

2008 CarswellOnt 9474
Ontario Superior Court of Justice

Scott v. Scott

2008 CarswellOnt 9474, [2010] W.D.F.L. 3396, [2010] W.D.F.L. 3431, [2010] W.D.F.L. 3432, [2010] W.D.F.L. 3433, [2010] W.D.F.L. 3436, [2010] W.D.F.L. 3439, [2010] W.D.F.L. 3477, [2010] W.D.F.L. 3491, [2010] W.D.F.L. 3499, [2010] W.D.F.L. 3505

Patricia Anne Scott, Applicant and John Frederick Scott, Respondent

S. Rogers J.

Heard: October 11-23, 2007
Judgment: January 7, 2008
Docket: Newmarket FC-05-022922-00

Counsel: **Andrea Di Battista**, for Applicant
Gordon F. Allan, for Respondent

Subject: Family; Property

Related Abridgment Classifications

Family law

III Division of family property

III.5 Assets which may be excluded from property to be divided

III.5.b Assets brought into marriage

III.5.b.i General principles

Family law

III Division of family property

III.5 Assets which may be excluded from property to be divided

III.5.d Business and employment assets

III.5.d.ii Shares in private corporations

III.5.d.ii.G Ontario

Family law

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III.5 Assets which may be excluded from property to be divided

III.5.m Debts and liabilities

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III.8.a Effect of conduct of spouses during marriage

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III.10 Matrimonial home

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IV.1 Spousal support under Divorce Act and provincial statutes

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IV.1 Spousal support under Divorce Act and provincial statutes

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IV.3 Child support under federal and provincial guidelines

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IV Support

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Family law

IX Custody and access

IX.8 Access

IX.8.a Factors to be considered

IX.8.a.iii Wishes of child

Headnote

Family law --- Family property on marriage breakdown — Assets which may be excluded from property to be divided — Assets brought into marriage — General principles

Husband and wife were married for 18 years and had 14-year-old son — Husband was part owner in two businesses ("family business and technology business") but submitted no valuation of business at trial — Hearing was chaotic — Husband failed to disclose documents until week before trial and in some cases during trial — Husband called witnesses with no prior notice even after court ordered husband to produce witness list — Husband's uncle testified as to value of shares of family business at time of marriage to protect his sister's interest in business — Technology business had significant debt due to shareholder loan to other principal in business — Hearing was held to determine equalization, access, child support and spousal support and wife pleaded unequal division of net family property due to depletion of assets and reckless accumulation of debt — Uncle's evidence as to value of shares of family business was accepted and at time of marriage husband's interest in company was worth \$155,696 — Technology business was valued at nil — Husband had insufficient evidence to determine value of hockey ticket subscription so husband was ordered to sell right to use subscription for not less than \$1,900 and send wife half of sale price — Because of deduction for husband's business at date of marriage, his net property value was \$0 — Wife's net worth at time of separation was \$60,472.63 — Both parties participated in fiscal mismanagement so there was no order for unequal division — Wife was to pay husband \$30,236.31, but husband was to pay wife \$39,537.75 as one half of income tax debt paid to Canada Revenue Agency upon sale of matrimonial home plus \$4,000 for repairs carried out on home.

Family law --- Family property on marriage breakdown — Assets which may be excluded from property to be divided — Business and employment assets — Shares in private corporations — Ontario

Husband and wife were married for 18 years and had 14-year-old son — Husband was part owner in two businesses (“family business and technology business”) but submitted no valuation of business at trial — Hearing was chaotic — Husband failed to disclose documents until week before trial and in some cases during trial — Husband called witnesses with no prior notice even after court ordered husband to produce witness list — Husband’s uncle testified as to value of shares of family business at time of marriage to protect his sister’s interest in business — Technology business had significant debt due to shareholder loan to other principal in business — Hearing was held to determine equalization, access, child support and spousal support and wife pleaded unequal division of net family property due to depletion of assets and reckless accumulation of debt — Uncle’s evidence as to value of shares of family business was accepted and at time of marriage husband’s interest in company was worth \$155,696 — Technology business was valued at nil — Husband had insufficient evidence to determine value of hockey ticket subscription so husband was ordered to sell right to use subscription for not less than \$1,900 and send wife half of sale price — Because of deduction for husband’s business at date of marriage, his net property value was \$0 — Wife’s net worth at time of separation was \$60,472.63 — Both parties participated in fiscal mismanagement so there was no order for unequal division — Wife was to pay husband \$30,236.31, but husband to pay wife \$39,537.75 as one half of income tax debt paid to Canada Revenue Agency upon sale of matrimonial home plus \$4,000 for repairs carried out on home.

Family law --- Family property on marriage breakdown — Assets which may be excluded from property to be divided — Debts and liabilities — General principles

Husband and wife were married for 18 years and had 14-year-old son — Husband was part owner in two businesses (“family business and technology business”) but submitted no valuation of business at trial — Hearing was chaotic — Husband failed to disclose documents until week before trial and in some cases during trial — Husband called witnesses with no prior notice even after court ordered husband to produce witness list — Husband’s uncle testified as to value of shares of family business at time of marriage to protect his sister’s interest in business — Technology business had significant debt due to shareholder loan to other principal in business — Hearing was held to determine equalization, access, child support and spousal support and wife pleaded unequal division of net family property due to depletion of assets and reckless accumulation of debt — Uncle’s evidence as to value of shares of family business was accepted and at time of marriage husband’s interest in company was worth \$155,696 — Technology business was valued at nil — Husband had insufficient evidence to determine value of hockey ticket subscription so husband was ordered to sell right to use subscription for not less than \$1,900 and send wife half of sale price — Because of deduction for husband’s business at date of marriage, his net property value was \$0 — Wife’s net worth at time of separation was \$60,472.63 — Both parties participated in fiscal mismanagement so there was no order for unequal division — Wife was to pay husband \$30,236.31, but husband to pay wife \$39,537.75 as one half of income tax debt paid to Canada Revenue Agency upon sale of matrimonial home plus \$4,000 for repairs carried out on home.

Family law --- Family property on marriage breakdown — Factors affecting equal or unequal division — Effect of conduct of spouses during marriage — Dissipation of assets

Husband and wife were married for 18 years and had 14-year-old son — Husband was part owner in two businesses (“family business and technology business”) but submitted no valuation of business at trial — Hearing was chaotic — Husband failed to disclose documents until week before trial and in some cases during trial — Husband called witnesses with no prior notice even after court ordered husband to produce witness list — Husband’s uncle testified as to value of shares of family business at time of marriage to protect his sister’s interest in business — Technology business had significant debt due to shareholder loan to other principal in business — Hearing was held to determine equalization, access, child support and spousal support and wife pleaded an unequal division of net family property due to depletion of assets and reckless accumulation of debt — Uncle’s evidence as to value of shares of family business was accepted and at time of marriage husband’s interest in company was worth \$155,696 — Technology business was valued at nil — Husband had insufficient evidence to determine value of hockey ticket subscription so husband was ordered to sell right to use subscription for not less than \$1,900 and send wife half of sale price — Because of deduction for husband’s business at date of marriage, his net property value was \$0 — Wife’s net worth at time of separation was \$60,472.63 — Both parties participated in fiscal mismanagement so there was no order for unequal division — Wife was to pay husband \$30,236.31, but husband to pay wife \$39,537.75 as one half of income tax debt paid to Canada Revenue Agency upon sale of matrimonial home plus \$4,000 for repairs carried out on home.

Family law --- Family property on marriage breakdown — Matrimonial home — Deductions from proceeds of sale — General principles

Husband and wife were married for 18 years and had 14-year-old son — Son was child actor and earned fair bit of money — Parties used money over years and depleted son’s bank account — Husband was part owner in two businesses (“family business and technology business”) but submitted no valuation of business at trial — Hearing was chaotic — Husband failed to disclose documents until week before trial and in some cases during trial — Husband called witnesses with no prior notice

even after court ordered husband to produce witness list — Technology business had significant debt due to shareholder loan to other principal in business — Husband also had income tax debt — Hearing was held to determine equalization, access, child support and spousal support and requested deductions from proceeds of sale of matrimonial home, including \$30,000 be put in trust for son — Wife's net worth at time of separation was \$60,472.63 — Wife was to pay husband \$30,236.31 equalization — Husband's net family property value was \$0 but husband agreed to pay wife half of value of Canada Revenue Agency debt upon sale of matrimonial home — Both parties participated in fiscal mismanagement so there was no order for unequal division — Also, following sale of home, parties were to send \$30,000 to Ontario Children's Lawyer to credit of son.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Entitlement — Means of spouses
Husband was part owner in two businesses ("family business and technology business") but submitted no valuation of business at trial — Wife did not work steadily during marriage or since separation — Hearing was chaotic — Husband failed to disclose documents until week before trial and in some cases during trial — Husband called witnesses with no prior notice even after court ordered husband to produce witness list — Hearing was held to determine equalization, access, child support and spousal support — Court imputed income to both parties — Examining deductions and income tax return of husband was impossible because of late or non-existent disclosure — Given lack of clarity about deductions, admissions of other sources of money not reflected on tax return and considerable skills of husband, this was case where court should impute income exceeding that of tax return — Court found husband's imputed income to be \$50,000 for 2005 and \$70,000 for 2006, 2007 and 2008 — Wife must assume responsibility for failure to attend to financial health and court imputed growing income to give applicant time to earn money — Court imputed wife's income at \$6,000 for 2005, \$10,000 for 2006, \$14,000 for 2007 and for 2008 court imputed higher of line 150 or \$16,000 — Husband was to pay wife \$916 per month from December 1, 2004, \$1,250 per month from January 1, 2006, \$1,167 per month from January 1, 2007 and \$1,084 per month from January 1 2008 — Husband was credited with \$23,813 for past support payments.

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Retroactivity of order
Husband was part owner in two businesses ("family business and technology business") but submitted no valuation of business at trial — Wife did not work steadily during marriage or since separation — Hearing was chaotic — Husband failed to disclose documents until week before trial and in some cases during trial — Husband called witnesses with no prior notice even after court ordered husband to produce witness list — Hearing was held to determine equalization, access, child support and spousal support — Court imputed income to both parties — Examining deductions and income tax return of husband was impossible because of late or non-existent disclosure — Given lack of clarity about deductions, admissions of other sources of money not reflected on tax return and considerable skills of husband, this was case where court should impute income exceeding that of tax return — Court found husband's imputed income to be \$50,000 for 2005 and \$70,000 for 2006, 2007 and 2008 — Wife must assume responsibility for failure to attend to financial health and court imputed growing income to give applicant time to earn money — Court imputed wife's income at \$6,000 for 2005, \$10,000 for 2006, \$14,000 for 2007 and for 2008 court imputed higher of line 150 or \$16,000 — Husband was to pay wife \$916 per month from December 1, 2004, \$1,250 per month from January 1, 2006, \$1,167 per month from January 1, 2007 and \$1,084 per month from January 1 2008 — Husband was credited with \$23,813 for past support payments.

Family law --- Support — Child support under federal and provincial guidelines — Retroactive award
Father and mother had 14-year-old son — Father was part owner in two businesses ("family business and technology business") but submitted no valuation of business at trial — Mother did not work steadily during marriage or since separation — Father had paid combined child and spousal support of varying amounts in past for total of \$15,550 — Father also paid some bills and expenses, though what father claimed he paid differed from what mother claimed — Hearing was chaotic — Father failed to disclose documents until week before trial and in some cases during trial — Father called witnesses with no prior notice even after court ordered father to produce witness list — Hearing was held to determine equalization, access, child support and spousal support — Court imputed income to both parties — Examining deductions and income tax return of father was impossible because of late or non-existent disclosure — Given lack of clarity about deductions, admissions of other sources of money not reflected on tax return and considerable skills of father, this was case where court should impute income exceeding that of tax return — Court found father's imputed income to be \$50,000 for 2005 and \$70,000 for 2006, 2007 and 2008 — Mother must assume responsibility for failure to attend to financial health and court imputed growing income to give applicant time to earn money — Court imputed mother's income at \$6,000 for 2005, \$10,000 for 2006, \$14,000 for 2007 and for 2008 court imputed higher of line 150 or \$16,000 — Mother's evidence as to expenses father paid was accepted and \$23,813 was to be credited to arrears of support.

Family law --- Support — Child support under federal and provincial guidelines — Determination of spouse's annual income

— Imputed income

Father and mother were married for 18 years and had 14-year-old son — Son was child actor and earned fair bit of money — Parents used money over years and depleted son's bank account — Hearing was chaotic due to father's failure to disclose documents and witnesses in timely manner — Mother said son told her father abused alcohol, cocaine and marijuana during access times but father denied allegations and son did not have counsel speak on his behalf — Hearing was held to determine equalization, access, child support and spousal support — Custody of son was granted to mother — Given lack of clarity about deductions, admissions of other sources of money not reflected on tax return and considerable skills of father, this was case where court should impute income exceeding that of tax return — Court found father's imputed income to be \$50,000 for 2005 and \$70,000 for 2006, 2007 and 2008 — Mother must assume responsibility for failure to attend to financial health and court imputed growing income to give applicant time to earn money — Court imputed mother's income at \$6,000 for 2005, \$10,000 for 2006, \$14,000 for 2007 and for 2008 court imputed higher of line 150 or \$16,000.

Family law --- Custody and access — Access — Factors to be considered — Wishes of child

Father and mother had 14-year-old son — Hearing was chaotic due to father's failure to disclose documents and witnesses in timely manner — Mother said son told her father abused alcohol, cocaine and marijuana during access times but father denied allegations and son did not have counsel speak on his behalf — Hearing was held to determine equalization, access, child support and spousal support and mother asked that \$30,000 be set aside from proceeds of sale of house to repay son — Custody of son was granted to mother — Court could not know veracity of allegations without more evidence but could not force 14-year-old boy to participate in access beyond his willingness — Father was to have access to son in accordance with son's wishes and to enrol him in counselling, cost of which would be split equally between parents — Father to pay retroactive child support of \$429 per month from December 1, 2004, \$647 per month from January 1 2006 and continuing at same rate for prospective child support — Father was to pay his proportionate share of medical, dental, and drug costs — Father was to pay his proportionate share of post secondary education costs after child contributed \$1,000 in first year and \$2,000 per year thereafter — Commencing January 1, 2008, father was to pay extra \$100 per month for extra-curricular activities.

Table of Authorities

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3
s. 5(6)(b) — considered
s. 5(6)(d) — considered

HEARING to determine issues of child support, spousal support, access and equalization of family assets.

S. Rogers J.:

1 This trial lasted nine days. At issue were the following:

1. The style of access to the son of the parties
2. An equalization payment
3. Child support
4. Spousal support

2 Other issues had been settled some time ago. In particular, the applicant agreed that the matrimonial home, although registered in her name, should be considered as joint property.

Process of the Trial

3 Seldom does a trial unfold as this one did. The respondent was not ready for trial although it was he who wished to proceed.

4 The respondent had not valued his assets for the net family property statement. The respondent disclosed vast numbers of documents he wished to rely upon within the week before the trial. Many other documents arrived during the trial. It was abundantly evident throughout the testimony of many of the respondent's witnesses that he would have had no difficulty obtaining all the documents much earlier.

5 The respondent's counsel was calling witnesses he had not told the applicant's counsel about throughout the trial. On the fifth day the court finally made an order that the respondent's counsel must provide the lawyer for the applicant with a witness list by 1:30 p.m. that day. The list was provided but the counsel for the respondent even sought to deviate from the list and call yet another undisclosed witness the morning after the list had been provided.

6 The respondent was absent for the testimony of several witnesses as he was said to be not well. The court repeatedly asked the counsel for the respondent if the trial should be adjourned, but counsel insisted on proceeding.

7 Many indulgences were granted to the respondent as to the introduction of the documents that arrived late or during the trial. The trial had to stop several times to allow counsel for the applicant to review the new documents. On the sixth day of the trial a crucial witness for the respondent, the business partner of Mr. Scott, arrived for his testimony with three bankers' boxes full of documents. Counsel for the respondent did not know what was in the boxes. Needless to say, neither did the lawyer for the applicant. Apparently these were documents pertaining to the business owned by Mr. Scott and Mr. Williams. The court had to address the issue of the introduction of said documents in evidence as a matter of elementary fairness to the applicant. The respondent had been granted many indulgences. The court had repeatedly made it clear that the respondent was obligated to disclose all documents he wished to rely upon. During the testimony of the business partner, it was clear that the respondent had had access to these documents throughout the litigation and could have produced them well before trial. The court therefore did not permit the introduction of the documents in the boxes.

8 It is unfortunate that the case proceeded in this fashion as it made for a very chaotic trial.

Equalization

9 A number of items on the net family property statement were not in contention but the issues of the business interests of the husband, the subscription for the Toronto Maple Leafs' hockey tickets and some debts of the respondent husband were all litigated.

a) Value of J & C Scott Brothers Limited at Date of Marriage, August 1, 1986

10 This item on the net family property statement is the critical issue that, if accepted, takes the respondent to a negative worth and therefore to 50 on his net family property statement.

11 No valuation of this business at the date of marriage was produced by either party. The uncle of the respondent, David Pretty, testified. Mr. Pretty is a retired businessman. He has had a successful career in the business world. He has sat on many boards of significant corporations. Mr. Pretty had reviewed his file and done his homework. The applicant submits that an expert should have valued this company for this trial. She also asserts that the respondent should have produced a valuation done for the probate of the respondent's father's estate in 1980 and the valuation in 1988 when the respondent bought out his mother. The respondent and Mr. Pretty testified that they could not locate these valuations. The applicant says the absence of

a fresh valuation and the two valuations in 1980 and 1988 should cause the court to set the value of the business at the date of marriage at \$0.

12 The court finds the evidence of Mr. Pretty to be persuasive. He had informed himself. He had been involved in this matter to protect the interests of his sister, the mother of the respondent. He had reviewed the files from his time on the board and was clear on the matters contained therein and as to his recollection. What he did not know, he stated as such. It is clear that this business was an ongoing concern and had value. Mr. Pretty's evidence as to the structure of the business and its worth was trustworthy and clear.

13 Mr. Pretty testified that his nephew became a 40% owner of the company in the early eighties after his father died. Mr. Pretty stated that the company was valued at \$150,000 in 1980 for the probate of his brother-in-law. The respondent purchased the remaining 60% of the shares from his mother in 1988. The company was valued then for the purpose of this purchase at \$500,000. This value cannot be too far off as the respondent sold the business two years later to an arms-length purchaser for \$700,000. On a straight line appreciation the company would have been worth \$412,500 in 1986. The respondent owned 40% of the company in 1986 and therefore had ownership value of about \$165,000 in 1986. Therefore the court accepts the claim of the respondent that his shares in the company were worth \$155,696 at the date of marriage.

b) Value of Subscription to Toronto Maple Leaf Hockey Team Tickets at Date of Marriage

14 The onus of proof of the ownership of an asset and the worth thereof is on the claimant for a date of marriage deduction. The respondent was unable to prove he owned the rights to the subscription for the Maple Leaf tickets at the date of marriage and there shall therefore be no deduction for this item.

c) Value of Husband's Businesses on Date of Separation, November 22, 2004

15 The respondent husband provided no valuation of his businesses to the court. He and his partner, Paul Williams, owned an interesting little company at the time of separation called Sundown Interactive Communications Corporation. Mr. Scott realized years ago that there was a considerable need for policy manuals for companies and institutions and that the employees would need training in these policies. The need for such has grown over the years particularly as government legislation and regulation requires more careful policy making and the ensuing training. For years Mr. Scott created hard copy manuals and training packages under other business names. Now he and his partner create these as software packages. It is a clever marrying of information compiling with delivery by technology.

16 As no valuation was provided to the court by either party, the best evidence before the court is the balance sheet of the company as of July 31, 2004. The liabilities of the company exceeded the assets. The significant debt of the company is a shareholder loan from Paul Williams, the other principal in the business. There is no value on paper in the business for Mr. Scott. Indeed, the worth of the company is the ability of Mr. Scott as the "idea man" and Mr. Williams as the manager of the business. The respondent's share in the business shall be valued at nil.

17 There were other businesses the respondent had at the time of the separation. They were handbook producing operations but were really leftovers from ventures prior to Sundown. There is no evidence at the time of the valuation day of these businesses generating much revenue or of being on-going concerns. They had no significant value.

d) Value of Subscription to Toronto Maple Leaf Hockey Tickets at Date of Separation

18 The respondent produced no value for this subscription saving and except he called as a witness a friend who had been willing to pay the respondent the sum of \$5000 over and above the sum of \$35,000 that he would have to pay to the corporation that runs Maple Leaf Gardens to transfer the subscription. The prospective buyer had paid \$1800 annually to use the subscription so as to be able to purchase tickets. This was the only person who had been offered the subscription rights. This is no testing of the market. Nor does an asset that yields \$1800 a year seem likely to be worth only \$5000. However, without a valuation, the court can only speculate.

19 The court has insufficient evidence to value the subscription and shall therefore have to share the worth of the asset between the parties until they can agree upon the worth of the asset or have a proper valuation.

e) Debts of the Respondent

20 The respondent has claimed a debt to his accountant that has no proper documentation. The alleged bill is not even on letterhead.

21 The debt to David Pretty was explained by both the respondent and Mr. Pretty. This was a family advance of money with the usual lack of paper documentation. While the court accepts that the money was advanced, there has been no performance as to repayment or demand for such. This advance can only be reasonably seen as a gift from a generous relative.

22 The debt to C.T Printing is for a company of the respondent that had no value as of separation. The debt is that of the company that is accounted for on the net family property statement.

23 Jeff Usling and Paul Williams testified as to the money they lent to the respondent owing at the time of separation. These debts were reasonably explained in testimony and are accepted as \$1,800 and \$3,600 respectively.

f) Respondent's Net Worth

24 The respondent's net family property value is \$0 because of the date of marriage deduction for J & C Scott Brothers Limited.

g) Applicant's Net Family Property Statement

25 In his submissions the respondent accepted the applicant's net family property statement as she presented it. It was agreed that the applicant's net worth at the time of separation was \$60,472.63

26 The applicant owes the respondent an equalization payment of \$30,236.31.

h) Unequal Division

27 The applicant has pleaded an unequal division of the net family property. The basis for this claim was the depletion of assets and the reckless accumulation of debt by the respondent pursuant to section 5(6)(d)&(b) of the Family Law Act respectively.

28 The applicant alleges that the respondent recklessly depleted the proceeds from the family company J & C Scott Brothers Limited and the excess proceeds of sale from the first home. These are good examples of fiscal mismanagement. However, the applicant is not an innocent party in this financial mess. She knew money was tight. She knew the family was living above their means. She did not get a job. If she did not appreciate that they had to be living on their assets, then she should have. There is no evidence that the comfortable profits from the business and the home went anywhere but into maintaining the family. Both parties participated in this fiscal mismanagement.

29 With respect to the CCRA debt, the respondent has agreed to pay the applicant one half of his debt sent to CCRA at the time of the closing of the sale of the matrimonial home. It is not entered on his net family property statement for whatever the debt was on valuation day. Such an entry would be significant given the respondent's net worth is \$0 and cannot go below that. The respondent has therefore agreed to remedy any perceived unfairness about the CCRA debt.

Adjustments

30 As noted above, the parties have agreed that the respondent will pay the applicant one half of his income tax debt that was paid off the top of the proceeds of sale of the matrimonial home. He owes her the sum of \$39,537.75.

31 The applicant received a refund of real estate commission from the sale of the matrimonial home. She has entered it on her net family property statement and is accounting for it in that fashion. It therefore appears in the equalization payment and no adjustment is warranted.

32 The respondent claims repayment of half the monies spent on the improvements to the sale of the matrimonial home. Clearly improvements were necessary and were made as testified by Paul Williams and a real estate agent. The amount of \$10,000 is excessive. The applicant shall pay the respondent \$4,000 as her share of these costs.

Support

a) Husband's Annual Income

33 The amount of money earned by Mr. Scott from the time of separation was disputed. Unfortunately the late disclosure, and indeed, non disclosure of many items pertaining to the business made the examination of business and personal deductions very difficult. It does not help to have the financial partner in the business arrive more than half way through the trial and point to three bankers' boxes as having the information about deductions when such had not been provided at a proper time in the litigation.

34 The respondent admits there are expenses for his home and vehicle paid for by the company and they should be considered as income. The respondent also admits he did not claim the profit from Sundown.

35 The examining of the deductions for the company and the income tax return of the respondent were impossible because of the late or non existent disclosure. The deductions were considerable both for the Sundown statements and then again for the respondent's tax return. When a litigant does not show the court how the deductions for income tax purposes relate to income for support purposes, the court has considerable difficulty understanding the litigant's proper income for support purposes. An expert opinion of the respondent's income would have been helpful. Given the lack of clarity about the deductions, the admissions of other sources of money not reflected on the tax return and, most importantly, the considerable skill of the respondent, this is a case where the court shall impute income to fix an annual income exceeding line 150 of the income tax return.

36 The husband and his partner allege a deterioration in his income for 2007. There is no valid business reason for this and the court shall impute an income similar to 2006.

37 The applicant alleged income of the respondent was hidden by being diverted to other entities and persons. Certainly income was diverted to such entities as PS Handbooks in the past but that was to avoid seizure of the income by CCRA and it was with the acquiescence of the applicant. There was no evidence of this continuing. Nor was there any evidence that Mr. Scott was earning money through other companies and not declaring such to CCRA, the court or his current business partner, Mr. Williams.

38 The court finds the respondent's imputed income to be:

- a. for the year 2005 - \$50,000.
- b. for the year 2006 - \$70,000.
- c. for the years 2007 and 2008 - \$70,000

b) Imputation of Income To the Applicant Wife

39 The applicant has not worked steadily since the separation. Nor did she work much during the marriage. The applicant is fifty two years old and without a very useful education or a career. Her resume will be sparse, to say the least.

40 The applicant must assume responsibility for this lack of tending to her own financial health. She testified to considerable financial difficulties while the parties were married. She picked up odd jobs to help on occasions. She, however, did not plan to gain financial independence even though it was clear she could not count on her husband to provide for the family. She had plenty of warning during the marriage of the need for her to work, but she did not prepare herself for the job market. Sadly, the applicant and the respondent lived on their assets yielded by the sale of J & C Scott Brothers Limited and their home in Markham without regard for the fact that they each needed to make a significant income to maintain their lifestyle. Now the applicant finds herself with no career prospects, a child and an ex husband who does not generate much money.

41 The applicant must now enter the work force if she hopes to provide for herself in her old age, let alone contribute to the care of her son and herself now. The court shall impute an income that grows over time to give the applicant time to get down to the work of earning money.

42 In his calculation of the wife's income for 2005 income the husband included a child tax credit that had accumulated when old tax returns were filed. This amount is on her net family property statement. It does not reflect 2005 income and is properly an asset, not 2005 income. This same double accounting is repeated when the respondent seeks to have \$22,500 from a wrongful dismissal action included in 2006 income for the wife when it is already on her net family property statement.

43 The court shall impute income to the applicant wife as follows:

- a. for the year 2005 - \$6,000
- b. for the year 2006 - \$10,000
- c. for the year 2007 - \$14,000
- d. for the year 2008 and thereafter - \$16,000 or such money as is on line 150 whichever is the higher.

c. Monies Paid by the Respondent as Support

44 The applicant recalls payments for combined child and spousal support in the amount of:

- a. \$400 per month from January 2005 to April 2005 for a total of 1,600,
- b. \$800 per month from May 2005 to July 2005 for a total of \$2,400,
- c. \$800 per month from September 2005 to May 2006 for a total of \$6,400,
- d. \$500 per month from June 2006 to December 2006 for a total of \$3,500,
- e. \$550 per month from January 2007 to March 2007 for a total of \$1,650,

Total \$ 15,550.

45 The respondent has itemized payments for support in the form of cash plus "other payment" far in excess of what the applicant claims. Included in the monies as calculated by the respondent are such items as "cash for spring break" "Jake's

birthday dinner party". This is not child support. Support is a periodic payment paid to the recipient. There are some items that would be section seven expenses but will not be considered as such given there was no agreement on this issue. Given the considerable overstating and odd categorization of monies by the respondent, the court accepts the applicant's evidence as to payments made.

46 The respondent made payments on behalf of the applicant that should be considered spousal support. The court shall consider the payment by the respondent of the applicant's auto insurance and phone bills as spousal support. The only information on this is for 2005 where the payments for these items total \$1,453.

47 The respondent also paid equity payments for the home that were the joint responsibilities of the parties. These were in 2005. He is responsible for the utility costs as he was the person using the services. One half of the mortgage payments and joint line of credit is \$6,810. This was paid by the respondent on behalf of the applicant and shall be considered as spousal support.

48 The court calculates the total of support paid as:

- a. periodic payments made to March 2007 - \$15,550,
- b. payments made in kind for the applicant for the insurance and the phone - \$1,453,
- c. payments made of behalf of the applicant's equity responsibilities for the home - \$6,810

Total \$23,813.

49 This shall be credited to arrears of support.

Child's issues

a) Access

50 Jake is fourteen years old. Unfortunately he did not have counsel to speak to the court on his behalf. The court is unclear as to why the Office of the Children's Lawyer did not participate in the access issue. The court is left with only the evidence of the parties as to the wellbeing of Jake on access.

51 The applicant mother believes that the father is using and possibly abusing alcohol, marijuana and cocaine while caring for Jake. This information she says comes from Jake. The respondent father denies the allegations.

52 The court cannot know the veracity of the allegations. Even if Jake did say such things to his mother and they are untrue, the court cannot know why he would do so. The respondent had some suggestions as to the reason why the boy is saying these things, but all this is speculation. The court is at a loss as to what is happening to the father/son relationship.

53 The court cannot force a fourteen year old to participate in access beyond his willingness. That would be very harmful to the relationship between the father and child let alone cause potential behavioural problems in the child. All this court can do is build support systems into Jake's life and give him the help he needs to negotiate the difficulties he is experiencing. If Jake has significant problems, it will take a combined effort of both parents to pull him through. Both parents should be prepared to participate in programs to assist the boy.

b) Jake's Money

54 Jake was a child actor for much of his early years. He earned a fair bit of money although the quantum is unknown to

this court. The Property Rights Division of the Office of the Children's Lawyer is looking into Jake's earnings to ascertain how much the child made over the years.

55 The parties quite cavalierly used Jake's money over the years and gravely depleted his bank account. The applicant asks that \$30,000 be set aside from the proceeds of sale of the matrimonial home to repay Jake. The respondent does not wish to do so and wishes the accounting to proceed. He feels the applicant is holding up the accounting. The respondent offers no reason why he does not wish to protect Jake's money.

56 Whether the applicant is holding up the accounting or not, it makes little sense to have a calculation of the parties' debt to Jake without a corresponding safe-keeping of some of the sale proceeds to pay the child. This is an admitted but unquantified debt of the parents to the child. Given the woeful fiscal management of the parties and their stated position that they each of them in turn cannot earn much money, the court must act protectively to save Jake his money.

57 It is ordered as a final order:

1. Custody of the child Jake shall be to the applicant mother.
2. The respondent father shall have access to the child Jake in accordance with Jake's wishes. The applicant shall enroll Jake in counselling to deal with the issues of his access to his father. The counselling shall be of modest cost. The parties shall each pay one half of the cost of the counselling. If the respondent does not pay his one half share within 10 days of receipt of the bill, the applicant may terminate the counselling.
3. The respondent shall pay child support to the applicant as follows:
 - a. \$429 per month as guideline support for the one child based on an imputed annual income of \$50,000 from 2005 commencing December 1, 2004,
 - b. \$647 per month as guideline support for one child based on an imputed annual income from 2006 of \$70,000 commencing January 1, 2006,
 - c. his proportionate share of medical, dental and drug costs,
 - d. his proportionate share of post secondary educational costs after the child has contributed at least \$1000 in his first year and \$2000 each year thereafter, and
 - e. \$100 per month for extra curricular activities commencing January 1, 2008.
4. a. The respondent shall sell the right to use the subscription to the Toronto Maple Leaf Hockey tickets on an annual basis. The sale price shall not be less than \$1900. The respondent shall rebate one half of the sale price with proof of the sale in the form of a bill of sale to the applicant. The respondent is to send the applicant her one half of the sale price within 10 days of receipt.
 - b. If either party wishes to sell the subscription rights, the parties shall consult to determine if they can agree on a sale price. If the parties cannot agree, either party may apply to court to dispense with the consent of the other party but shall file with the application a written valuation by a certified valuator who has expertise in the valuation of such an asset. Upon the sale the proceeds shall be split equally between the parties after the payment of the valuator has been made.
 - c. Upon the child Jake turning 30 or by way of testamentary disposition, the respondent may transfer the right to the subscription to the child Jake without the consent of the applicant if the right to the subscription has not been sold by agreement of the parties or court order.
5. The applicant shall pay to the respondent the sum of \$30,236.31 as an equalization payment as in paragraph 12 below.
6. The respondent husband shall pay the applicant wife spousal support as follows:

- a. \$916 per month, imputing the applicant's income at \$6000 for 2005 and imputing the respondent's income at \$50,000 for 2005 commencing December 1, 2004,
 - b. \$1250 per month imputing the applicant's income at \$10,000 for 2006 and imputing the respondent's income at \$70,000 for 2006 commencing January 1, 2006,
 - c. \$1167 per month imputing the applicant's income at \$14,000 for 2007 and imputing the respondent's income at \$70,000 for 2007 commencing January 1, 2007, and
 - d. \$1084 per month imputing the applicant's income at \$16,000 for 2008 and imputing the respondent's income at \$70,000 for 2008 commencing January 1, 2008.
7. The respondent shall be credited with \$23,813 as support payment from the date of separation to March 1, 2007.
8. If at any time the respondent's income at line 150 of his income tax return exceeds \$70,000, that shall be deemed a material change of circumstance.
9. If the respondent wishes to reopen his tax returns for 2005 and 2006, he shall prepare said returns and file by February 15, 2008. He shall provide the applicant with a copy of each new return by February 20, 2008. The applicant will then have to refile her returns for said years. The accounting costs of said returns to the applicant and the taxes owing by her shall be paid out of the respondent's funds held in trust from the sale of the matrimonial home.
10. The parties shall exchange income tax returns by June 15th of each year commencing June 15, 2008 and Notices of Assessment within 10 days of receipt of the same. The party seeking a change in child or spousal support shall send the Change information form and the Consent to the other party reflecting a change effective July 1st of that year.
11. From the proceeds of sale of the matrimonial home Thomas McPherson is ordered as follows:
- a. to send the sum of \$30,000 to the Ontario Children's Lawyer to the credit of Jake Scott,
 - b. to send to the applicant's lawyer in trust the balance of the funds.
12. The applicant's lawyer shall divide the remaining funds into 2 equal shares, and shall disburse the funds as follows:
- a. to the applicant from the respondent's share the sum of \$39,537.75 as one half of the respondent's income tax debt paid to the Canada Revenue Agency at the time of closing of the sale of the matrimonial home,
 - b. to the Director of the Family Responsibility Office from the respondent's share the sum of \$30,000 to be credited to child and spousal support arrears or as security for future payments of child and spousal support,
 - c. to the respondent from the applicant's account the sum of \$4,000 as repayment for supplies to improve the matrimonial home prior to sale,
 - d. to hold in trust in the 2 separate accounts all remaining funds including the equalization payment owed to the respondent pending the cost order and the potential refilling of tax returns by the respondent as in paragraph 10 above, and
 - e. after April 30, 2008 and after an award for costs, whichever is the later, the lawyer for the applicant shall pay any cost award out of a party's share as ordered in the cost order, shall pay to the applicant any accountant's fees and taxes owing as in paragraph 10 above, shall pay to the respondent his equalization payment and shall then disburse the funds remaining in each party's account to the party.

13. A support deduction order shall issue.

14. Costs may be claimed by way of written submissions. The submissions are to be directed to this judicial officer on 20 days notice to the other party but shall be no later than February 15, 2008.

Order accordingly.