2002 CarswellOnt 3871
Ontario Superior Court of Justice

Cade v. Rotstein

2002 CarswellOnt 3871, [2002] O.J. No. 4460, [2002] O.T.C. 899, 118 A.C.W.S. (3d) 100

Terry Cade, Applicant and Douglas Rotstein, Respondent

Wood J.

Heard: October 9-16, 2002
Judgment: October 24, 2002
Docket: Newmarket 11727-01

Counsel: *Brenda Christen*, for Applicant
Tracey Foster, for Respondent

Subject: Family; Property

Headnote

Family law --- Family property on marriage breakdown — Factors affecting equal or unequal division — Debts — Family debts
Family law --- Family property on marriage breakdown — Matrimonial home — Deductions from proceeds of sale — General
Family law --- Support — Child support under federal and provincial guidelines — Determination of spouse's annual income — Income over $150,000
Family law --- Custody and access — Terms of custody order — Mobility

***Wood J.*:**

Issues

1 In this trial the Court was asked to rule on the issues of custody and access, child and spousal support, and net family property equalization. Under each of these headings one issue predominated. Under custody and access the issue was mobility. In the area of support, the issue was the respondent's income for support purposes. In the area of net family property, the question was whether or not certain monies advanced by the respondent's parents were loans or gifts.

Background

2 The parties are each 45. They met in 1983 and married in 1987. They separated on April 22nd, 2001. They have two children: Stella, born May 25th, 1988 (now 14), and Isabel, born June 13th, 1995 (now 7).

3 Both parties have creative talent and have pursued careers in the arts. The applicant has trained as a jazz vocalist. She has cut one CD and has performed at a number of small clubs in Toronto and more recently in New York. She has a certificate in the Orf method of primary music instruction and has taught as an itinerant instructor in Toronto area schools. She has also recently completed her Bachelor of Arts degree.

4 The respondent, after initially pursuing a career in acting, has developed a successful career as a script supervisor in the Toronto-based television and movie production industry. His hope is to become a director. He has also worked towards the production and sale of one or more scripts to the film industry.

5 Since Stella's birth in 1988, the applicant has assumed the primary responsibility for the care and raising of the children. Any work she has done has been part-time and fitted around the needs of the children.

6 The nature of the respondent's work was such that he was generally not available for day-to-day child raising duties. Although he sometimes had time off during the day, he often worked late and his time commitments from contract to contract were unpredictable. Production work in the respondent's industry is generally a 12-hour day. Once this is over the respondent has two or three hours' worth of homework to prepare for the next day's shooting. Contracts are generally of short duration and must be pursued when they are available.

7 On several critical occasions, when the children were young, the respondent was out of the country for prolonged periods of time. This left the applicant to care for the children entirely on her own. The nature of his work is such that the respondent sometimes has periods between contracts when he is not employed. During these periods and on weekends, the respondent would assist with the children to allow the applicant to work on her music. However, this was not a regular occurrence.

8 The primary dependence of the children upon the applicant was dramatically demonstrated between January and September 2002. A consensual shared parenting plan which placed the children with each party on a one-week rotational basis was varied by the respondent almost immediately due to work commitments. Within two months of its inception it had essentially been abandoned. Since that time, the children have spent over 75% of their time with the applicant.

9 The applicant's child caring responsibilities have prevented her from developing her career as a jazz vocalist. She considers this to be her prime vocation. The respondent was initially very supportive of the applicant's ambitions. He acted as her manager in concert with a friend who had connections in the industry. Together, they arranged a number of appearances for her in the Toronto area and an appearance at a New York jazz festival. The respondent also produced the applicant's CD, designed the cover graphics, and arranged for production of it by a record label. However, with the applicant's entry into the New York jazz scene, his support has turned to criticism. This change of attitude arises from his opposition to the applicant's desire to move to New York where she feels her future lies.

10 The difficulty over this issue began in 1999 when the applicant performed at the Texaco, New York Jazz Festival. This led to an appearance at the Knitting Factory, a small jazz club in New York. She and her band were invited back three or four times over the next year to perform. She has returned for a similar number of performances each subsequent year working with a band from New York. She was also successful in obtaining a Canada Council grant to study jazz with Ann Marie Masse who was the head of vocal jazz at the Manhattan School of Music. A pattern developed in which she would spend some three to five days per month in New York, performing or studying. She has developed a number of contacts in the city and hopes to pursue her career both academically and through performance. She realizes however, that this career will not support her for the foreseeable future. She has therefore worked successfully towards a teaching career in New York where her talents and credentials appear to be in high demand.

11 Since 1999, it had been the applicant's hope that the family would relocate to New York City. There were many discussions between the parties about this possibility. When they did not bear fruit, the applicant enlisted the aid of Dr. Shasko, a marriage counsellor who had assisted them in the past, to try to negotiate a resolution. Although this application was commenced in April 2001, the parties continued to talk and attempted reconciliation throughout the summer of that year. They gave conflicting evidence as to whether or not a consensus was reached. I find the respondent's assertion that he never committed to the move is the more credible version. However, there can be little doubt that the applicant still hoped that the family would remain intact and would move to New York in 2002. It was in this belief that she moved to New York to "set things up" on September 10th, 2001.

12 Prior to the applicant's departure the parties entered into mediation to settle the care of the children. A temporary "without prejudice" agreement was signed which had the children with the respondent in Toronto during the week and with the applicant on weekends when she planned to return. Negotiations toward a more permanent arrangement were to be ongoing.

13 On September 12th, 2001, the applicant received word through her counsel that the issue of mobility had been "taken off the table". She immediately returned from New York foregoing two part-time jobs teaching music which she had arranged prior to her departure. She returned to the matrimonial home where the parties continued to live uneasily under the same roof. This situation continued until the consent order of December 20th, 2001 which set up the shared parenting arrangement referred to

above. Since the sale of the matrimonial home in May 2002, the applicant has resided in a two-bedroom apartment with the children and the respondent has obtained a small house.

Custody

14 I find that the applicant was the children's primary caregiver throughout the marriage and has continued to be since separation. The nature of the respondent's work during the marriage was such that he was home at irregular times and therefore unavailable to care for the children on an ongoing basis. The pattern of the respondent's employment since separation has continued without change. He has been unable to commit to any meaningful form of shared parenting because of these commitments. His view of shared custody is that the applicant should assume primary care of the children but be ready to make them available to him at short notice whenever he has the time to be with them.

15 A custody and access assessment performed by Dr. Steven Weir, a psychiatrist trained in this area, confirmed that the children are well bonded to each of their parents and that they enjoy their time with their father. However, the conclusions of the report which were based upon the respondent committing to a true shared parenting arrangement, have been undermined by the actions of the respondent over the last six months.

16 Dr. Weir foresaw the difficulties which would arise as a result of the respondent's work. For this reason he recommended that the parties be flexible in the time-sharing. He also recommended that each party be the caregiver of choice if the other party were not available. The respondent has relied upon those recommendations in asserting that a shared parenting arrangement should continue.

17 It is clear both from Dr. Weir's report and his evidence however, that he envisioned a commitment by each party to full participation in the care giving and the time commitment that this would require. I find as a fact that the respondent has not been prepared to make this time commitment. I also find that the nature of his work is such that it would be virtually impossible for him to do so. It is in the best interest of the girls that they reside primarily with the applicant.

18 I was concerned by the degree of animosity displayed in the witness box by the respondent to the applicant. He frequently raised his voice and became argumentative and hectoring. This was evidently a problem during the marriage and would have been much more intimidating in a less controlled setting.

19 The respondent is perplexed and angered by the applicant's reluctance to assume the primary care of the children while making them available to him at such times as may suit his work schedule. He has not grasped the difficulties inherent in this arrangement both for the children who increasingly have their own lives and schedules, and for the applicant who is no longer a part of his household. I am not satisfied that the parties would be able to work together cooperatively or to successfully make joint decisions in the best interests of the children. However, it is important that the respondent continue to be as involved in the children's lives as possible. If this is to occur, the respondent must participate in the decisions which govern the major steps and events in their lives. Thus although custody should be awarded to the applicant it should be subject to the requirement that she consult with the respondent on major decisions involving such matters as schooling, health, and religious upbringing. However if the parties cannot agree the applicant's decision should prevail. The respondent should have independent access to all school religious and medical personnel who deal with the children and any documentation produced by them. He should also be advised of all special events in the children's lives and entitled to participate fully.

Mobility

20 The approach to be taken by the Court to the issue of mobility is set out succinctly at paragraphs 48, 49 and 50 of the decision of Madam Justice McLachlin in the well known case of *Gordon v. Goertz*, [1996] 2 S.C.R. 27 (S.C.C.):

> 48 While a legal presumption in favour of the custodial parent must be rejected, the views of the custodial parent, who lives with the child is charged with making decisions in its interest on a day-to-day basis, are entitled to great respect and the most serious consideration. The decision of the custodial parent to live and work where he or she chooses is likewise entitled to respect, barring an improper motive reflecting adversely on the custodial parent's parenting ability.

49 The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, inter alia:

(a) the existing custody arrangement and relationship between the child and the custodial parent;

(b) the existing access arrangement and the relationship between the child and the access parent;

(c) the desirability of maximizing contact between the child and both parents;

(d) the views of the child;

(e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;

(f) disruption to the child of a change in custody;

(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

50 In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

21 As no final custody order had been made in this case, the threshold test set out in sub-paragraph 1 of paragraph 49 does not apply. The question, as always, is the best interests of the child rather than the interests and rights of the parents. Applying the factors set out in paragraph 49 sub-paragraph 7 to the facts of this case, I make the following findings:

(A) The existing custody arrangement and relationship between the child and the custodial parent

The applicant has been the primary caregiver of Stella and Isabel throughout the marriage and since separation. Although the children are bonded to both parents, they look to their mother for their day-to-day emotional and physical requirements. Dr. Weir's evidence made it clear that the children were upset at their mother's absence in New York and that he believed that this was a factor in their wishing to accompany her were she to move there.

(B) The existing access arrangement and the relationship between the child and the access parent

Stella and Isabel are very fond of their father. They are at ease with him and have a good time in his presence. However, his presence in their lives has always been an occasional one dictated by the requirements of his work. Isabel, in particular, misses her father and needs to have contact with him on a regular basis. Stella, who is now in high school with her own schedule and commitments, also requires more regularity and predictability in her contacts.

(C) The desirability of maximizing contact between the child and both parents

There is no question that a move by the applicant to New York would interfere with contact between the respondent and the children. There is also no question that maximizing this contact is in the children's best interests, particularly, Isabel's.

The consent order of 2001 and Dr. Weir's report both attempted to set up an almost equal sharing of time for the children with each parent. However, the respondent's work commitments frustrated this almost immediately and established, instead, a pattern of access dictated in large part by the requirements of his work contracts.

The respondent's desire to see the children at short notice when he had time available has been a cause of friction between the parties for the last nine months. Stella, in particular, now has friends and outside commitments. She requires lead-time if she is to enjoy her periods with her father. The more formal structure, which would be dictated by a greater distance between the home of the children and that of their father, might well result in longer scheduled periods of access which would be more satisfactory for the children.

(D) The views of the child

Both Stella and Isabel expressed a desire to move to New York with their mother to Dr. Weir. Dr. Weir testified that he felt this desire arose from two sources. First, their mother's portrait of life in New York which he felt influenced Isabel in particular, and second, the children's concern that their mother might leave them and their desire to remain with her. Dr. Weir criticized the applicant both for talking about New York before the matter was settled and for placing her own needs ahead of those of the children. While this criticism is justified to a certain extent, I am not satisfied that what she has done is totally improper. Both Stella and Isabel have artistic interests and abilities. The applicant has taken steps towards enrollment of Stella in the Brooklyn Academy of Arts (the Fame school) and Isabel in a gifted and artistic program. It is only natural that the girls should feel excited about this possibility. The girls' anxiety at the thought of their mother leaving them underlines the finding that she is the parent upon whom they primarily depend. That said, I am concerned that the move proposed is a very big one both geographically and culturally. The girls have never lived anywhere but Toronto. While it is clear that they do not wish to be separated from their mother, it is far from clear that they will take to living with her alone separated from the rest of their extended family and circle of friends.

(E) The custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child

This factor is of the greatest relevance in this case for two reasons. The first is financial. The second is emotional.

The applicant's jazz vocalist career has never been a source of income for her. She freely admitted on the witness stand that, at best, her gigs broke even and that often they resulted in a loss. Whatever her artistic ability, there can be no doubt that her chosen field is a competitive one in which success or even financial viability is far from guaranteed.

However, she has found that her teaching abilities as an Orf instructor are in great demand in New York. When she first moved to that city on September 10th, 2001, she had two part-time jobs lined up in New York schools. Since that time, she has received several offers. She is presently commuting to New York to teach two days per week and more work is available. I find as a fact that she has viable offers which would result in her earning between $50,000.00 and $60,000.00 U.S. per year were she to move to New York.

Ironically, at the same time, the trustee appointed by the government of Ontario to manage the affairs of the Toronto School Board has recommended the cessation of the itinerant music program in which she previously found part-time work. An additional impediment to her working here is her lack of a Bachelor of Education degree which is required for full-time employment. There is therefore a strong financial incentive for her to move to New York City. This incentive is compounded by the inability or unwillingness of the respondent to make adequate provision for the applicant's support. Immediately following separation, the respondent took steps to deny the applicant access to joint bank accounts from which the expenses of the household had previously been met. He further placed her on an allowance of $280.00 per week to meet all of the household food and clothing requirements for herself and the two girls. When this sum was increased by the Court in the fall, he made the lump sum payments required in a grudging manner over time although he had adequate funds to provide for the lump sum immediately.

Some payments of support were not made on time or were made in part with the requirement that the remainder wait until he "could afford it". On two occasions the applicant was forced to bring motions to compel payment. The respondent has also been grudging in his acknowledgement of income earned and the disclosure required to verify it. His reported income since the commencement of proceedings has been set, in sworn documents, at $46,800.00, $30,500.00, $72,084.00 and finally, at trial, acknowledged to be $158,000.00. I am satisfied that the disclosure has been granted grudgingly and has required considerable interim motion activity on the part of the applicant. The applicant is therefore faced with the choice of remunerative work in New York which would make her largely self-sufficient or dependency upon an unwilling support payor in Toronto.

The respondent has argued that the applicant has not attempted to find work in the Toronto area or to enroll in a Bachelor of Education Program. This is a fair criticism. However, there would be no guarantee of work in her specialty even if this were obtained. She also wishes to move to New York. I am mindful in this regard of McLachlin J's comments at paragraph 48 of *Gordon v. Goertz* quoted above, that "the views of the custodial parent who lives with the child and is charged with making decisions in its interest on a day-to-day basis are entitled to great respect and the most serious consideration".

This leads logically into the second reason for the applicant's move which is emotional. Her career as a jazz vocalist has been on hold as a result of her childcare commitments dictated by the requirements of the respondent's career. While the chances of a financially viable career are remote, she has already obtained some degree of success in New York. She can continue to study and perform on a limited basis while earning a living as a teacher of music, something which is denied to her, at least in the short term, in Toronto. It is clear that her emotional state in New York with a job and career prospects will be far better than it would be in Toronto where she would be dependent upon the grudging largess of the respondent, and her career prospects would be greatly diminished.

While the test remains the best interests of the children, the wishes of the custodial parent and the atmosphere in the home in which they live are factors to be taken into consideration when applying the test *Oldfield v. Oldfield* (1991), 33 R.F.L. (3d) 235 (Ont. Gen. Div.).

(F) Disruption to the child of a change in custody

This heading is not applicable in this case. Although the parties have been sharing custody in name since December 20, 2001, In reality the applicant has been the parent exercising all the normal incidents of custody.

(G) Disruption to the child consequent on removal from family, schools and the community he or she has come to know

Stella is presently in first year high school. Isabel is in Grade 2 at the Lyndwood School. The applicant has two siblings and her mother living in the Toronto area. The respondent has two siblings and his parents. There was little evidence of extended contact between the children and their aunts and uncles however, they see their maternal grandmother frequently as she acts as a babysitter for both the applicant and the respondent. I have the impression that their relationship with their paternal grandparents is more distant particularly since the separation. Stella will be making new friends in high school

> and, no doubt, the move to New York will be disruptive to her. Isabel is still more closely linked to her family, particularly her maternal grandmother and she will miss her father more. The disruption will be minimized by the applicant's mother's commitment to move with her daughter and granddaughters to New York for an indefinite period of time and act as a chaperone for access flights back and forth. While there can be no question that the move will be disruptive to the children, the prospects for them in New York, the relative lack of frequency with which they see their father and his extended family, and the continued contact with their maternal grandmother, of whom they are very fond, will minimize this disruption.

McLachlin J. concludes her discussion in *Gordon v. Goertz* with the following paragraph:

> In the end, the importance of the child remaining with the parent to whose custody it has become accustomed in the new location must be weighed against the continuance of full contact with the child's access parent, its extended family and its community. The ultimate question in every case is this: what is in the best interests of the child in all the circumstances, old as well as new?

In this case the importance of the children remaining with their mother outweighs the continuance of full contact with their father and the extended families. I find that it is in their best interests to allow the move to New York as of the end of the 2002-03 school year if it continues to be the plan of the applicant to do so. If, on the other hand, the applicant elects to remain in the Toronto area for the children's sake, support should be adjusted to reflect her lack of earning power here.

Access

22 The applicant maintained throughout her evidence that she was prepared to provide the respondent with generous access to the children. She also repeated her belief that the children loved and enjoyed their time with their father. The respondent complained that the applicant had prevented his exercise of the shared parenting arrangement by refusing to provide the children when he was available. While I do not doubt that there was friction between the parties and some jockeying for position in the litigation, I am satisfied that it was the respondent's work commitments and not the applicant's opposition which prevented his exercise of more access. While I am satisfied that the applicant will not place obstacles in the way of the respondent's exercise of access, the increasing age of the children and the parties' inability to communicate will require that there be some structure to the respondent's access upon which the children can rely.

23 While the children are in New York:

> (a) The respondent should have access to the children at least once a month for a weekend. These weekends should correspond wherever possible with an American school holiday such as Columbus Day, Thanksgiving, Martin Luther King Day, Presidents' Day, Easter, Memorial Day, Independence Day, or with Jewish High holidays.
>
> (b) On each scheduled access visit, the respondent should bear the financial responsibility for getting the children to Toronto. The applicant should be responsible for their return to New York.
>
> (c) In addition to the access set out above, the respondent should have one-half of the children's Christmas school vacation, the children's mid-winter vacation, and up to one-half of the children's summer vacation. The summer access should be conditional upon his schedule allowing him to spend not less than half of this summer period or periods with the children free of work commitments.
>
> (d) The respondent should have unlimited access to the children by telephone and email. He should also have any additional access, which he can arrange either in New York or Toronto at his expense on reasonable notice.

While the children are in Toronto area the respondent should have access:

> (a) Every second weekend from Friday afternoon to Sunday evening or Monday evening if the Monday is a holiday,
>
> (b) At least one evening per week on reasonable notice,

(c) All Jewish High Holidays,

(d) One half of the Christmas School vacation not including December 25 th ,

(e) The mid-winter school break,

(f) One half of the summer school vacation provided that his schedule allows him to spend not less than half of that period or periods with the children free of work commitments,

(g) Unlimited telephone and e-mail access,

(h) Any additional access to which the parties agree.

Respondent's Income for Support Purposes

24 The respondent is self-employed as a contractor to the Toronto area film production industry. At all times relevant to this case, he operated through a closely held corporation which made his services available to the various production companies. Until the end of September 2002, the applicant and respondent were equal shareholders in Dug Rotstein Films Inc. After that date Dug Rotstein Films Inc. ceased operations and a new company, Dug Films Inc. carried on the same business in the same manner. The respondent is the sole shareholder of Dug Films Inc. Both companies were controlled exclusively by the respondent who was their only real employee. Prior to separation however, the applicant had signing rights on the bank account of Dug Rotstein Films Inc. and was paid a small management fee in the area of $10,000.00 for tax splitting purposes.

25 Throughout the course of the litigation, the respondent has filed sworn financial statements setting out wildly different incomes. His financial statements through the course of the litigation set his 2001 income at $46,800.00, $30,500.00 and $72,084.00, respectively. At the commencement of trial he conceded that the post expense income of his corporation Dug Rotstein Films Inc. for 2001 was $158,000.00. The elusiveness of the respondent's income led to a court ordered evaluation. Paula White of the firm of Cole Valuation Partners Ltd. was retained for this purpose. Her report dated September 21st, 2002 was filed in evidence. Ms. White testified as an expert in valuing income on consent.

26 Following generally accepted principles for determining income for support purposes, Ms. White reviewed income statements for the companies prepared by Mr. Rotstein. She then added back deductions or parts of deductions which pertained to the family's personal expenses and grossed up the resulting income to reflect the income tax savings realized by the respondent in having his company pay non-business expenses on his behalf.

27 The respondent took no real issue with Ms. White's assumptions or calculations. At the commencement of trial, he conceded that the income for Dug Rotstein Films Inc. for 2001 was $158,000.00. That figure is one of two alternate income figures provided by Ms. White for 2001. Her second figure is $177,000.00, a figure which Ms. White feels more accurately reflects the true income flowing to Mr. Rotstein for the year 2001.

28 Considerable time was spent both in evidence and argument upon two questions. The first was whether the income of the company for 2001 should be the lower or higher figure. The second was whether the income of the company should be taken as the income of the respondent for support purposes. The opinion of Ms. White, which was adopted by the applicant, is that the income of the company for 2001 should be set at $177,000.00 rather than $158,000.00. Her reason for this was a discrepancy between the management fees expensed by the company in 2000 and 2001 and the management fees declared on the corporate income tax return for those years. The unreported management fees which I find were paid to Mr. Rotstein amounted to almost $40,000.00 in 2000 and $37,000.00 in 2001. Mr. Rotstein's accountant wrote a letter to the respondent's solicitor (filed as Exhibit #9) which indicated that these undeclared fees would be declared in 2002 or 2003.

29 The respondent argued that these figures should not be included for two reasons. The first was that they represented, either in whole or in part, monies which should properly be attributed to the applicant by way of income split. The second was that they would be recaptured in future income tax returns.

30 I cannot agree with the respondent on either ground. I find as a fact that the income split paid to the applicant for 2001 was taken into account by Ms White in the calculation of the undeclared income. I also find as a fact that the funds were paid to Mr. Rotstein in the year indicated and therefore constituted income within the meaning of the Federal Child Support Guidelines.

31 The second area of disagreement between the parties was whether the income of the corporation for any given fiscal year should properly be taken as Mr. Rotstein's income for that year. The respondent argued strenuously that the correct approach for the calculation of income for support purposes is to review the monies paid to the support paying party in each calendar year. Since the year end for both companies is August 31 st, this would involve a combining of corporate years for each calendar year calculated.

32 Ms. White is a chartered accountant specializing in the calculation of income. In her opinion, the correct approach where a party derives all of his income from a closely held corporation, is to take the funds paid to that party during the corporation's fiscal year (after adjustment and gross up if necessary) as income for the calendar year in which the corporation's year-end occurs. In the absence of any qualified opinion to the contrary, I accept the method endorsed by Ms. White. I find therefore that the respondent's income for the years 1999, 2000, and 2001 for support purposes is as set out under the heading "preliminary adjusted pre-tax income (alternative)" at the bottom of schedule 1 of Paula White's report. For 2001 that figure is $177,205.00.

33 Unfortunately the respondent has filed no year-end statements for Dug Films Inc. for 2002. This makes it difficult to calculate support based on current income. Although the respondent indicates that his income will be much lower than it was in 2001, there is little evidence to back up his assertion. However, his reason for this prediction makes some sense. He was fortunate enough to work on two feature films in 2001. The pay scale is much higher for this type of work, but over the years it has formed a very small percentage of his business. It is unlikely therefore that he will have as much of this type of work in 2003.

34 Paula White's calculations indicated income for support purposes of $105,000.00 in 1999, $158,000.00 in 2000 and $177,000.00 in 2001. While this appears to show a clear upward trend, I am satisfied that the lack of feature film work and the disruption caused by the separation and litigation will result in a lowering of Mr. Rotstein's income for 2002. I find that the grossed up income figure calculated by Paula White for the year 2000 represents a realistic and sustainable figure for ongoing support purposes for the respondent. His ongoing child and spousal support obligation for the next year should be calculated upon this figure which is $158,000.00. Spousal and child support arrears should be calculated based upon Mr. Rotstein's 2001 income of $177,000.00 commencing as of May 1st, 2001. [1]

Calculation of Arrears and Ongoing Support

35 The applicant has the ability and a duty to contribute to her own support. This ability is limited while she remains in the Toronto area since teaching positions with the Toronto area boards are no longer available to her. She can however, teach privately as she did in the past. In addition to this, she presently teaches two days a week in New York City. It is reasonable to attribute an ability to earn $10,000.00 per year income to the applicant while she remains in the Toronto area. The applicant's income could be significantly affected by two factors. Should she decide to relocate to New York, her income would be much higher. If on the other hand she decided to stay in Toronto to seek a Bachelor of Education, her income for the next year would be non-existent.

36 The applicant's most recent financial statement shows monthly expenses of approximately $5398.00 per month for herself and the two children. I find this to be a reasonable figure for a family in the income bracket of the parties. I note in this regard that the respondent projects monthly expenses for himself and the two children of $7084.00. Using the assumptions and findings set out above, a computer-generated tax and support planner indicates that the respondent should have paid child support of $2042.00 per month since May 2001 and spousal support of $3250.00 per month for the same period.

37 The respondent should have paid combined child and spousal support for the past 18 months of $5292.00 per month or $95,256.00. During this period he paid $65,051.00 in support and $14,400.00 for ongoing housing expenses for which he should receive a 50% credit ($7,200.00). He has therefore paid $72,251.00, leaving arrears of $23,005.00 outstanding.

38 Child and spousal support should remain at the levels set out in paragraph [36] until the end of 2002. Commencing January 1st 2003, child support should be varied to $1844.00 and spousal support should be increased to $3550.00.

39 Should the applicant obtain work in New York, spousal support should be varied after three months of such employment as follows. Support should be reduced by $0.50 for every dollar earned by the applicant over $25,000.00 (for these purposes U.S. and Canadian dollars should be treated as equal as the applicant's expenses will be in U.S. dollars).

40 Should the applicant elect to remain in Toronto to seek further education (such as a Bachelor of Education), spousal support should increase to $4350.00 on the first of the month prior to her commencement of classes.

41 In addition to base child support the respondent should pay his proportional share of the children's section 7 *Child Support Guideline* expenses. The parties should consult as set out in paragraph [19] before any section 7(1)(f) activities are arranged.

42 In any event, either party should have the right to review spousal support after July 1st, 2004 without proving a material change in circumstances.

43 Any award of spousal support should be automatically adjustable in accordance with the provisions of section 34(5) & (6) of the *Family Law Act*. The respondent should arrange life insurance in the amount of at least $300,000.00 with the applicant designated as irrevocable beneficiary. This insurance should remain in place for so long as he has an obligation to pay support. It may however be term insurance with a face value which declines in accordance with the respondent's diminishing obligation to provide support.

Net Family Property

44 The principal dispute between the parties in this area is the status of five advances made by the respondent's parents over the course of the marriage. The applicant maintains they were gifts. The respondent says they were loans.

45 The first sum in the amount of $35,000.00 was advanced on December 1st, 1988 when the parties were buying their first house. There is no dispute that the money was used for the down payment.

46 The respondent's father, Dr. Matthew Rotstein, drew up a promissory note on his letterhead which was signed by both parties on the date of the advance. It is an unusual document in several respects. It provides as follows.

> This loan is payable all or in part prior to maturity but is to be paid in full on demand on date of maturity Dec 1st 1993.
>
> This loan is payable in full on demand in the event of the sale of the house at 34 Blandford St. by the undersigned.
>
> The maturity date may be renewed by Matthew and or Sadie Rotstein.

47 On August 1st, 1991 Dr. Rotstein advanced a further $25,000.00. This sum was used to bridge the gap between the proceeds of the couple's first house and the cost of a new house at 666 Balliol Ave.

48 A handwritten addendum was added to the December 1st note and also signed by both parties. It read:

> Sum of $25,000.00 added to above agreement under same conditions to sale at house at 666 Balliol Ave.

49 No payments were ever made on these notes although the Balliol Avenue house was sold prior to the maturity date. However, a demand for payment was made on May 27th 2001, approximately one month after this application was commenced. No payment has been made as a result of the demand letter and no further action has been taken by the respondent's parents.

50 On September 12th, 1999 Dr. Rotstein divided the proceeds of the sale of his office building among his four children. Each got $25,000.00. Only the respondent signed a note. Dr. Rotstein's evidence was that this was done at the respondent's insistence. It too was interest free and used the same curious wording with respect to when it might become due. It read as follows:

> This loan is payable all or in part on demand prior to maturity but is to be paid in full on demand on the date of maturity, September 12th 2004 to Matthew and/or Sadie Rotstein.
>
> The terms of payment and the date of maturity may be renewed by Matthew and/or Sadie Rotstein.

51 Only the respondent signed this note. No demand for payment has been made on it.

52 On April 1st, 2000 Dr. Rotstein advanced a further $32,000.00 to the couple to allow them to take advantage of a window in their mortgage which allowed a 20% reduction of capital owing. The respondent signed an interest free note which was said to mature on April 1st, 2005 or "in the event of the sale of the house at 150 Borrows St. Thornhill, Ont". It too contained the demand and renewal wording set out above. 150 Borrows St. sold in May 2002. However no demand for repayment has been made.

53 On February 1st, 2001 Dr. Rotstein advanced a further $75,000.00 again for the purpose of paying down the principal of the mortgage on 150 Borrows St. Again the respondent signed a note characterizing the advance as an interest free loan payable on February 1st 2006 or on the sale of 150 Borrows St. Again the same demand and renewal wording appeared. However, unlike the others, this note provided for payments of $300.00 per month commencing March 1st, 2001. Dr. Rotstein's evidence was that the respondent made ten payments then stopped because he "couldn't afford it". No demand for repayment has been made on this note.

54 Dr. Rotstein is an 80-year-old semi-retired surgeon. He still practices surgery on a limited basis. His wife is 73. She had cancer several years ago which was in remission until last year when it recurred. She has now undergone a second course of chemotherapy. Dr. and Mrs. Rotstein are wealthy. Dr. Rotstein testified that they do not require the repayment of any of the sums advanced although he expects to be paid "some day". He also testified that he would never take legal action against his son to collect on the notes.

55 The Rotsteins' have given sums of money to their other children although not nearly as much as to the parties. No notes have been taken from them. They have also advanced money to the parties on two occasions and not taken back a note. Dr. Rotstein testified that these advances were "gifts".

56 The applicant testified that the funds were offered by Dr. and Mrs. Rotstein as gifts and that there was no expectation of repayment. The notes were records of monies advanced. She believes that had the parties not separated, no demand for payment of any of the notes would ever have been made.

57 The respondent testified that he always considered the sums set out in the notes loans and expected to repay them when he could. He acknowledges that his parents have never asked him for repayment of any of the sums despite the demand letter and his failure to keep up payments on the February 1st, 2001 note.

58 The question of how to characterize parental advances such as those made by Dr. and Mrs. Rotstein was thoroughly reviewed by Heeney J. of this Court in the recent decision in *Poole v. Poole*, [2001] O.J. No. 2154 (Ont. S.C.J.) . Approaching the question from the same perspective as Aston J. in the earlier decision of *Salamon v. Salamon*, [1997] O.J. No. 852 (Ont. Gen. Div.) , he ruled that debts such as those evidenced by the notes in this case should be examined to determine the probability of their ever having to be repaid. If upon examination that probability is low or non-existent the debts should be discounted accordingly.

59 This reasoning applied even in cases where a demand was made, as the interests of the parents and the party who was their child was in reality, identical. The gist of the argument is set out at paragraphs 32-38 of the judgment.

> 32 Having found that the promissory notes constitute debts, one might think that it would be a simple matter to insert the face value of those debts into the appropriate place in the net family property calculation of each party. However, the process is not so simple. Just because an asset or a debt has a certain face value, it does not automatically follow that the court must insert that face value in the net family property calculation. There may well be a valuation issue to be resolved, in situations where the face value of an asset or debt does not necessarily equate with its real value.

33 For example, suppose that a spouse owned an asset on the date of separation that consisted of a promissory note owing to him of $20,000. If the evidence was that the promissor had no assets and little income, such that the likelihood of the spouse collecting on the note were at or close to nil, then the face value of the note would be discounted for equalization purposes to an amount at or approaching nil, in order to represent its true value in the equalization calculation.

34 Thus it can be said that the value of a promissory note to the holder of the note is directly related to the probability of collecting on the note.

35 Conceptually, there is no reason why the same approach should not apply where the spouse is the promissor, as opposed to the holder of the note. The value of a debt (using "value" in a negative sense) is directly related to the probability that the debt will be enforced against the promissor. Even though a debt may have a specified face value, if the evidence indicates that it is unlikely that the promissor will ever be called upon to pay the debt, the value of the debt should be discounted to reflect that reality.

36 There is a compelling reason for taking this good hard look at the reality of the situation. A debt constitutes a credit in the equalization calculation, and reduces the net family property of the spouse claiming the debt. This has a direct impact on the equalization payment due, by either reducing the amount that party has to pay to the other (if he has the higher net family property), or increasing the amount that he will receive (if his net family property is lower). Fairness dictates that he should not receive a credit for a debt, with the financial benefits that flow from that credit, if he will never be called upon to pay the debt.

37 This approach was taken by Aston J. in *Salamon v. Salamon*, [1997] O.J. No. 852 (Ont. Gen. Div.(Family Ct.)). In that case, the husband claimed two debts to his parents totalling $12,000. The debts were evidenced as promissory notes, payable without interest. His father testified that he intended to get the money back "before I die", but had not yet made a demand for payment. Aston J. concluded on the evidence that it was very possible that the loans will in fact be forgiven and never repaid. Accordingly, he treated the loans as a contingent liability, and discounted them by 50% to reflect that they may never have to be repaid, or may not be repaid for many years to come.

38 That case is different from the case at bar in that Lorne and Mabel Poole have, through counsel, made demand on the notes, and have commenced these proceedings to obtain judgment for the amount of the notes. However, in the circumstances, that is hardly surprising. Since both the Husband and Wife signed the notes, demand would have to be made in order to collect the notes from the Wife, and litigation would have to be commenced against both of them in order to collect from her. Despite the demand and litigation, it still remains a live question as to whether Lorne and Mabel Poole will actually enforce the judgment that they have just recovered against their son. By enforcement, I do not mean going through the motions of receiving payment from the Husband and then promptly giving the money back to him. That would be a sham, and would amount to not enforcing the debt at all. The issue that must be determined is what is the probability that they will actually demand and receive payment from him, such that he will actually remain out-of-pocket in the amount paid?

60 The learned judge then found that the likelihood of the husband ever having to pay his half of the debt was "highly improbable" for the following reasons:

1. The debts were old and had never been demanded save in the context of the son's matrimonial dispute. The judge found that the demand was motivated by a desire to collect the debt from the Wife, not the Husband;

2. The moneys were advanced by the parents to their son and his wife in order to help them out, and were not anticipated to be repaid until they could afford it and until the parents needed it. While the parents would no longer feel this sense of family obligation to the Wife due to the separation, the separation changed nothing as far as their sense of family obligation to their son was concerned. All of the factors that made it unlikely that the payment of the debt would be demanded during the marriage continue to operate in the Husband's favour notwithstanding the separation;

3. There was an "inferential admission" by Mrs. Poole that, but for the separation, the parents would not have demanded payment on their notes and commenced litigation to recover on them.

4. The Husband made no payments on the loan since the separation, nor did the parents demand any;

5. The parents were 81 and 82 years of age. The judge found that this fact reduced "the window of opportunity for collection". and made it at least somewhat less likely that they would get around to collecting the debt from the Husband.

6. The evidence of Mabel Poole was that the money was to be repaid "whenever they could afford it". The judge found that "given the financial setback that invariably results from a contested separation, with two households to support instead of one coupled with the costs of litigation, the Husband is less able to afford to repay this debt now than he was before the separation. The likelihood of his parents adding to his economic burden by insisting on payment of the debt owing to them is very low;"

7. Mabel Poole's evidence was also that the money was to be paid back when they needed it, but that they did not, at present, need the money;

8. Their need for the money would be even further reduced by virtue of collecting one-half of the debt from the Wife, making it less likely that they would seek to collect the Husband's half on the basis of need;

9. The Husband did not show the debt to his parents on two applications for credit to Scotiabank dated May 18, 1994 and October 3, 1997, leading to the inference that he did not consider the debt to his parents to be a "real" debt that he would actually have to repay;

10. Counsel for the Husband, was virtually arguing the parents' case for them. The judge found that it was inconceivable that the Husband would instruct him to do so if the Husband believed that he would actually, genuinely have to pay the sum of $42,800 to his parents. This would be acting directly against his own economic interests. He therefore concluded from this behaviour that he did so to ensure that the Wife had to pay her half to his parents, knowing that the judgment against himself would never be enforced.

61 The facts in this case are strikingly similar.

1) The joint debts are old; no demand has been made save one motivated by the separation of the parties.

2) The monies were advanced to the parties to help them out.

3) Dr. Rotstein testified that he would not have looked for the money, nor would he take action against his son. This leads to the clear conclusion that the demand was made as a result of the separation and to benefit their son in the subsequent litigation.

4) Dr. and Mrs. Rotstein are elderly and Mrs. Rotstein is in poor health.

5) Dr. Rotstein testified that he did not expect the money until the parties were able to afford to pay it back. The separation and this litigation have made that an improbability just as in the *Poole* case.

6) The Rotstein Sr.'s do not need the money.

7) Counsel for the respondent called Dr. Rotstein and argued strongly that the debts were valid and enforceable

62 In the *Poole* decision the parents had actually sued their son and daughter in law although Heeney J. concluded that the action against the son was a sham. Notwithstanding the existence of this lawsuit he discounted the value of the debt to 10% of its face value.

63 In this case Dr. Rotstein has testified that he would never take action to collect the debts from his son. He also testified that he "walked away" from $200,000.00 worth of bad debt when he closed his practice. I therefore discount the debts to 5% of their face value or $9,600.00. Of this figure $1500.00 should be shown as a debt on the applicant's side of the ledger and the remaining $8100.00 assigned to the respondent.

64 The other figures are largely agreed upon. I find the net family property equalization payment to be $18,029.85 as set out in the calculation attached as Appendix "A" to these reasons for judgment.

Payment Out of Net Proceeds of Sale of Home

65 The party's real estate solicitor Jeffrey M. Paul is presently holding the balance of the net proceeds of the sale of 150 Borrows St. in his trust account. As of the closing date this figure amounted to $171,131.61. Since that date however a number of advances have been made and some interest may have accrued. The funds held in trust should be divided in equal shares subject to a number of adjustments as set out in Appendix "B" to this decision. These adjustments are all in favour of the applicant for support arrears, net family property equalization, costs previously awarded, or expenses paid out of joint funds which were properly attributable to the respondent.

66 Subject to adjustment for any interest which may have accrued and the final cost award yet to be made, the applicant should receive the sum of $84,600.00 and the respondent the remaining $20,175.00. Any interest which has accrued should be divided equally. Although the majority of the funds held were to be paid to the applicant, she received a significant advance on her share. No funds should be paid until the final award of costs has been made.

Timeshare Property

67 The parties own a timeshare in Florida. It is to be sold with the proceeds divided equally. Until sale the time available is to be divided equally between the parties.

Children's Educational Trust Accounts

68 The parties established educational trust accounts for each of the children. During the course of their difficulties the respondent moved these accounts to the ING bank. In doing so he removed the applicant as a signing authority. The respondent should restore the applicant as a signing authority with any further withdrawals requiring both parties' signatures.

Joint Line of Credit

69 The respondent who has drawn upon the joint line of credit since separation should assume full responsibility for its repayment. He should also arrange to have the applicant's name removed from it if this has not already been done.

Divorce

70 The only remaining undecided issue in this application is the divorce. That matter is adjourned without fixed date for either party to move by Rule 14(b) motion for a divorce on affidavit evidence.

Costs

71 Upon release of this decision the parties may arrange to address costs either in person or by telephone conference call, through the trial coordinator in Newmarket. Counsel should exchange and submit bills of costs at least five days before the appointment. These bills should address the costs of February 6th, 2002 and May 2nd, 2002 as well as the trial.

Appendix

A Net Family Property Statement

ITEM	HUSBAND	WIFE		
1. Assets — Matrimonial Home — 150 Borrows Street Thornhill, Ontario			$144,637.70	$144,637.70
Household goods & furniture — DIVIDED			$0.00	$0.00
Cars, boats, vehicles — 1985 Volkswagon			$500.00	
	- 1998 Toyota [2]		$19,000.00	
Jewellery, art, electronics, tools, sports & hobby equipment — Diamond ring				$4,000.00
Other special items — tools			$800.00	
	- computer		$1,000.00	
Bank accounts and savings — chq — Mbanx			$130.04	$130.04
		- Svg — ING	$2,973.63	
		- Svg — ING	$15,156.55	
		- Svg — mbanx	$0.82	$0.82
		- Svg — ING	$3,136.54	
		- US svg — mba	$4.43	$4.43
		- Chq — Mbanx	$107.14	$107.14
		- Chq — mbanx	$2,438.48	
		- Inv — mbanx	$34.17	
		- OMERS		$8,896.66
		- RRSP-mban	$4,158.97	
		- RRSP-Altam		$8,000.00
Securities — Stocks — Investorline			$5,690.00	
	- Investor Group IATSE		$5,090.15	
	- BMO Investorline		$4,106.86	
Life and Disability Insurance			$3,373.00	
Timeshare			*$3,500.00*	*$3,500.00*
		TOTAL 1.	$215,838.48	$169,276.79
2. Debts and Liabilities 1st & 2nd Mortgage - 150 Borrows St.			$59,071.89	$59,071.89
Royal Bank Visa			$700.00	
CIBC Visa			$7,274.00	
Tax RRSP @ 25%			$2,312.00	$1,760.00
Tax OMERS @ 25%				$2,224.00
Discounted value of debts owing to Mathew & Sadie Rotstein @ 5%			*$8,100.00*	*$1,500.00*
		TOTAL 2.	$77,457.89	$64,555.89
3. Property Owned at Marriage			$0.00	$0.00
4. Excluded Property Gift or inheritance from third person — ring				*$2,400.00*
		TOTAL 4.	$0.00	$2,400.00
5. Net Family Property *(Total 1 minus Totals 2, 3 and 4)*			$138,380.59	$102,320.90
6. Equalization Payment			$18,029.85	$0.00

Appendix

B Calculation of Funds to be Paid to Applicant From Proceeds of Sale of Matrimonial Home

Net proceeds		$171,131.00
Applicant's 50% share	$ 85,565.00	
Child support already paid from proceeds	$ 8,206.00	
Costs to applicant already paid from proceeds	$ 8,150.00	
Costs to applicant ordered on 1{st} day of trial	$ 1,000.00	
Credit for 50% of Paula White report paid before calculation of net proceeds	$ 2,000.00	
Credit to applicant to even advances on joint line of credit for legal fees	$ 5,000.00	
Retroactive child and spousal support	$ 23,005.00	

Net Family Property Equalization payment	$ 18,030.00
Sub-total	*$150,956.00*
Less funds already received by applicant	$ 66,356.00
Funds to be paid to applicant subject to adjustment for costs and interest if any	*$ 84,600.00*
Funds to be paid to respondent subject to adjustment for costs and interest if any	*$20,175.00*

Footnotes

1 Commencing in 2004 child support based upon the respondent's previous year's income may be calculated using the Paula White report as follows. For the years 1999, 2000 and 2001, the added back expenses calculated by Ms. White represented 20% of the corporation's gross income. This figure should be multiplied by a factor based on Mr. Rotstein's estimated marginal income tax rate for the year as set out in Note 3 to Schedule 1 of Ms. White's report. Following this formula in each year will provide a base for child support in accordance with the guidelines without the expense of retaining a valuator or returning to Court.

2 (average of two values given)