

in the matrimonial home (as well as her obligation to a joint line of credit) for the sum of \$220,000.

[4] At the outset of the trial, there was an issue as to the value of a 2002 motorcycle listed as the Husband's asset. The parties advised that neither had any evidence from an appraiser. Accordingly, the value was left at \$1,000 as claimed by the Husband in the NFP Statement, Exhibit 1.

[5] The remaining issues to be decided at trial were:

- a. Granting the Divorce.
- b. What is the date of separation?
- c. What is value of the Husband's business?
- d. Was the \$65,000 received from the Husband's mother a gift or a loan, and to whom?
- e. What is the equalization?
- f. What is the Husband's income for calculating support, and what is the support obligation to Mrs. Gajda?
- g. What, if any, insurance must Mr. Gajda keep in place to secure his support obligations?

II MARITAL FACTS

[6] The Husband, Robert Gajda, was born on March 15, 1968, and was 46 at the time of the trial. Heather Gajda was born on April 21, 1970 and was 44 at the time of the trial.

[7] They were married on May 3, 1997. There is one child of the marriage, Sydney Gajda, born May 15, 2004. The parents have shared custody. Support is not an issue.

[8] The parties separated on either May 2, 2011 or November 28, 2011. This is an issue to be decided. They have lived separate and apart since that time, but under the same roof until

December, 2012 when the husband purchased the wife's interest in the matrimonial home and she moved out.

[9] There is no hope of reconciliation.

II ISSUES TO BE DECIDED:

a) Divorce:

[10] The marriage is over.

[11] The parties have lived separate and apart for over one year, and there is no hope of reconciliation. Ms. Gajda has moved on, and found a new partner. Both parties consent to the divorce, and I order them divorced.

b) What is the Valuation Date/Separation Date?

[12] This issue affects the NFP calculation.

[13] The parties agreed that if the separation occurred in November 28, 2011, as submitted by the Husband, the equalization paid to the Wife is \$2,954.98 (Exhibit 1). If the separation occurred on May 2, 2011, as submitted by the Wife, the parties agree that the equalization to be paid to the wife is \$23,465.12. Both calculations are subject to issues decided elsewhere in this judgment.

[14] The Wife submits that she told the Husband on May 2, 2011, that she wanted a divorce and to separate. The Husband denies she told him this. In any event, the Wife says that, notwithstanding the conversation with her Husband, she continued to participate in family outings and vacations for the sake of her daughter. She did not tell others about her decision until after she moved out. She did not want others to know her personal issues.

[15] The Husband says that he considered the marriage over on November 28, 2011 when he discovered that his wife was having an affair. He says that he did not confront the wife until shortly after the New Year in order to not spoil Christmas for their daughter.

[16] The Husband's evidence in response to his Wife's position with respect to the separation date is quite specific. He testified that before receiving correspondence from the Wife's lawyer in early 2012, she ever told him she wanted a separation or divorce.

[17] He gave evidence with respect to several holidays and trips the family took together between May and December 2011, as well as many family functions they attended. They were their usual selves at these functions. Her response to this evidence is that he never asked to come; he just came. She agreed that she did not ask the Husband to stay away.

[18] More telling on this issue are a number of specific pieces of evidence. First, the Husband says that he took his wife to her favourite restaurant on May 3, 2011, for their 14th anniversary. The Wife says she has no memory of this dinner. She does not deny it happened although thinks it was odd that it would have given what she told him the day before that she wanted out of the marriage.

[19] The Husband says the dinner did happen. He says that if he were told on May 2 that the marriage was over, he would not have gone out the next day to celebrate the 14th wedding anniversary. Given that the Wife cannot deny that the dinner took place, only that she has no memory of it, I accept the Husband's evidence that the dinner took place, and that he would not have gone had he been told the day before that his marriage was over.

[20] Second, and more important, the wife stated in her Answer dated November 16, 2012 that the first formal communication to the Husband that the marriage was over, was in early 2012. This is an admission. There is no evidence that she sought to retract this admission. This runs contrary to her oral evidence that the separation occurred on May 2, 2011.

[21] Third, the evidence suggests that the first transmission to the Husband of the Wife's intentions was in 2012. Under cross examination she admitted that she did not communicate with the Husband or his lawyer before November, 2011, and that it was likely in 2012 (see Exhibit 8). The Wife said that she delivered a draft separation agreement before December 2011. The Husband denies this. The wife was unable to produce documentary evidence that this deliver took place before 2012.

[22] From all outward appearances, there was no separation until after November 2011. The evidence from Mr. & Mrs. McAloon, long time neighbours and friends to both the Gajdas, was that while the Gajdas were having trouble between May and December, 2011, they showed no signs of splitting up. Certainly, Mrs. Gajda never expressed this desire. It appeared to both the McAloons that the Gajdas were merely having their ups and downs, as does every couple. Mr. Gajda's mother said much the same thing.

[23] In order to avoid an attempt by any party to manipulate the valuation date to improve his or her financial position on equalization, in the absence of a clear separation date, the Court must examine the facts carefully and err on the side of not prejudicing litigants who might lose rights of equalization: see *Newton v. Newton*, [1995] O.J. No. 519, 11 R.F.L. (4th) 251 (Ont. U.F.C.).

[24] I asked the parties why I should not use a separation date of sometime in January 2012 (eg. when the Husband acted on the information he received in November, 2011, or when the Wife's lawyer told the Husband the marriage was at an end). Both submitted that since they agreed as May 2, 2011 and November 28 as the only possible dates, I was restricted by that agreement. I do not accept this position. The evidence put forward by both parties, however, applied only to these one or these two dates, and I have no evidence before me that allows me to determine the impact of a January 2012 separation date.

[25] Based on a careful review of the evidence on the separation date, I find that the separation occurred on November 28, 2011. This is consistent with the evidence, except that of the Wife.

c) *What is the Value of the Husband's Business?*

[26] The only evidence on this issue was that of Joseph Hilton of BDO. By agreement, he was qualified as an expert in Business Valuation, and assessing income for support purposes.

[27] Mr. Hilton's opinion was that, using the May 2, 2011 separation date, the value of the Husband's 25% interest in Mount Royal Painting was \$5,500, and using November 28, 2011, the value was \$0.

[28] I accept his evidence. The wife presented no evidence to the contrary. Her cross examination of Mr. Hilton did not result in any changes to or weaknesses in his opinion.

[29] Having found that the separation date is November 28, 2011, I find that the value of the Husband's business is \$0.

d) Was the \$65,000 received from the Husband's mother a gift or a loan, and to whom?

[30] This issue turns out to be a non-issue as it did not affect the outcome of equalization or support.

[31] The Husband and his mother both testified that she loaned the Husband \$50,000 toward a down payment to their first home, shortly after they were married. The loan was interest free, to be paid back when the couple could afford it. The Husband's mother loaned the couple another \$15,000 after Sydney was born, for fertility treatments, so that they could have another child. The repayment terms were the same.

[32] The Wife says that she knew nothing about these financial transactions until after the separation. It is clear that she is suspicious of this transaction. The overall tenor of her questioning on this issue was that she thinks that it was fabricated for the purpose of depleting the Husband's assets. Her position for the equalization of property is that the money was a gift to the Husband that should have been declared as his asset on the NFP Statement. The money was repaid between May and December 2011. The Wife says that this was done to reduce the Husband's Net Family Property. Calling it a loan, in her view, was a post-separation construct to alter NFP calculations.

[33] Neither transaction was documented. However, given that the wife has no memory of the transactions, and since she did not shake either her Husband or his mother on cross examination, I accept their evidence that the money advanced was a loan to the husband, and that it was repaid before November 28, 2011. The reason for the repayment is that the Husband's brother was also asking the mother for assistance in buying a home. The mother, in order to not have to collapse an RRSP, asked the Husband to repay his loans. The Husband confirmed this and said that he had most of the money saved by that time, anyway.

[34] The loans totalling \$65,000 were for the benefit of the couple during the marriage. The husband submits, therefore, that half of the debt should be claimed by each spouse if the separation date is May, 2011. This is incorrect. Since the Husband negotiated the loans with his mother, they are his obligations, only. If the separation date is November 28, however, since the loan was re-paid, there is no entry for either spouse on the Joint NFP statement. Since I found a separation date in November, the loan obligation no longer existed and need not be accounted for on either spouse's NFP. Therefore, Exhibit 1 is correct in this respect.

e) *What is the Equalization?*

[35] Based on the agreed equalization figures, and given my finding as to separation date, the Husband owes the wife \$2,954.98 in equalization. This bears pre-judgment interest from November 28, 2011 to the date of the judgment at 1.3%.

f) *What is the Husband's income for calculating support, and what is the support obligation to Mrs. Gajda?*

[36] The Husband is self-employed. Calculating his income for support purposes is more complicated than using line 150 from the Husband's T1 tax return.

[37] The Wife submits that the Court should impute income to Mr. Gajda based on a cash, underground economy he operated. In her submissions, she reported Mr. Gajda making a great deal of money from a cash business, in house renovations, but presented no evidence of this.

[38] Income for child and spousal support purposes is determined the same way, namely pursuant to the *Child Support Guidelines* (see: *Bak v. Dobell*, 2007 CarswellOnt 2324 (C.A.), *Smith v. Smith*, 2012 CarswellOnt 3113 (S.C.J.), *Ludmer v. Ludmer*, 2013 CarswellOnt 1625 (S.C.J.) and *Spousal Support Advisory Guidelines*).

[39] The principles that apply in determining whether to impute income are the same in both child support and spousal support cases (see: *Smith, Perino v. Perino*, 2007 CarswellOnt 7171 (S.C.J.) and *Rilli v. Rilli*, 2006 CarswellOnt 6335 (S.C.J.)). Income imputation is not strictly limited to the payor spouse. It may also be imputed to the recipient spouse (see *Spousal Support Advisory Guidelines*).

[40] Income may be imputed in circumstances where an individual is intentionally under-employed or unemployed (see: *Drygala v. Pauli*, 2002 CarswellOnt 3228 (C.A.) and section 19(1) of the *Guidelines*).

[41] Prior to a court imputing income under Section 19(1), it must undertake the three part analysis set out by the Court of Appeal in *Drygala* (2002): a court must ask itself:

- a. Is the spouse intentionally under-employed or unemployed?
- b. If so, is the intentional under-employment or unemployment required by virtue of the needs of a child of the marriage or any child under the age of majority?
- c. If the answer to question b. is negative, what income is appropriately imputed in the circumstances?

[42] In *Smith v. Smith* (2012), Justice Chappel outlined the relevant factors for determining whether to impute income as follows:

- (a) The onus is on the party seeking to impute income to establish an evidentiary basis upon which to establish that the other party is intentionally unemployed or underemployed;
- (b) It is not necessary to establish bad faith or an attempt to thwart support obligations before imputing income. A payor is intentionally underemployed 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. The factors that the court should consider include the age, education, experience, skills and health of the party, the party's past earning history and the amount of income that the party could reasonably earn if they worked to capacity;
- (c) 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 dependants;
- (d) The court will not excuse a party from their 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 support payments;

- (e) 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 party's support obligations;
- (f) The amount of income that the court imputes to a party 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.

[43] In this case, the Wife has the onus to establish the underemployment and imputation of income. I am entitled to consider all relevant evidence, however, including that of the Husband.

[44] Mr. Gajda, in justifying his decline in income from 2010 to 2012, and his submission that I find his earning capacity for 2013 and 2014 at \$45,000, admitted that since the separation, he has slowed down the work he is doing so he can spend more time with his daughter. There was no indication that this reduced commitment was due to necessity, but rather to his preference.

[45] He admitted that his income in 2010 was \$80,000 and in 2011 was \$48,000 as determined by Mr. Hilton (see Exhibit 5, page 1).

[46] Other than his desire to "step back" and spend more time with his daughter, he gave as further reasons for reducing his work hours to low back pain and arm pain for which he was being treated, and made vague references to law suits against Epoxy Solutions Inc. (a company wholly owned by Mount Royal Painting, of which he owned 25%) depleting resources between 2008 and 2010. He gave no evidence about his arm and back issues and how they affected his earning ability and over what period. Further, he gave no details of the nature of the resource depleting expenses and over what time they were incurred.

[47] I am left with the only reasonable conclusion that Mr. Gajda intentionally reduced his earnings without the reasonable need to do so; merely the preference to do so.

[48] Mr. Hilton gave evidence about the Husband's income for support calculation. He calculated it at \$45,000 per year, in 2012. His calculations, however, are based on financial data, which reflect work actually done, not the explanation for reducing work.

[49] I accept Mr. Gajda's evidence as a partial explanation why his income dropped from \$80,000 in 2012 to \$45,000 in 2010, but not a full explanation. Aside from his desire to "step back" and spend more time with his daughter, his explanations are too vague to account for the whole drop in income. A fair statement of his capacity to work based on the evidence, although somewhat arbitrary, is that he has the capacity to generate \$60,000 per year in income.

[50] Based on assumed income of \$45,000 for the Husband and \$28,800 for the Wife, the parties agreed that Mr. Gajda would pay \$171/mo. in child support beginning on the date Mrs. Gajda left the home in December, 2012. No evidence was presented as to when child support actually began, whether it is current, or what the current outstanding is. Assuming support was paid beginning on January 1, 2013 up to the end of April, 2014, at \$171/mo., the amount that should have been paid to date is \$2,736.

[51] Using the Husband's income at \$45,000 and the Wife's at \$28,800, there was no spousal support paid.

[52] Using DivorceMate software, assuming incomes of \$60,000 for the Husband and \$28,800 for the Wife, I find that spousal support is \$288/mo. and net child support is \$311/mo. (see Schedule A, attached). I order that the Husband shall pay to the wife \$599/mo., beginning January 1, 2013, the first day of the month immediately following the Wife's departure from the home. Past combined support from January 1, 2013 to May 1, 2014 is \$9,584. From this should be deducted any child or spousal support paid to date. As support is a periodic payment, pre-judgment interest on the net amount of support outstanding shall be one half the prescribed rate of 1.3%, or .65%.

[53] The duration of spousal support is not indefinite. The Wife expressed the expectation that she will move from being a school bus driver to doing office work including some dispatching. This is reasonable. Subject to a motion to change under R. 15, on all of the

evidence, I expect the Wife's need for support to end in 10 years. Therefore, support shall end on May 1, 2024.

[54] The parties have agreed to split reasonable Section 7 expenses on a 60/40 basis in favour of the Wife. This is reasonable and I order it.

g) Insurance Requirements.

[55] The parties agreed that they would insure their respective support obligations.

[56] Pursuant to Schedule A, attached, the death benefit of a life insurance policy to secure the Husband's spousal and child support obligation to the Wife is \$85,541, and the death benefit to secure her child support obligation to him \$24,701. These death benefits presume that the Husband will pay to the Wife spousal support, indefinitely. Given that I have limited spousal support to 10 years, I order that each party shall maintain a term life insurance policy, at the party's own expense, naming the other party as the irrevocable beneficiary. The term of the policy shall not be shorter than 15 years, to account for the child's attending a four year University program. The death benefit of the policy the husband shall take out to secure his support obligations shall be \$50,000 and the policy the wife will take out shall be \$25,000.

IV ORDER

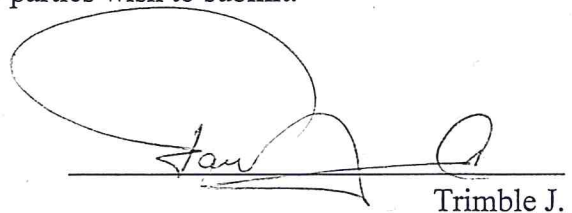
[57] Based on my findings, above, I order as follows:

- The separation date is November 28, 2011.
- Based on the separation date, the value of the husband's business is \$0.
- The Husband shall pay the Wife equalization of \$2,954.98, with interest from November 28, 2011 at 1.3%. All parties rights to equalization of property one from the other, are hereby extinguished.
- The Husband's imputed income for support purposes is \$60,000 and the wife's is \$28,800.

- Spousal support to be paid by the Husband to the Wife shall be at \$288/month and net child support paid by the Husband to the Wife shall be \$311/month. Support obligations began on January 1, 2013 and continue. Combined support owing to date is \$9,584, subject to deducting support paid to date. Interest on the outstanding net amount is at 0.65% from January 1, 2013.
- Spousal support shall cease on to May 1, 2024. Child support shall cease on June 1, 2029.
- By agreement, the parties shall pay section 7 expenses at 60% by the Husband and 40% by the Wife.
- To secure his support obligations, the Husband shall take out a term life policy for not fewer than 15 years, with a death benefit of \$50,000 naming the Wife as an irrevocable beneficiary.
- To secure her support obligations, the Wife shall take out a term life policy for not fewer than 15 years with a death benefit of \$25,000 naming the Husband as an irrevocable beneficiary.

V COSTS

[58] Within the next 30 days, the parties shall provide their submissions, in writing as to who should receive costs and in what amount. The submissions shall not exceed five double spaced pages. They shall attach any bills of costs the parties wish to submit.


Trimble J.

Released: May 5, 2014

Calculation Input		Annual \$
Robert	Male, 46, Resident of ON	
Income		
Employment income		60,000
Heather	Female, 44, Resident of ON	
Income		
Employment income		28,800
Children	Age Lives with Table Amt Claimed by	
Sydney	9 Shared Yes N/A	
Youngest child finishes high school 11 years from the date of separation.		
Dependant credit claimed by Heather.		

Child Support Guidelines (CSG)		Monthly \$	
		Robert	Heather
Annual Guidelines Income		60,000	28,800
CSG Table Amount		546	235
Child Support (Table)		311	0

Spousal Support Advisory Guidelines (SSAG)		Monthly \$
Length of marriage/cohabitation: 14 years		
Recipient's age at separation: 44 years		





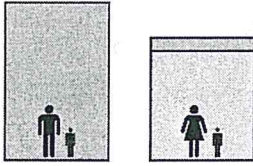

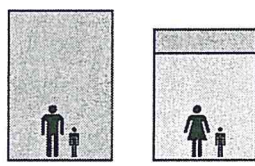
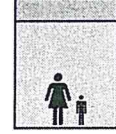
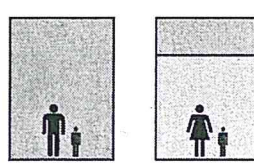

"With Child Support" Formula

Low	Mid	High
59	288	609*

*High end of the range extended to include 50/50 NDI split

The formula results in a range for spousal support of \$59 to \$609 per month for an indefinite (unspecified) duration, subject to variation and possibly review, with a minimum duration of 7 years and a maximum duration of 14 years from the date of separation.

SSAG Considerations: The results of the SSAG formula must be interpreted with regard to: Entitlement; Location within the Ranges; Restructuring; Ceilings and Floors; and Exceptions.

Support Scenarios	Monthly \$	A. SSAG Low		B. SSAG Mid		C. SSAG High	
		Robert	Heather	Robert	Heather	Robert	Heather
Gross Income		5,000	2,400	5,000	2,400	5,000	2,400
Taxes and Deductions		(1,223)	(273)	(1,152)	(319)	(1,052)	(384)
Benefits and Credits		47	194	49	176	52	143
Spousal Support		(59)	59	(288)	288	(609)	609
Child Support (Table)		(311)	311	(311)	311	(311)	311
Net Disposable Income (NDI)		3,454	2,691	3,298	2,856	3,080	3,079
 adult in household  child in household  shared/summer child in household  Payor's NDI/Contribution							
Percent of NDI		56.2%	43.8%	53.6%	46.4%	50.0%	50.0%
CSG Special Expenses Apportioning %		66.8%	33.2%	63.7%	36.3%	59.3%	40.7%
Life Insurance (to secure support)							
Child Support (CSG Table only)		57,390	24,701	57,390	24,701	57,390	24,701
Spousal Support (Heather's after-tax benefit)		5,758	N/A	28,150	N/A	59,404	N/A
Life Insurance Estimate		63,148	24,701	85,541	24,701	116,794	24,701
Spousal Support Lump Sum (NPV)							
Robert's after-tax cost			4,944		24,234		51,204
Heather's after-tax benefit			5,758		28,150		59,404
Midpoint			5,351		26,192		55,304

Net Present Value (NPV) Assumptions: spousal support duration is 10 years, 6 months; child support until age 18; spousal support payments not discounted for Recipient's life expectancy; and a discount rate of: 0.6% (Automatic - Indexed).

CITATION: Gajda v. Gajda, 2014 ONSC 2787
COURT FILE NO.: 35009/12
DATE: 20140505

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Robert Lawrence Gajda

Applicant

– and –

Heather Margaret Jean Gajda

Respondent

REASONS FOR JUDGMENT

Trimble J.

Released: May 5, 2014