6. Where a party fails to provide full financial disclosure relating to their income, the court is entitled to draw an adverse inference and to impute income to them.
7. The amount of income that the court imputes to a parent is a matter of discretion. The only limitation on the discretion of the court in this regard is that there must be some basis in the evidence for the amount that the court has chosen to impute.

[Citations omitted.]

341 While Chappel J.'s seven principles speak to intentional unemployment by support payors, they nonetheless remain relevant to a claim that a spousal support recipient is intentionally underemployed. While payors are required to maximize their income to support their dependants to the extent possible, as set out in *CSG* s. 19(1)(a), a person seeking to receive support from that payor should have a concurrent obligation (whether to support themselves or their children). While that factor is always relevant, it is even more material when the claim has a non-compensatory or mixed basis for support.

342 Further, while I have broad discretion to impute income to a payor, that

discretion is not absolute. As Gillese J.A. wrote for the Court at para. 44 of *Drygala v. Pauli:*

> Section 19 of the Guidelines is not an invitation to the court to arbitrarily select an amount as imputed income. There must be a rational basis underlying the selection of any such figure. The amount selected as an exercise of the court's discretion must be grounded in the evidence.

343 At para. 23, the Court set out the following three questions which should be answered by a court in considering a request to impute income under s. 19 (1) (a) of the *CSG*:

> [1] Is the party intentionally under-employed or unemployed?
>
> [2] If so, is the intentional under-employment or unemployment required by the needs of any child or by the reasonable educational or health needs of the parent or spouse?
>
> [3] If not, what income is appropriately imputed?

344 The Court was clear in *Drygala v. Pauli* that the test for imputing income is the same for both child and spousal support.

345 In *Lavie v. Lavie*, 2018 ONCA 10, the Court appears to have gone a step further in refining the test for imputing income to a spouse. There, Rouleau J.A., speaking for the Court, set out a very clear black line test for intentional underemployment. It is one in which the subjective reasons for the underemployment, (and by extension, unemployment) are not relevant. He wrote at para. 26:

> There is no requirement of bad faith or intention to evade support obligations inherent in intentional underemployment: *Drygala v. Pauli*, at paras. 24-37. the reasons for underemployment are irrelevant. If a parent is earning less than she or he could be, he or she is intentionally underemployed.

Arguments of the Parties Regarding Income and Imputation

[50] As set out above, Michael concedes at para. 84 of his written closing submissions that the court should impute an annual income of $85,000 per year to him. That figure is slightly above the $7,000 per month (or $84,000 per year) payments set out in the January 19, 2023 contract between Optimal and More Solutions. Michael

offers no clear rationale for the imputation, although he also stated that he has not actually begun to work at that job since the contract was signed. I add that he has not adequately explained his failure to start work.

[51] On the other hand, Kathryn is asking me to impute income to Michael based on his earnings at Rogers years before the parties separated. He left Rogers approximately four and a half years ago, in early 2019. The parties would not separate for about another two and a half years from then, on July 3, 2021. At that time, Michael took a new job at Evertz that he hoped would lead to equivalent if not better income, although his actual earnings were based on an annual income of $125,000 salary plus a $5,000 bonus.

Analysis of the Parties' Income and Imputation Arguments

[52] The reason that Michael left Rogers for Evertz is not clear. He did not earn more money at Evertz than at Rogers. But there seems to have been a connection arising out of Innovacom and Optimal. That connection was not fully explored at this trial, in part due to the absence of Mr. Demchenko.

[53] Furthermore, the reasons for Michael leaving Evertz remain murky. To the extent that he claims to have been fired, Michael fails to offer corroborating evidence. The only evidence that he does offer, his November 12, 2020 Evertz termination letter, speaks of a "mutual separation". To the extent that Michael claims that his loss of a job and subsequent unemployment is the result of mental health issues, he fails to offer any corroborating evidence or even particulars of this alleged mental health issues. As stated above, he fails to mention the name of any treating professionals, the type of treatment he received or even his diagnosis.

[54] I also point to the fact that Michael failed to call anyone from Evertz or Mr. Demchenko, his present ostensible employer (through their respective companies). I have already stated above that it is reasonable to assume that the evidence of Mr. Demchenko would not have assisted Michael. It is reasonable to assume the same regarding Michael's superiors at Evertz.

[55] Regarding retraining, Michael gave evidence that he had spent time attempting to retrain and upgrade his skills after the parties separated. He testified that he had spent about two hundred hours taking a course in the area of project management. That is a field which he intended to pivot into, as it used similar skills to his previous career in management at Rogers and Evertz. Yet he never completed that training or offered a valid excuse for his failure to do so.

[56] Michael testified that moving forward, he did not anticipate being able to earn as much income as he had previously earned at Rogers or even Evertz. He offers two reasons for his anticipated income drop. First is his part of the parties' shared parenting arrangements. They require him to find a job closer to Burlington and greater work-time flexibility, such as remote work. Second, relying on his termination form Evertz, Michael claims that he suffered damage to his reputation in a small industry.

[57] These arguments are not convincing for the two following reasons. First, Michael's last job was in Burlington, with Evertz. That shows that there are jobs in his field relatively close to home. There is no evidence to the contrary. Further, I have no evidence but Michael's claim of the damage to his reputation. He works in a broad and wide-ranging field that includes many tech giants. I have no reason to believe that Kathryn's alleged barhopping will affect his job prospects if he truly seeks employment.

[58] Further, as set out above, Michael failed to clearly articulate how Kathryn's insistence on a 2-2-3 parenting time arrangement rather than a week about arrangement has adversely affected his employment opportunities. I do not accept that the present week-about arrangement will affect his ongoing work prospects. It is open to Michael to find employment that allows him to work around his childcare responsibilities just as Kathryn does.

[59] I also note that Michael failed to complete the retraining that may have enhanced his employment prospects.

[60] On the other hand, following the parties' separation, Kathryn was in more or less the same situation regarding employment as Michael. She was capable of earning a reasonable income and carried parenting responsibilities 50% of the time. She started work in September 2022 but I have no clear evidence of the reasons that she was only inconsistently working between July 2021 and September 2022.

[61] In *Lavie*, The Court of Appeal for Ontario determined that what I describe as a "good for the goose, good for the gander" approach to the imputation of income between spouses is fitting when the parties are in analogous employment circumstances. At para. 36, Rouleau J.A. wrote for the court that where both parties had failed to demonstrate a good reason for their unemployment or underemployment, it was "appropriate to either impute additional income to both parties or to neither of them." So, it is here.

[62] From the time of separation until she obtained her full-time job with the Region of Halton, Kathryn was working part-time. Michael was not working at all, for reasons which, as set out above, have not been fully or credibly articulated.

[63] For the year 2021, the year of separation, in light of the roughly equal childcare responsibilities and the need to adjust to their new arrangements, each party had virtually identical incomes in their notices of assessment, $37,702 for Kathryn and $37, 717 for Michael. I lack sufficient evidence to impute different incomes for either party. Rather, I treat that year as the type of "grace period" contemplated by Chappel J.in *Szitas*, above. Thus for 2021 I will deal with their incomes as equal and order no table child support.

[64] Kathryn was able to find full-time employment in August 2022, commencing in September 2022. Why she was unable to do so before that date is not clear from the evidence. Michael failed to earn any employment income at all in 2022. As he did in 2021, he was living off residuals being paid by Evertz. He has no satisfactory answer for his unemployment.

[65] In sum, I have no evidence that Michael either sought employment in 2022 or that he was unable to work for reasons, per. *CSG* s. 19(1)(b), relating to the children's needs, his health or his education. To the extent that he took a course, Michael failed to stick with it until completion.

[66] Thus, I find that Michael chose not to find further employment in 2022. Despite his contract with Optimal, he still had not even started that employment as of the completion of this trial. I find that he was and remains intentionally unemployed. Thus, I am willing to impute income to Michael, starting in 2022.

[67] Regarding the amount that should be imputed to Michael, I feel that basing the imputation on his Rogers income is a bridge too far. He had moved on from that job to find another relatively well-paying sinecure with Evertz. His job there paid him an annual salary plus bonus of $130,000. He has failed to offer a credible explanation for the loss of that job.

[68] Michael testified that he was confident that he could earn $85-95,000 per year but felt that he was unable to earn more because of his childcare responsibilities. He points to his role as two of his children's soccer coach. But that means that he was not seeking employment at the highest level of remuneration. In fact, Michael testified at the trial that he had yet to start the work under the contract between Optimal and his corporation, More Solutions.

[69] I can see no compelling evidence to justify Michael's failure to seek, let alone find any employment equivalent to his employment in Evertz. In the circumstances, it is appropriate to impute an annual income of $130,000 to him, beginning in January 2022.

[70] Regarding Kathryn, she says that I should find that her income for support purposes is $50,000 per year. That is approximately what her notice of assessment says that she earned in 2022. But why was she unable to find a full-time job like the one that she obtained with Halton Region in August 2022, starting on September 6, 2022? She offers no evidence. In her Application, issued on or about January 20, 2023, Kathryn states that she worked as a full-time public health nurse for the periods

between the birth of her children and her maternity leaves. She pleads that she left that employment in April 2021 due to the overall stress and demands of the job as well as the demands of childcare. Later in the Application, she pleads that “she can no longer work in the public nursing environment”.

[71] Like Michael, Kathryn provides no proof of that inability to work. Her childcare responsibilities echoed those of Michael. I have no evidence that she was unable to find employment before September 2022, only that she felt unwilling or unable to do so. Kathryn’s 2022 income of $50,787 appears to be based on Employment Insurance and her full-time work, commencing September 2022. While I am not willing to impute the full $93,147.60 figure set out above to Kathryn for 2022, I also do not accept that she was limited to earning only $50,787 that year either. While I have not been offered a precise figure, I find that the evidence provides some basis for finding that an income midway between the $50,787 notice of assessment figure and the $93,147.60 figure, or $71,967.30, is appropriate. For 2023 the $93,147.60 figure is appropriate. While Kathryn expressed scepticism as to the renewal of her contract with the Region of Halton, I have been provided with no evidence to find that her employment will end in September 2023.

[72] Based on those figures, for 2022, Michael owes Kathryn table support of $2,845 per month, while she owes him $1,708 per month, for a set off of $1,137 per month. For the twelve months of 2022 that amounts to $13,644.

[73] For 2023 the table support remains $2,845 per month for Michael but $2,160 per month for Kathryn, for a set off figure of $685 per month. For the months of January to September 2023 that amounts to $6,165.

[74] Commencing on October 1, 2023 and continuing on the first day of each succeeding month, Michael shall pay to Kathryn $2,845 per month and Kathryn will pay to Michael $2,160 per month, which amounts to a set off figure of $685 per month. I will leave it to the parties whether they wish to exchange cheques for tax purposes.

Special and Extraordinary Expenses and Post-Separation Adjustments

[75] Each party has made a claim for special and extraordinary expenses under s. 7 of the *Child Support Guidelines* (the "Guidelines"). However, there is a paucity of evidence to support any such claims.

[76] Kathryn offered a poorly formatted[5] sixty-four-page spreadsheet, attached to her April 11, 2023 sworn financial statement and included at tab 4 of in her exhibit book (Exhibit 2a). It purports to offer her schedule of both s. 7 and post-separation expenses. The spreadsheet appears to offer no differentiation between s. 7 expenses, which would be split proportional to income and post-separation expenses, which would be equally shared. There appears to be no summary page. Kathryn has not produced the actual receipts for the expenses that she claims.

[77] In her opening statement at trial, Kathryn's lawyer asserted that her client was seeking a total of $57,000 for "post-separation expenses"; that is half of $114,000 that she is claiming to have spent on those expenses. Counsel stated that those expenses include sports equipment, utilities, school field trips, furniture for the children in her new home (because she was not allowed to move any children's items from the Home), uniforms and clothing. She added that she was willing to accept that Michael is entitled to a $49,812.83 set-off arising from his total post-separation expenses.

[78] In her written final submissions, Kathryn's counsel wrote regarding her request for reimbursement of post-separation expenses:

> 62. The Applicant testified that she spent a great deal of money for children's activities, clothing, equipment, medications, dentists, doctors, utilities, school trips and lunches and groceries for her time with the children and the Respondent's [sic] all of which is set out in **Exhibit 2A, Tab 6.**
>
> 63. The Applicant spent a total of $50,956.00 and brought to Court all the receipts should they have been requested. She is seeking

[5] Many of the pages of the spreadsheet are differently oriented, with some landscape mode while others are portrait. Many columns of the spreadsheet run off the page to sit as singular columns in subsequent pages, making them virtually unintelligible.

reimbursement from the Respondent for $25,478.00.

[79] Exhibit 2A, tab 6 is a comparative net family property statement. I assume that Kathryn's counsel was referring to the spreadsheet cited above. Paragraph 63 of the written submission speaks to having brought the receipts for her claimed expenses to court, not having entered them into evidence.

[80] Kathryn did not speak to her spreadsheet in her evidence. Nor was she cross-examined on it. From my review of the document, many of the items claimed are neither proper s. 7 expenses nor post-separation expenses. They include clothing, groceries, restaurant meals, gasoline, toiletries, cash withdrawals and school supplies. There may be a justification for including some of them in the spreadsheet, but they were not offered in oral evidence.

[81] In his trial opening statement, Michael's lawyer stated that each party was claiming post-separation expenses, including children's expenses. But he asserted that the evidence would show the propriety of Michael's claims and not those of Kathryn. In his evidence, Michael offers separate spreadsheets for "home expenses" and child-related expenses that he claims to have paid. His child-related expenses total $5,575.27. No receipts are provided. Some of the claimed expenses include a cell phone for one child, a hairdresser ($150.92), something called Roblox and $20.33 per month for "Google" for July 2021 – March 2023. Like Kathryn, Michael offered no oral evidence or receipts to support his s. 7 expense claims and was not cross-examined on them.

[82] In his written closing argument, Michael's counsel conceded that the court "did not hear evidence at trial regarding what child related expenses were paid by each party post-separation..." Nonetheless, he admitted the propriety of some expenses claimed by Kathryn, which were offset by Michael's own expenses. Based on the set off that he accepted, he contended that Kathryn is entitled to a set-off payment of $3,941.91.

[83] I must confess that in the absence of meaningful evidence, I am not in a position to determine the parties' s. 7 expenses, let alone their set-off. That is particularly the case in the absence of any evidence that directly speaks to those expenses, including receipts and oral evidence to explain why the questionable expenses cited above are proper s. 7 expenses.

[84] Judges often find themselves faced with litigants and counsel who dump a batch of papers on the court and ask it to make sense of them. In that way, judges may feel kinship with the accountant greeted by a client's box of loose receipts at tax time. But accountants are not final arbiters, and they can sit down with their clients to sort out the documentation with which they are confronted.

[85] On the other hand, at a trial, a party presents the evidence, generally without the active involvement of the presiding judge, makes their submissions and then leaves it to the court to decide. In other words, at trial, each party must *prove* their case. They cannot leave it up to the court to do their work for them. Here, I cannot perform the parties' work for them.

[86] The parties would have done well to have exchanged requests to admit and based on them, narrowed the scope of expenses in question and then jointly placed the questioned expenses before the court. An agreed statement of facts could have accomplished this.

[87] Thus, I decline to make any retroactive s. 7 determinations other than that, based on Michael's concession, Kathryn is entitled to a set-off payment of $3,941.91. I deal with the remainder of unresolved post-separation expenses below.

[88] With regard to ongoing s. 7 expenses, they shall be shared proportional to income. In their consent parenting order of April 4, 2023, the parties have already agreed that each parent shall be responsible for providing clothing, toiletries and day-to-day care items in their home. The parties agree that they are to share all proper s. 7 expenses proportional to income as set out above. No party will incur a s.7 expense without the written consent of the other, such consent not to be unreasonably withheld.

[89] In light of the parties' history of conflict, I strongly suggest that they arrange a parenting coordinator who has power to make the appropriate determinations if they cannot agree on s. 7 expenses. That would be far less expensive than returning to court.

[90] Further regarding ongoing disclosure, commencing in 2024, on or before June 1st of each year, the parties shall each provide the other with their prior year's notice of assessment. If either party earns any income through a corporation, they shall also provide their prior year's corporate financial statement. Subject to a material change in circumstances, the parties shall use their prior year's income and the guideline set-off amount to adjust child support payable effective July 1st of each year.

Spousal Support

Arguments of the Parties

[91] Kathryn seeks spousal support from Michael, based on the imputed income that she seeks to attribute to Michael. She argues that she has both a compensatory and non-compensatory claim. Her compensatory claim is based on her role as a primary caregiver of the children; one who took extended maternity leaves for the birth of each of the four children who were born over an eight-year period. She seeks it on a non-compensatory basis, looking to the length of the parties' marriage (approximately 13 years, 10 months), Michael's role as the parties' primary breadwinner, the ages of the children and her ongoing childcare responsibilities.

[92] Michael denies that Kathryn is entitled to any spousal support. As set out above, he looks to Kathryn's employment contract with the Region of Halton, which pays her over $90,000 per annum. He argues that he actually earns less than her (an argument which I have rejected above). While conceding that Kathryn has a compensatory claim, he argues that he was always an involved parent. Thus, her main compensatory claim is for the approximately six years that she was off work on maternity leaves. He adds that she has offered no evidence that her career as a public health nurse was adversely affected by those maternity leaves.

[93] Michael also points out that he has had equal shared parenting responsibilities since the parties separated. That will continue indefinitely, a fact that significantly affects Kathryn's compensatory support claim. He submits that if I order any spousal support, it should be at the mid-range.

[94] When considering spousal support, a court should generally look to any equalization and property issues before determining entitlement and quantum. As set out below, Kathryn will be receiving an equalization payment, which largely reflects the difference between the amounts that each party received from the second mortgage on the Home. For that reason, it will not have a great effect on spousal support.

Authorities Regarding Spousal Support

[95] In *R.L. V. M.F.,* above, I set out the authorities regarding spousal support as follows:

> **280** The court's jurisdiction to order the payment of spousal support is found in s. 15.2(1) of the *Divorce Act*. That provision allows the court to order a spouse to pay periodic and/or lump sum amounts, as the court thinks reasonable for the support of the other spouse.
>
> **281** Spousal support may be made on a final or interim basis: s. 15.2 (1) and (2). Under s. 15.2(3), the spousal support order may be made for definite or indefinite periods or until a specified event occurs. The court may also impose "terms, conditions or restrictions in connection with the order as it thinks fit and just".
>
> **282** Section 15.2(4) requires the court to "take into consideration the condition, means, needs and other circumstances of each spouse." The factors that the court must consider include:
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

283 Under s. 15.2(4), an interim or final spousal support order should meet the following objectives:

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

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

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

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

284 As the Supreme Court of Canada stated in the seminal case of *Moge v. Moge*, [1992] 3 S.C.R. 813, all four of the potentially overlapping objectives must be taken into account. None, including self-sufficiency, is paramount or should be given priority to the others. This approach recognizes the great diversity of marriages. It allows the court to take a case-by-case approach to the determination of spousal support.

285 The goal of the application of these four objectives is to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown. There is no guarantee that the spouses will share an equal standard of living after the marriage's dissolution. However, the longer the relationship and the closer the economic union, the greater will be a spouse's presumptive claim to equal standards of living upon dissolution.

286 As L'Heureux-Dube J. wrote for the majority at pages 848-849 of *Moge:*

> [T]he purpose of spousal support is to relieve economic hardship that results from "marriage or its breakdown". Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party's economic prospects.
>
> This approach is consistent with both modern and traditional conceptions of marriage in as much as marriage is, among other things, an economic unit which generates financial benefits... The [Divorce] Act reflects the fact that in today's marital relationships, partners should expect and are entitled to share those financial benefits.

287 In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, the Supreme Court of Canada recognized that there are three conceptual grounds for entitlement to spousal support: (1) compensatory; (2) non-compensatory; and (3) contractual.

288 Compensatory support is premised on the notion that some or all of a spouse's entitlement to support may arise out of his or her contributions to the other spouse during their relationship. That contribution may arise out of the roles that the parties assumed. Those roles may:

> * confer an advantage on one party (say career enhancement; see for example, *Caratun v. Caratun* (1992), 10 O.R. (3d) 385 (C.A.)); and
>
> * confer a disadvantage to the other (say a spouse giving up, delaying or impairing a career to assume a caregiving role during the relationship; see for example, *Spurgeon v. Spurgeon* (2001), 53 O.R. (3d) 509 (Div. Ct.)).

289 Further, a spouse may make a financial contribution to the other's career (such as supporting the spouse through their schooling). In *Thompson v. Thompson*, 2013 ONSC 5500, Chappel J. wrote at para. 56 that "a compensatory claim can also be founded on other forms of contribution to the other party's career, such as supporting the family while the other party obtained or upgraded their education, selling assets or a business for the benefit of the family unit, or assisting a party in establishing and operating a business that is the source of that party's income." [Citations omitted.]

290 Unlike the law of unjust enrichment, for a spouse to be entitled to compensatory spousal support, it is not necessary that their contribution to their spouse's economic advantage be matched by their corresponding disadvantage. As Kiteley J. wrote in *Shaw v. Shaw*, [2002] O.J. No. 2782 (S.C.J.), at para. 156:

> In order to establish entitlement to spousal support based on compensatory grounds, it is not essential that I find that Karen was economically disadvantaged by the role she played in the relationship. The objectives of the Divorce Act speak of "economic advantages or disadvantages to the spouses". The doctrine of unjust enrichment requires an advantage to one party and a consequential disadvantage to the other party. That is not the case in s. 15.2(6). Even if Karen did not experience a disadvantage, the fact of Stephen's advantage gives rise to an entitlement to spousal support. It follows that Karen has established on the balance of probabilities that she is entitled to compensatory spousal support.

291 I will have more to say about compensatory support below.

292 On the other hand, non-compensatory support is based on need and ability to pay. The claim to such support arises out of the relationship itself and the mutual financial interdependence arising from that relationship. A claim to spousal support can arise on this basis even if there is no agreement or claim to compensatory support. As McLachlin J. wrote at para. 49 of *Bracklow*:

> [W]here need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a vital role. Absent negating factors, it is available, in appropriate circumstances, to provide just support.

293 Contractual support is based on the agreements formally reached between spouses in domestic agreements (such as prenuptial or separation agreements) and implied or informal agreements.[16] That factor is irrelevant here.

…

297 In his article, *Post-Separation Increases in Payor Income and Spousal Support*, (2020) 39 CFLQ 185, Professor Rollie Thompson[18] offers concrete examples of the circumstances that lead to an award of compensatory support. He describes them as the "practical markers of compensatory support". They are:

> * spouse stays home full-time or part-time to care for children
>
> * secondary earner who takes a less demanding job to assume greater responsibility for childcare
>
> * spouse relocates to further career or employment of the other spouse
>
> * spouse earns income to support the other spouse who is completing education, training or other qualifications to improve income
>
> * spouse primarily responsible for childcare *after* separation
>
> * spouse works in family business, acquiring skills specific to the business and no broader credentials for employment elsewhere.
>
> [Citations omitted.]

298 Professor Thompson continues, reminding the reader that "a spouse may have *both* a compensatory *and* a non-compensatory claim to spousal support, with one claim stronger than the other and their relative strength shifting over time".

…

> **305** Regarding the non-compensatory basis for support, the Spousal Support Advisory Guidelines: The Revised User Guide (the "RUG") points out at p. 8 that "a mere disparity of income that would generate an amount under the SSAG formulas, does not automatically lead to entitlement".
>
> …
>
> **308** The SSAG posits that the time frame for the determination of a spouse's income for spousal support purposes is generally the date of the hearing or agreement.

Analysis of Kathryn's Claim to Spousal Support

[96] Kathryn is clearly entitled to spousal support on both a compensatory and non-compensatory basis. Regarding her compensatory claim, there is no evidence that her present ability to earn income as a public health nurse has been adversely affected by her childcare responsibilities and maternity leaves. In other words, there is no evidence that she would be earning more than the $93,147 per year that I have ascribed to her above. But Kathryn's contributions at home have freed Michael up to work full-time in his field and become successful when he was seeking to work. That does not make for the strongest compensatory claim, but it does support such a claim. Further, on a non-compensatory basis, the parties have an almost 14-year marriage, which places it well within the mid-range of relationships under the SSAG. Kathryn is correct regarding the financial interdependence that the parties experienced during the marriage, Michael was the primary income-earner, particularly after the children were born. He also utilized Kathryn in his income-generating activities, particularly in regard to Innovacom.

[97] Looking to the date for the commencement of spousal support, I have been provided with no evidence of notice of the claim other than the issuance of the application on or before January 20, 2022. Thus, I find that the appropriate date to commence spousal support is February 1, 2022.

[98] I further find that spousal support should be determined separately for 2022 and 2023/ongoing. That is because Kathryn obtained full-time and remunerative employment with the Region of Halton commencing September 2022.

[99] In light of the fact that my income determinations set out above had little overlap with the figures offered by either party, I do not have their SSAG calculations for either year based on my findings. Thus, I direct the parties to provide me with their SSAG calculations for 2022 and 2023/ongoing. Kathryn will do so within fourteen days of the release of this endorsement and if Michael disagrees with her figures, he shall provide his own SSAG calculation within a further fourteen days. Each party may provide a written submission of up to one page to accompany their SSAG calculations.

Equalization Calculation

[100] Each party has submitted their own net family property ("NFP") calculation as well as a comparative NFP calculation. They agree that the key NFP issue is Michael's claim that he had a $100,000 debt to his parents on the date of separation, a claim that Kathryn denies. Two other issues are the value and potential disposition of the three timeshare units held in Michael's name and Kathryn's claim that Michael must pay her one-half the difference between the appraised value of the Home as of March 2022, and the sale price. Further each party raises valuation issues regarding the assets of the other. I deal with those issues below.

Alleged $100,000 Loan

Arguments

[101] Michael claims that he owed his parents $100,000 on the date of separation. He says that the debt arises from a parental loan intended to assist the parties' purchase of a vacant property upon which they intended to build a family compound. Michael relies on a promissory note between himself and his parents for that amount. He says that he paid off the debt shortly before the commencement of this trial. He

placed the front of the cheque, which he purports to have used to pay off that debt, into evidence.

[102] Kathryn asserts that the promissory note is a sham and a fraud. It was only prepared after separation in order to alter the equalization calculation. She does not even accept that the alleged loan was belatedly repaid just prior to this trial. She states that the senior Gilmores never lent the parties any money to help purchase any property. Rather, the parties were able to make the purchase themselves with various funds that they were able to obtain from commercial lenders, particularly funds that Kathryn was able to obtain.

[103] For the reasons that follows, I accept Kathryn's view of the alleged loan and find that the promissory note is a fraudulent document.

The Loan Agreement

[104] The purported promissory note, described in the note as a "Loan Agreement" is dated March 1, 2009. It was only signed by Michael and his father, Edward Gilmore. However, it states that it is a loan agreement between Rosalie and Edward Gilmore as lenders and Michael Gilmore as the borrower. It states that the lenders agree to loan $100,000 to the borrower and that he promises to repay that amount.

[105] The payment terms set out in the Loan Agreement state that "[Michael] will repay the amounts owing under this agreement upon receiving a mortgage on or the sale of the property at 8990 Ninth Line…" It is not contested that the parties never built their family compound. They sold the still-vacant land in the fall of 2020. The Loan Agreement was not repaid at the time of the sale.

Evidence of Regarding the Loan

[106] Michael testified that he obtained the loan from his parents in 2009 to assist with the downpayment and closing costs of the vacant property that he and Kathryn purchased that year for $230,000. He stated that he approached his parents the

previous Christmas and that they agreed. Other than producing the loan agreement and the front of his purported repayment cheque, Michael admits that he has no other documentary evidence of the loan. But his father, Edward Gilmore (Edward"), confirms both the loan and its recent repayment.

[107] It is uncontested that $115,000 of the $230,000 purchase price came from a TD land loan and that $20,000 came from Kathryn's line of credit. Michael testified that he provided some of the money as well (an allegation that Kathryn does not deny), although he was not certain of the exact amount. Michael adds that neither party had a great deal of money at the time of closing. In addition, as her comparative NFP statement shows, Kathryn acknowledged that she entered the marriage with $67,352 in debt.

[108] Michael concedes his lack of a paper trail showing where the alleged loan went. The conveyancing lawyer's trust account shows no $100,000 payment from Michael or his father. Rather, Michael contends that the loan went to pay off Kathryn's various debts, with the remainder going to the purchase. The payment of those debts allowed Kathryn to enter into the loan agreements that provided those closing funds. In his written closing submission, Michael's counsel writes that "[t]his allowed [Kathryn] to qualify for the $115,000 land loan and freed up her $20,000 line of credit."

[109] Michael testified that that he finally repaid the loan to his father on February 1, 2023. He produced a photocopy of the front of his cheque to Edward in his book of exhibits. However, he does not produce the signed back of the cheque, showing that it was deposited.

[110] Michael was cross-examined about the fact that the loan agreement called for the re-payment of the loan at the earliest of either a mortgage on the property or its sale. Yet he did not repay his father when the land was sold. Instead, he paid off his car loan. He justified his choice to prefer his car loan repayment over his obligation to his father by stating that the car loan carried the higher interest rate.

[111] Edward testified that Michael had raised the issue of a loan over Christmas 2008 although the subject may have been raised earlier. However, the loan agreement was signed a few months after the purchase of the property was completed and the loan funds had been advanced. The loan agreement was drafted by a friend, Edward Furlong. Mr. Furlong is a lawyer, who did not testify and whose file for the drafting assignment was never produced. Edward testified that he and his wife obtained the loan funds from their CIBC Wood Gundy investment account. But he is unable to produce the records due to the passage of time.

[112] Edward expected to be repaid when his son and daughter in-law obtained a mortgage on the property. When the family compound was never built on the vacant land, he still felt that he would be repaid when the property was sold in 2015. However, Michael did not inform him of the sale.

[113] Edward stated that the other people who knew of the loan were the real estate agent, Pat Ison[6], and his daughter, Elisha. Neither testified. Edward's wife, Rosalie died in 2020. While she was alive when the loan agreement was purportedly signed, she did not sign it. Edward does not know what Michael did with his share of the proceeds of sale of the land, after it was sold.

[114] Edward confirmed the repayment of the loan in February 2023. But he was unable to explain the absence of the back of the payment cheque, which would have been deposited to his bank account. He also did not produce the bank records which would have shown the deposit of the $100,000 repayment. Similarly, Michael never produced the bank record showing the withdrawal of the $100,000 cheque from his account.

[115] Kathryn denied the notion that Michael's parents loaned her or Michael any money to buy the vacant land. She produced the trust ledger from the conveyancing

[6] Spelling uncertain

lawyer, showing the source of all of the $229,176.43 in closing funds. The ledger states that the closing funds, all deposited on March 31, 2009, originated as follows:

TD Bank mortgage funds	$115,000.00
BMO client's purchase funds	$ 20,000.00
TD Bank client's purchase funds	$ 39,280.00
BMO client purchase funds	$ 24,390.00
BMO client purchase funds	$ 20,500.00
BMO client purchase funds	$ 5,800.00
Kathryn Gilmore client purchase funds by MasterCard	$ 4,206.43
Total	$229,176.43

[116] Kathryn testified about "racing" and "scrambling" to secure the closing funds. She testified that she relied on various lines of credit, RRSP loans and even her credit card. Some of the closing funds came from Michael, perhaps the TD Bank funds, but none from Edward and Rosalie Gilmore.

[117] In cross-examination, Kathryn was confronted with her narrative of having raised most of the closing funds herself from the various sources cited above. She was asked how she could qualify for any loan when she had carried so much debt into the marriage on September 1, 2007. She stated that she had been diligent in paying her debts off but was unable to offer any particulars or proof. Nonetheless, she insisted that Michael did not pay off any of her debts and that the Gilmores did not loan any money to do so.

Analysis regarding the Alleged $100,000 Loan

[118] The onus is on Michael, who claims the loan as a deduction, to prove it. I find that he has failed to do so and that the alleged agreement was prepared in anticipation of this litigation, in order to falsely claim a $100,000 deduction. I say this for the following reasons:

1. Rosalie Gilmore was purportedly a party to the loan agreement, but she never signed it. The fact that she died in 2020 lends

credence to the assertion that the document was actually prepared and signed after her death, and not in 2009.

2. The loan agreement was allegedly prepared by Edward's lawyer and close friend, Edward Furlong. Yet Mr. Furlong was not called to testify to confirm his friend's narrative. Nor was his file produced.

3. There was no evidence that the money was actually advanced by Edward and Rosemary Gilmore. No bank statements or cancelled cheques were provided to show the advance. Michael claims that Kathryn stole the original cancelled cheque from him. That is a convenient explanation. But as Kathryn points out, the cheque would have been returned to his parents once it was cashed, not him.

4. While Michael produced the front of his purported February 1, 2023 repayment cheque to Edward, he failed to produce the back. That would have proven that the cheque was endorsed and the money was actually deposited. Even if he or Edward were unable to get the back of the cheque from the bank, they could have produced the bank records showing both the withdrawal of funds from Michael's account and its deposit into that of Edward.

5. If Michael repaid Kathryn's debts in order to free up her credit to borrow more money, he fails to offer proof of those repayments.

6. Michael has offered an inconsistent narrative regarding the use he made of his parent's loan. At his questioning, Michael claimed that he gave the $100,000 loan proceeds to the conveyancing lawyer. But at trial, after the lawyer's trust ledger was produced, showing no $100,000 deposit in trust, he changed his story. Rather, he testified that he used the loan proceeds to pay off

Kathryn's previous loans. This allowed her to obtain the credit to borrow the money needed to close the land purchase.

7. Even that revised account makes little sense. Why pay off loans just to take out other loans?

8. The loan agreement called for the $100,000 debt to be repaid when the land was sold. But when it was sold, Michael did not repay his father. In fact, he did not even inform Edward of the sale.

9. Edward swore a brief affidavit on October 21, 2022, purporting to confirm the loan. He said nothing about the sale of the land. It is fair to infer that Edward was not informed of that sale, even at the time that he swore the affidavit.

10. The only reason that Michael would have to inform his father of the land sale would be the obligation to repay him under the loan agreement. If there were no such agreement in place when the land was sold, Michael would have no reason to inform his father of the land sale.

11. The timing of the alleged repayment is very suspicious. The front of the cheque produced is dated February 1, 2023. That was just six days before Michael was questioned and just two months before the trial commenced. But it was also more than two years after the land was sold.

12. Edward's evidence is offered to corroborate that of Michael. It is the only oral corroborating evidence offered. However, Edward testified that there were at least three other potential corroborating witnesses: Edward Furlong (the drafting solicitor), Michael's sister, Elisha, and real estate agent, Pat Ison. None of them were called upon to testify.

13. In determining his credibility, I am entitled to consider the fact that on June 5, 2015, Edward pled guilty to a count of tax evasion, a crime dealing with dishonesty or false statements: *R. v. Poitras*, [2002] O.J. No. 25 (Ont. C.A.), at para. 28, *R. v. Corbett*, [1988] S.C.J. No. 40, at para. 113. While this factor is not determinative of Edward's credibility, it does not assist it either.

14. For reasons cited elsewhere in this endorsement, I find that Michael has offered other testimony at this trial that is not credible. My consideration of his evidence regarding the alleged loan comes within both that context and the fact that his evidence regarding the loan is itself not credible for the reasons cited above.

15. While Kathryn was unable, after a number of years, to offer definitive evidence regarding the repayment of her date of marriage debts, I still prefer her narrative over that of Michael and Edward. Her account of working hard, paying off some date of marriage debts and then borrowing further money makes more logical sense than an account of borrowing money to pay off loans only to borrow other money. Further, unlike Michael, Kathryn's account was consistent. It did not change when confronted with contradictory evidence.

16. While Kathryn's evidence as a whole was not free from hyperbole, there were no instances in which I found that she had deliberately stated untruths to the court. I cannot say the same for Michael. Any concerns that I have with Kathryn's credibility pale in comparison to those I have with Michael. To the extent that their evidence does not align, in the absence of objective evidence to the contrary, I prefer the evidence of Kathryn to that of Michael.

[119] Because of the strength of my findings set out above, I have to conclude that Michael (with or without the connivance of Edward) fabricated the loan agreement in order to reduce his equalization obligations.

Timeshare

[120] Michael holds an interest in three Florida timeshare investments in a development called Westgate. The family used those units for holidays during the parties' marriage. While all three units were held in Michael's name, Kathryn states that their purchase and maintenance were effected with family funds and thus Michael holds a 50% interest in them in trust for her. She adds that she was unaware of the true state of their title until this litigation commenced. In her testimony, Kathryn stated that she wishes to have one of the units transferred to her. It is the "week 10" two-bedroom plus loft.

[121] Michael claims that the timeshare units are only worth about $1,000 each, meaning that they will have a minimal effect on any equalization calculation. He produced the transfer deed for the three units, demonstrating that they had been purchased for 1,700 USD each in 2016/17. But he offers no actual appraisal. He adds, without other evidence, that the parties would incur significant expenses if any of the units were to be transferred.

[122] Kathryn produced some ads showing that the units could be worth as much as $23,000 each. Michael says that those ads are "cherry picked" and do not reflect the true value of the units.

[123] I am frankly astonished that the parties' valuable resources were expended on this issue, especially in light of their joint parenting arrangement and the fact that the units would be used for the benefit of their children. The parties were ultimately able to work out an equal parenting arrangement and will presumably continue that arrangement for many years to come. I would have thought that they would be able to arrive at an arrangement regarding the units.

[124] I find that Kathryn's evidence to the effect that joint family funds were incurred to purchase the three timeshares is credible. The fact that they were used for family purposes during the marriage supports her claim. So too is the fact that she and the parties' children used the units twice after separation. Thus, I find that Michael holds 50% of his interest in all three units in trust for both himself and Kathryn.

[125] While this means that Kathryn holds a beneficial joint interest in all three timeshare units, she only wishes one of them. The parties seem unable to share or divide those units without the assistance of the court. Under s. 9(1)(d) of the *Family Law Act*, R.S.O. 1990, c. F.3, as amended, I vest the beneficial ownership of the Westgate "week 10" two-bedroom plus loft timeshare unit to Kathryn and the beneficial ownership of the other two timeshare units to Michael. That means that Michael has title but not beneficial ownership to the "week 10" unit. Kathryn is entitled to exclusive use of that unit. She is also responsible for all maintenance and other costs of the unit. If either party wishes to have legal title in the "week 10" unit transferred into Kathryn's name, the parties will equally share the costs of that transfer. For the other two units, as Michael already holds legal title, I need order nothing else.

[126] In regard to the parties' references to their timeshare units in their NFP statements, Michael shall include $3,400 on his side of the ledger and Kathryn shall include $1,700 on her side. Since I have no strong evidence of the V-Day value of the units, I rely on the $1,700 per unit purchase price. Michael claims $3,080.71 as outstanding maintenance fees as a V-Day debt. He relies on a June 9, 2021 invoice from a collection agency. That is an appropriate deduction.

Disposition Costs of Kathryn's Pension

[127] The parties have now agreed that the appropriate tax rate is 20%.

Kathryn's claim that Michael must pay her one-half the difference between the appraised value of the Home as of March 2022, and the sale price.

[128] Kathryn claims that she was effectively forced out of the Home where the parties had been operating under a nesting agreement. She wishes the court to find that she not only has no responsibility for the expenses of the Home after she moved out, but that Michael pay her half of the difference between the March 2022 value of the home and the sale price. Of course, as of the writing of this endorsement, I have not been advised that the house has been sold, so I could not determine its sale price in order to compare it with the price that her agent testified the home was worth in March 2022.

[129] I have no doubt that the parties' nesting arrangement was uncomfortable for both parties. I have heard evidence about a loss of hydro, the condition of the home, who was utilizing the cleaning lady, Michael's introduction of his girlfriend into the home and other concerns with the arrangements regarding the home. But Kathryn was not ousted from the home and no order was made for exclusive possession of the home. It is true that Michael resisted the sale of the home at a time that he exclusively occupied it on a *de facto* basis and hoped to purchase it. It is also true that in a motion before me on January 4, 2023, I adjourned the issue of the sale of the home to this trial, on consent. I also placed this proceeding on the spring trial blitz list.

[130] If Kathryn felt that Michael was acting badly in regard to the home, she had her own remedies, including her own motion for exclusive possession or other relief under s. 24 of the *Family Law Act.*

[131] Accordingly, I make no order requiring Michael to pay Kathryn for any decrease in the value of the Home after she moved out of it. Further, the parties are equally liable for the costs of mortgage taxes and insurance on the home. Michael is responsible for all utilities after Kathryn left the home and any damage caused during his exclusive occupation of the home.

Other Valuation Issues

[132] The parties raised other valuation issues in their evidence and arguments. I briefly deal with them below.

V-Day Valuation of Michael's Converted Van

[133] Michael purchased a 2020 GMC Savanah van, which he customized to include a number of improvements. Michael testified that the total purchase price of the van was $92,000 plus tax, including about $35,000 for the conversion kit. He never obtained an expert appraisal of its value as of the date of separation. But instead, he relied on a Blue Book valuation of a 2020 GMC Savanah without the upgrade, which valued it at $60,000.

[134] Kathryn says that the amount owing on the loan for the van on the date of separation was $70,932.32. She argues that it should be worth at least that amount. She points out that: 1) Michael's valuation ignores the expensive conversion of the van, 2) the parties separated during COVID, when automobiles were notoriously difficult to obtain, thereby increasing the value of used vehicles, and 3) the van was not used a great deal between purchase and separation.

[135] I agree with Kathryn that an increased value should be assigned to the van because of the conversion, which was quite costly and most likely increased its value beyond $60,000. I assign a value of $71,000 to the van, which offers a premium for the conversion and makes it worth roughly the amount of the loan which financed it.

Michael's Unequal Share of The Parties' Second Mortgage

[136] Michael took an unequal share of the parties' second mortgage, even though the proceeds were to be equally divided. In fact, he held on to the full proceeds for about four months. He did not provide Kathryn any of the proceeds until days after the parties separated. He is not entitled to take advantage of that unilateral conduct. The parties' NFP statements shall reflect the differing amounts, with the amount that Kathryn received on her side of the ledger and the balance on Michael's side.

Kathryn's Vehicles and Highway 407 Fees

[137] Kathryn owned two vehicles on the date of separation, a 2012 Dodge Caravan van and a 2016 Kia Sorrento SUV. She produced two recent Blue Book statements, valuing her van at $8,895 and her SUV at $16,695. Michael rightly points out that there was about 1.5 years of depreciation occurred between V-Day and the date of the statements. However, he does not produce any V-Day statements of his own for those vehicles. Nonetheless, he asks the court to value the van at $9,000 and the SUV at $25,000 as of V-Day.

[138] The van was nine years old on V-Day. The SUV was about five years old. Most of the depreciation on the two vehicles had already taken place by the time that the parties separated. In the absence of better evidence, I accept Michael's $9,000 figure for the van, which is not far from Kathryn's figure. I also find that $20,000 is an appropriate figure for the SUV. It is a rounded-off figure based on an approximately 10% per year depreciation figure.

[139] Despite his ownership of an expensive 2020 van of his own, Michael drove Kathryn's van when with the children and allowed his girlfriend to do the same. Kathryn states without contradiction that when Michael returned her van, it was barely operable and in need of repair. Kathryn had not determined whether it was worthy of repair because the vehicle was worth so little. As a result, she did not repair the van. Kathryn provides a series of what appear to be estimates (there is no proof of payment). They total $3,846.52. In the absence of better evidence, I order Michael to pay Kathryn the amount of those estimates, as a post-separation adjustment. That amount represents the amount that would be required to bring the van into good working order, or if Kathryn chooses not to repair it, the loss in value of the van were she to sell it.

[140] In addition, during Michael's exclusive use of Kathryn's van he incurred 407 costs of $1,499. He says that he paid some of that amount, but I am not satisfied that he has proven that payment. He shall reimburse her that amount.

Paul Lewis Account

[141] Michael placed a post-separation legal account of lawyer, Paul Lewis in his NFP calculation. It should be removed from his calculation.

RESP

[142] Kathryn holds a RESP for the children, which was intended to represent a joint contribution to the children's education. She shall transfer one-half of the amount of those RESPs, as of the date of separation, to Michael, who will open his own RESP account for the children. Each RESP account will be held for the benefit of the children. Any unused amounts will be provided to the children after all of them have completed their post-secondary education.

Updated NFP Statement(s)

[143] I assume that the parties can determine the proper equalization payment owing by Michael to Kathryn, based upon the findings that I have made above. Ms. Deskin shall update her NFP statement to reflect my findings. She shall provide it to the now self-represented Michael and place it on CaseLines within fourteen days of the release of these reasons. If Michael disagrees with the accuracy of that NFP statement, he shall provide his own NFP statement within a further fourteen days. If the parties agree upon the appropriate equalization payment, it will come from Michael's share of the proceeds of the sale of the home. If they are unable to agree, each party will provide the court with a written submission of no more than five pages, double-spaced, one-inch margins, explaining why their calculation is the correct one. They shall do so within seven days of Michael releasing his own NFP statement.

Prejudgment Interest

[144] Michael will pay Kathryn pre-judgment and post-judgment interest on the equalization payment and any other amounts that he owes to Kathryn from V-day to the date of release of this endorsement at the rate set out in the *Courts of Justice Act*.

Conclusion

[145] In conclusion, I order as follows:

Child Support

1. For 2022, Michael shall pay $13,644 to Kathryn for set-off child support for 2022.

2. Michael shall pay $6,165 to Kathryn for set-off child support for January – September 2023.

3. Commencing on October 1, 2023 and continuing on the first date of every following month until a further court order, Michael shall pay to Kathryn $2,845 per month and Kathryn will pay to Michael $2,160 per month, which amounts to a set off figure of $685 per month. I will leave it to the parties whether they wish to exchange cheques for tax purposes.

4. Commencing in 2024, on or before June 1st of each year, the parties shall each provide the other with their prior year's notice of assessment. If either party earns any income through a corporation, they shall also provide their prior year's corporate financial statement. Subject to a material change in circumstances, the parties shall use their prior year's income and the guideline set-off amount to adjust child support payable effective July 1st of each year.

5. A support deduction order shall issue.

Spousal Support

6. The parties shall provide me with their SSAG calculations for 2022 and 2023/ongoing. Kathryn will do so within fourteen days of the release of this endorsement and if Michael disagrees with her figures, he shall provide

his own SSAG calculation within a further fourteen days. Each party may provide a written submission of up to one page to accompany their SSAG calculations.

Home Expenses

7. The parties are equally liable for the costs of mortgage, taxes and insurance on the Home from the date of separation until sale. Michael is responsible for all utilities after Kathryn left the home and any damage caused during his exclusive occupation of the home.

Other Property and Equalization Issues

8. I vest the beneficial ownership of the Westgate “week 10” two-bedroom plus loft timeshare unit to Kathryn and the beneficial ownership of the other two timeshare units to Michael. That means that Michael has title but not beneficial ownership to the “week 10” unit. Kathryn is entitled to exclusive use of that unit. She is also responsible for all maintenance and other costs of that unit. If either party wishes to have legal title in the “week 10” unit transferred into Kathryn’s name, the parties will equally share the costs of that transfer.

9. Michael is responsible for all of the interest on the second mortgage on the Home from the time that it was taken until the time that he paid $340,000 to Kathryn. He shall reimburse Kathryn for any amounts she paid in that regard.

10. Michael shall pay $3,846.52 to Kathryn, representing a 50% diminution in the value of her van while it was in his post-separation exclusive possession.

11. Michael shall pay $1,499 to Kathryn, representing his use of her Highway 407 transponder post-separation.

12. Ms. Deskin shall update Kathryn's NFP statement to reflect my findings above and provide it to the now self-represented Michael. She shall also place it on CaseLines within fourteen days of the release of these reasons.

13. If Michael disagrees with the accuracy of Kathryn's updated NFP statement, he shall provide his own NFP statement within a further fourteen days upon the same terms that apply to Kathryn. In that event, each party shall provide the court with a written submission of no more than five pages, double-spaced, explaining why their calculation is the correct one. They shall do so within seven days of Michael releasing his own NFP statement. Ms. Deskin shall also provide a comparative NFP statement in addition to her submissions. If he wishes, Mr. Gilmore may do the same.

RESP

14. Kathryn shall transfer to Michael one-half of the amount of the RESPs, that she held as of the date of separation. Michael shall open his own RESP account for the children with those funds.

15. Each RESP account will be held for the benefit of the children.

16. Any unused RESP amounts will be provided equally to the children after all of them have completed their post-secondary education.

Payment out of Parties' Proceeds of Sale of the Home

17. Any amount that either party may owe to the other as asset out above, other than ongoing support, shall be paid from their share of the proceeds of sale of the Home.

Pre- and Post-Judgment Interest

18. Michael will pay Kathryn pre-judgment and post-judgment interest on the equalization payment and any other amounts that he owes to Kathryn from V-day to the date of release of this endorsement at the rate set out in the *Courts of Justice Act*.

Costs

19. I will deal with the issue of costs after the remaining issues cited above are resolved or determined.

Justice Marvin Kurz

Date: September 21**,** 2023