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Lauderdale v. Lauderdale

JULIE DIANNE LAUDERDALE v. WILLIAM MARK LAUDERDALE

WILLIAM MARK LAUDERDALE v. JULIE DIANNE LAUDERDALE

Alberta Court of Queen's Bench

LoVecchio J.

Judgment: January 23, 1996
Docket: Doc. Calgary 4801-84100, 9501-06828, 9501-07323

Counsel: *Diann P. **Castle***, for Julie Lauderdale.

David P. Vallance, for William Lauderdale.

Subject: Family; Property

Family Law --- Family property on marriage breakdown — Matrimonial home — Occupation rent.

Family Law --- Support — Spousal support under Divorce Act — Lump sum award — Factors to be considered — Economic disadvantage of marriage.

Family Law --- Support — Child support — Duty to contribute — Means of parents.

Matrimonial property — Assets subject to division — Gifts and inheritances — Upon separation, parties disagreeing on value of husband's inheritance exemption — Husband having used portion to purchase spousal RRSP — Husband entitled to exemption of 75 per cent of value plus attributed value of contribution to wife's RRSP.

Matrimonial property — Valuation — Particular assets — Professional practices and degrees — Upon separation, parties disagreeing on value of husband's psychiatry practice — Most recent set of financial statements used even though six months old at time of trial — Statements being reliable and no evidence of significant events occurring since suggesting statements not reflecting appropriate value of practice.

Matrimonial property — Occupation rent — Parties separating and wife's common law husband moving into matrimonial home — Husband applying for occupation rent — Application dismissed — Common law husband making contributions toward cost of food and house as well as to welfare of wife and children through purchase of furniture and fixtures for house and car for wife.

Children — Maintenance — Factors governing award — Apportionment of child-care costs — Mother being primary care-giver prior to separation and continuing to do so with common law spouse — Under Levesque, mother to be assigned share of child-care expenses — Attribution of income accomplishing same thing — Under circumstances, rather than attributing portion of common law spouse's income, more appropriate to attribute what mother likely to earn if she were to re-enter work force.

Children — Maintenance — Factors governing award — Ability to pay — Mother being primary care-giver prior to separation and continuing to do so with common law spouse — Under Levesque, mother to be assigned share of child-care expenses — Attribution of income accomplishing same thing — Under circumstances, rather than attributing portion of common law spouse's income, more appropriate to attribute what mother likely to earn if she were to re-enter work force.

Children — Maintenance — Quantum — Appropriate value for child-care expenses being $3,600 — Father ordered to pay $4,773.49 to yield mother $3,100 after tax — Difference wife receiving prior to final order reflected in income tax differences.

Maintenance — Factors governing award — Economic disadvantage — Wife clearly being disadvantaged in future earning capacity because of decision to interrupt career and stay home and be mother — Wife now disadvantaged in ability to generate income — Fact wife entered into new relationship not changing fact she was disadvantaged by marriage breakdown but being relevant factor in including lump sum award for spousal support.

Maintenance — Factors governing award — Assumption of new obligations — Wife clearly being disadvantaged in future earning capacity because of decision to interrupt career and stay home and be mother — Wife now disadvantaged in ability to generate income — Fact wife entered into new relationship not changing fact she was disadvantaged by marriage breakdown but being relevant factor in including lump sum award for spousal support.

The parties were married in 1976 and separated in 1993. At the time of the marriage, the husband had already completed medical school and the wife was a student. She worked as a secretary while the husband finished his internship and then, when the couple relocated to Toronto, she continued to work as the husband completed his psychiatric residency. The wife stayed home when the first of the couple's four children was born and she did not work outside the home during the remainder of the 16 1/2-year marriage except as an employee of the husband's professional corporation and casually as a music teacher in the school system. The wife had been attributed a salary from the professional corporation in the amount of $34,500 for the year prior to the separation, as well as $4,049 in respect of a housing loan. The wife was the primary caregiver to the children throughout the marriage and continued as such after the separation. She had day-to-day care and control of the children while the couple shared joint custody. Two of the children suffered from psychiatric problems for which they were receiving treatment. Since the separation, the wife and the children had continued to reside in the matrimonial home. Since the end of 1993, the wife's common law husband resided with them, bringing his two children into the home for half of the time. The common law husband was also a physician and had been contributing $1,500 per month to the household expenses. The husband was also living in a common law relationship. His gross income was $110,000 per year. The wife had obtained interim child support of $3,200 per month and interim spousal support of $1,750 per month and the husband was not in arrears of any of the payments. The couple had essentially agreed on the value of all of their assets and liabilities, with the exception of a family sports club membership, the husband's professional corporation and the husband's inheritance exemption, $5,000 of which he had used to purchase a spousal RRSP. An equal sharing of the matrimonial assets, each party keeping what he

or she had in his or her possession already, would require the wife to make an equalization payment to the husband in the amount of $74,162.86. The wife applied for spousal support, child support and a lump sum for retroactive child support. The husband applied for occupation rent in respect of the wife and her common law husband.

Held:

The wife's application was granted; the husband's application was dismissed.

The inheritance exemption to which the husband was entitled in the property accounting was 75 per cent of the value of the inheritance, being $20,718.90, plus the sum of $3,000, being the attributed value of the RRSP contribution made to the wife's RRSP, for a total inheritance exemption of $18,539.17. In light of the fact that the children of the marriage continued to use the family sports club membership, it was clear that it had some value, even though the wife was no longer the designated spouse. The membership was therefore be valued at its cost of $4,500. In determining the value of the husband's professional corporation, it was appropriate to use the most recent set of financial statements of the corporation, even though they were six months old by the time of trial. Not only were those statements reliable but there was no evidence of any significant events that had occurred in the interim that would suggest that the statements were not reflective of an appropriate value of the corporation's assets for the purpose of the matrimonial property division. Statements older than that would not give effect to a full year of practice. The proper place to value the salary paid to the wife was in assessing the husband's earning potential, not in valuing the corporation. In all the circumstances, occupation rent was inappropriate. Prior to the wife's common law husband occupying the home, the husband had been required to make the mortgage payments for the home. He unilaterally stopped making those payments, ceased paying the wife a salary from the corporation and commenced paying $2,500 per month in support of the family. The common law husband, meanwhile, had been making a payment of $1,500 per month toward the cost of the house and food since he had begun living there. He had also made significant contributions to the welfare of the wife's children through the purchase of furniture and fixtures for the home and in assisting in the purchase of a new vehicle for the wife.

The husband's *Law of Property Act* (Alta.) action was commenced a year after the interim order was made and it could not be said that anything was different at that time from when the interim order was granted or that the common law husband had been living for free in the home. In calculating the couple's combined income, it was inappropriate to factor in the sale of any matrimonial assets to enhance income, in part because the assets were the object of the matrimonial property action and were being divided equally between the parties. The liquid investments totalled less than one per cent of the matrimonial property and the income was included. The sale of the matrimonial home would not be prudent under the circumstances, given the effect it would have on the children.

The wife's common law relationship was a special circumstance that was to be considered, because absent that relationship the wife would have been obliged to re-enter the workforce in order to discharge her obligation to the children, which was not fully discharged by her day-to-day care and nurturing of them. While the *Levesque* case suggested that the wife be assigned a share of the child-care expenses, attributing income would accomplish the same thing. Under the circumstances, rather than attributing a portion of her common law spouse's income, it would be more appropriate to attribute what the wife would likely earn if she were to re-enter the workforce. She clearly had a lower earning capacity because of the choice she had made to remain at home with the children and therefore her notional income was set at $20,000 per year. An appropriate value for the child-care expenses was $3,600 per month. A child support payment of $4,773.49 per month would yield $3,100 to the wife

after tax. As there was no evidence that the husband's income would improve with the cost of living, there was no cost of living adjustment to the support obligation. There was a considerable difference in respect of the amount the wife was receiving under the interim order and the after tax amount she would receive under the final order. The difference, however, was largely attributable to income tax differences. While the wife had been expected to assume the larger share of the burden of bringing up the children, that was partly a consequence of the divorce itself and it was inappropriate to adjust the support obligation retroactively. There was no question, however, that the wife herself had been obliged to do without in order to provide for the children and that factor was taken into account in respect of spousal support. The interim order in respect of spousal support was not deficient in relation to family expenses attributable to her. The wife was clearly disadvantaged in her future earning capacity because of her decision to interrupt her career and become a stay-at-home mother. While she was somewhat compensated for that during the marriage through a comfortable lifestyle, the wife was currently disadvantaged in her ability to generate income. The fact that she had entered into a new relationship did not change the fact that she was disadvantaged by the marriage breakdown but was a relevant factor in making a lump sum award for spousal support. In order to enter the workforce, the wife would require some retraining, which would require full-time attendance at an educational institution, with the attendant costs of day care, tuition and living expenses. Such a program could take three years and it was likely that even after she graduated it would be at least one to two years before she began to establish herself. A payment of $20,000 a year for four and a half years would finance such a venture, to which was added the sum of $30,000 as an additional amount which should have been available for interim child support during the previous three years because of the significant tax burden the wife absorbed on the amounts received and the fact that the actual payment was slightly lower. That payment was reduced to $95,000 to take into account a notional interest factor for the fact that the payment was to be received as a lump sum, tax free payment. As the wife owed the husband $74,162.86 from the matrimonial property distribution, the spousal support obligation would therefore be discharged by the cancellation of that payment and by the payment by the husband to the wife of $21,000.

Cases considered:

Levesque v. Levesque, 20 Alta. L.R. (3d) 429, 4 R.F.L. (4th) 375, [1994] 8 W.W.R. 589, 155 A.R. 26, 73 W.A.C. 26, 116 D.L.R. (4th) 314 (C.A.) [additional reasons at (1995), 165 A.R. 319, 89 W.A.C. 319 (C.A.)] — *followed*

MacMinn v. MacMinn (1995), 17 R.F.L. (4th) 88, 174 A.R. 261, 102 W.A.C. 261 (C.A.) — *followed*

Mazurenko v. Mazurenko (1981), 23 R.F.L. (2d) 113, 15 Alta. L.R. (2d) 357, 124 D.L.R. (3d) 406, 30 A.R. 34 (C.A.) [leave to appeal to S.C.C. refused (1981), 32 A.R. 612, 39 N.R. 539] — *considered*

McColl v. McColl (1995), 13 R.F.L. (4th) 449 (Ont. Gen. Div.) — *applied*

Moge v. Moge, [1993] 1 W.W.R. 481, 43 R.F.L. (3d) 345, 145 N.R. 1, 81 Man. R. (2d) 161, 30 W.A.C. 161, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456, R.D.F. 168 (headnote only) — *followed*

Shuparski v. Mair, [1995] N.W.T.R. 4 (S.C.) — *applied*

Snelgrove-Fowler v. Fowler (1993), 46 R.F.L. (3d) 353, 138 A.R. 192, 13 Alta. L.R. (3d) 432 (Q.B.) — *applied*

Willick v. Willick, 6 R.F.L. (4th) 161, 173 N.R. 321, 125 Sask. R. 81, 81 W.A.C. 81, 119 D.L.R. (4th) 405,

[1994] 3 S.C.R. 670, [1994] R.D.F. 617 (headnote only) — *considered*

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) —

s. 15

Law of Property Act, R.S.A. 1980, c. L-8.

Matrimonial Property Act, R.S.A. 1980, c. M-9.

Application by wife for spousal support, child support and retroactice lump sum child support; application by husband for occupation rent.

***LoVecchio J.*:**

1 Julie Dianne Lauderdale ("Mrs. Lauderdale"), who is respectively, the Petitioner in a Divorce Action (No. 4801-84100), the Plaintiff in a Matrimonial Property Action (No. 9501-06828) and the Respondent in a Law of Property Action (No. 95010-7323), and William Mark Lauderdale ("Dr. Lauderdale"), who is respectively, the Respondent, the Defendant and the Applicant in such actions, were married on June 5, 1976 in Calgary, Alberta. After 16 1/2 years of marriage, they separated on January 2, 1993. Mrs. Lauderdale petitioned for their divorce pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) by commencing the Divorce Action on February 1, 1994 and she sought the division of their matrimonial property pursuant to the *Matrimonial Property Act*, R.S.A. 1980, c. M-9 by commencing the Matrimonial Property Action on May 10, 1995. Dr. Lauderdale filed an Originating Notice of Motion (the "Law of Property Action") on May 16,1995 seeking to terminate his joint tenancy with Mrs. Lauderdale of the matrimonial home and claiming an accounting and direction respecting the use and occupation of such property by Mrs. Lauderdale and one Michael Ernest Trew ("Dr. Trew") pursuant to the *Law of Property Act*, R.S.A. 1980, c. L-8.

I — Background

2 Under the Divorce Action (which was amended once), Mrs. Lauderdale sought joint custody of their four children namely, Kyle Skeet Lauderdale, born January 9, 1982, Evan Robert Lauderdale, born January 21, 1984 and the twins Glen William Lauderdale and Dean Thompson Lauderdale, born July 11, 1988 with reasonable access to Dr. Lauderdale, support for the children in the amount of $1,000.00 per month per child, support for herself in such amount as the Court deemed appropriate and costs. Dr. Lauderdale filed a Counter Petition for Divorce which did not really raise any new issues but rather simply suggested a support amount of $600.00 per month per child and stated that Mrs. Lauderdale was capable of being self sufficient.

3 At trial, the amount actually claimed on a per child basis having regard for the budgets submitted and the argument made was effectively increased to approximately $1,500.00 gross per month per child ($1,600.00 using the "litmus" test in the case of *Levesque* which is referred to below) and it was asked that this amount be made retroactive to the date of separation. The effect of such retroactivity is to seek additional compensation of approximately $96,000.00 net. The spousal support claim was quantified in the alternative. In one scenario the sum of $1,500.00 per month for a period of ten years was sought and in the other a lump sum payment of $140,000.00 was sought. In the second scenario, the actual amount claimed was $180,000.00 with Dr. Lauder-

dale receiving credit for the amount of $40,000.00 which it was acknowledged is the amount which Mrs. Lauderdale has received from the date of separation to the date of trial. It is necessary in confirming this acknowledgement to accept the allocation made by Counsel for Mrs. Lauderdale in her argument of certain funds received by Mrs. Lauderdale during 1993 and early 1994 between Mrs. Lauderdale and the four boys. It seems to me, we should also consider the salary she received from Mark Lauderdale Professional Corporation in 1993 when they were separated as a payment in lieu of spousal support. I am neither agreeing nor disagreeing with her submission in this regard respecting how such funds should be allocated as between child support and spousal support during this period but do acknowledge that to the extent a retroactive adjustment in either spousal support or child support is maintained it will be necessary for me to give an appropriate credit for the amounts paid and the salary received. At this point, I simple wish to set forth what amounts regardless of their source have been paid by Dr. Lauderdale to date for the interim support of Mrs. Lauderdale and their children.

4 During the calendar year 1993, Mrs. Lauderdale received from Mark Lauderdale Professional Corporation the sum of $38,549.00. This amount is in fact comprised of two separate amounts namely an attribution of income in the amount of $4,049.00 in respect of a housing loan (and there will be more about the housing loan later) and a salary of $34,500.00. (See Exhibit — 3 which is the 1993 T1 General of Mrs. Lauderdale) In addition during 1993, Dr. Lauderdale paid on account of the mortgage and taxes ("PIT") for the matrimonial home 11 blended payments in the amount of $1,344.00 each in respect of PIT. For the period December 1, 1993 to March 31, 1994 inclusive, which is a four month period he paid $2,500.00 per month in respect of spousal support and child support with no separation being made in either his or Mrs. Lauderdale's mind as to how that might be allocated. Ms. Castle allocated this amount 1/2 to Mrs. Lauderdale and 1/2 to the children. It was this allocation that I was referring to above. The same is also true in respect of the amount received during 1993 from Mark Lauderdale Professional Corporation and the payments on account of PIT. In my view, they should be treated as in lieu of spousal and child support and allocated. I do not feel the same is true for the housing loan attribution.

5 Commencing with the month of April 1994, Dr. Lauderdale commenced paying spousal support and child support pursuant to the Order of Mr. Justice Forsyth of this Court. Dr. Lauderdale was ordered to pay the sum of $3,200.00 per month in respect of child support and the sum of $1,750.00 per month in respect of spousal support. These were received by Mrs. Lauderdale as before tax amounts and thus the net amount available to her to meet expenses after tax was lower by a significant amount. It is appropriate to note that, as at the date of the trial, there were no arrears in respect of these amounts and that pending my reserve on spousal support and child support, such Order continues in full force and effect. While the parties have a legitimate difference of opinion on the quantum which should have been paid in the past and what should be paid in the future, one cannot suggest that they have not discharged their joint interim responsibilities in a fashion which is a credit to both of them.

6 Under the Matrimonial Property Action, Mrs. Lauderdale sought an equal division of their matrimonial property subject to the recognition of any appropriate exemptions. In the defence to such action, Dr. Lauderdale simply sought the right to be heard.

7 Under the Law of Property Action, Dr. Lauderdale sought credit for an occupation rent of approximately $2,050.00 per month. At trial, Mrs. Lauderdale simply asked that the Law of Property application be dismissed.

8 All three actions were joined and a trial of all issues was held before me commencing on December 4, 1995. The trial required 4 days. At the conclusion of the trial, I granted the divorce requested and waived the ap-

peal period in respect of the divorce only. The custody arrangements which had been agreed between the parties are not at issue in any respect. Such custody arrangements were the joint custody of the fours boys to Dr. and Mrs. Lauderdale with Mrs. Lauderdale being the primary care giver and Dr. Lauderdale having reasonable access. However, I did reserve my decision on spousal support, child support, the division of the matrimonial property and the occupation rent.

II — The Facts

9 There were really no critical factual issues which were in dispute other than the value of Mark Lauderdale Professional Corporation and the appropriateness of the budgets of the parties. The parties presented themselves extremely well. They are well educated sophisticated individuals who unfortunately will not be pursuing their lives together but rather in each case with another individual. In Mrs. Lauderdale's case, she is engaged to Dr. Trew an individual with whom she is living in a common law relationship and who gave evidence at trial and I sincerely hope their life together is rewarding for both of them. In Dr. Lauderdale's case, while he is not engaged to Janice Kowal, they live in a common law relationship and she also gave evidence at trial. In their case, I likewise hope their life together is rewarding for both of them. In the middle of this are the four boys of the Lauderdale marriage and while they are not directly an issue there are also two children from a previous marriage of Dr. Trew who spend half of their time with Dr. Trew and Mrs. Lauderdale in the matrimonial home. Obviously all is not perfect with the children but we are dealing with individuals who are aware of the problems and for the most part have tried to keep their differences and the children's best interest separate. That money and access are not part of the same equation is itself evidence that such is the case. Also, there was no suggestion at trial by either Mrs. Lauderdale or Dr. Lauderdale in their evidence that the other was not a good parent and concerned about the well being of the children. There is a small amount of strain with the new relationships and one can only hope that, with individuals of this level of education and sophistication that once the necessary healing has occurred, the recrimination will dissipate.

10 There are however a few facts which emerged from the trial which should be set forth as they have a significant impact on some of the rulings that I must make in this case. Dr. Lauderdale is currently a practising child psychiatrist. He had completed Medical School prior to their marriage. Mrs. Lauderdale on the other hand had not completed post secondary education prior to their marriage. She was in fact a student at the University of Calgary having just completed first year prior to their marriage in June of 1976. While it had been her intent to return to University, this was abandoned and she worked as a secretary while Dr. Lauderdale completed his internship. After the completion of his Internship, Dr. Lauderdale accepted a residency in Child Psychiatry in Toronto, Ontario where they relocated for a number of years. Mrs. Lauderdale explored continuing her university career towards a Bachelor of Arts degree but, as her credits from The University of Calgary were not accepted by the University of Toronto, that was abandoned and she continued to work to supplement the income of the parties until their return to Calgary. After the birth of their first child, Mrs. Lauderdale did not work outside the home except for her involvement as an employee of Mark Lauderdale Professional Corporation and for some casual music teaching in the school system. She lost her position with the school system when it became clear she would require more training if she were to continue. There is no question that Dr. and Mrs. Lauderdale made a joint decision that he would be the primary income provider and that she would be the primary caregiver for the children. Their relationship continued in a uninterrupted manner until their separation after 16 1/2 years of marriage. Mrs. Lauderdale is very involved with the various activities of the four boys two of whom could be classified as children with special needs. Dr. and Mrs. Lauderdale are acutely aware of the needs of their children and they are receiving professional help for Kyle's obsessive compulsive disorder and for Glen's difficulties with learning and bed wetting. The whole family has enjoyed a comfortable lifestyle consistent with their col-

lective income and educational levels. It must be acknowledged that Mrs. Lauderdale has assisted her husband's professional career through her role as primary care giver for their children and by providing the necessary stability in the home so as to enable Dr. Lauderdale to pursue his professional career. While some would refer to this as a traditional marriage, I do not personally like that categorization. We simply have two individuals who made a series of choices about how they would lead their collective lives and the particular roles each would play. Others might make different choices. That does not mean one set of choices leads to a traditional marriage and the other leads to something else to which we should give another handle. Parties simply make different choices and govern their lives accordingly. There was no suggestion of any coercion on either side quite to the contrary they were quite comfortable intellectually and economically with the choices they made. Mrs. Lauderdale did attempt at one point to establish a jewellery business but that effort was unsuccessful. She in currently employed on a part time basis as a lunch room assistant at the local school. That being all said they are now both faced with new choices. Dr. Lauderdale has found a new relationship and will be pursuing his career in an uninterrupted fashion. Mrs. Lauderdale will also be continuing her role as a mother but that is not due to anything emanating from the marriage but rather from a choice she made in her new relationship with Dr. Trew. I do not wish to categorize her as a victim of her marriage but the cold hard reality is today that absent support from Dr. Lauderdale or support from Dr. Trew she could not sustain herself in the fashion to which she was previously accustomed without significant retraining and time to reenter the workforce.

III — The Matrimonial Property Action

11 As previously stated, the parties separated on January 2, 1993 and this matter did not come to trial until December 4, 1995. While certain financial events have occurred since the separation, there are no real issues of valuation, other than the value of Mark Lauderdale Professional Corporation, the value of the Winter Club Membership and the value of the inheritance exemption, as the parties have agreed on a value for all items of significance. In this regard, reference should be made to Schedule "A" to this judgment which is a worksheet I prepared in Microsoft Excel Version 5.0 setting forth the equalization payment I have found it necessary for Mrs. Lauderdale to make to Dr. Lauderdale in order to give effect to the wish of the parties to maintain possession of the assets currently in their possession. This payment of $74,162.86 is predicated on the following: (1) the agreed values of the parties to all of the significant assets and liabilities of the marriage and their declared wish to maintain possession of the assets currently in their possession and in furtherance of such possession to have Mrs. Lauderdale be responsible for the TD Mortgage on the Matrimonial Home and the Canada Trust — Line of Credit which is also associated with the Matrimonial Home and to have Dr. Lauderdale assume the liability which will emerge when his Professional Corporation carries out the plan (the "Housing Loan Plan") proposed by his advisors to discharge the loan (the "Housing Loan") to Mrs. Lauderdale incurred in connection with the acquisition of the Matrimonial Home in a manner which will not have a cash cost to her (See Exhibit — 29), (2) for the reasons set forth below, my finding that the value of Mark Lauderdale Professional Corporation is $33,452.00, the value of the Winter Club Membership is $4,500.00 and the value of the inheritance exemption for Dr. Lauderdale is $18,539.17, (3) that the appropriate division of the matrimonial property is an equal division and (4) my belief that the Lauderdale children would be best served by their remaining in the Matrimonial Home.

12 As stated in the Notes to Schedule "A" to this Judgement, all assets and liabilities were essentially agreed except for the value of the Winter Club Membership, the value of Mark Lauderdale Professional Corporation and the inheritance exemption.

The Inheritance Exemption

13 I used the figures which emerged from Dr. Lauderdale's bank records (Exhibit — 1, Tab 14). Ms. Castle used the same number namely $20,718.90. On the worksheet of Mr. Vallance, he used $20,538.00 as his exemption number. The figure Mr. Vallance used was in fact 75% of $20,717.90 plus $5,000.00 which is a combined number for the improvements plus the RRSP contribution. When his figure is adjusted as I have done in Note 6 of Schedule "A", it will emerge we all used the same number for the improvements. Neither of their work sheets referred to the RRSP amount as a separate line item but it was acknowledged at trial that a $5,000.00 contribution was made to Mrs. Lauderdale's RRSP from Dr. Lauderdale's inheritance and that a discount or tax factor had to be applied to such contribution. I simply chose the same one they had agreed upon for the other RRSP amounts.

The Winter Club Membership

14 In determining the value of the Winter Club Membership, I must acknowledge I used cost as I could not think of any other appropriate way to value the item given its nature. The four boys will continue to have the benefit of the membership as funds for payment of their fee's for such membership are currently provided through the support arrangements presently in place. While Dr. Lauderdale might leave the city at some point, I trust arrangements could be made so that the membership could continue to be available for them. The difficulty is for Mrs. Lauderdale personally as she is no longer the designated spouse on the membership. Given that the boys currently have the continued enjoyment of the membership along with Dr. Lauderdale the membership clearly does have some value. I used cost as it reflects the status quo for the boys who seem to be the principle beneficiaries of the membership.

Mark Lauderdale Professional Corporation

15 In determining the value of Mark Lauderdale Professional Corporation, I utilized the most recent set of financial statements of the Corporation being those for its financial year ended June 30, 1995. While such statements are not as at the date of trial and I am aware that the Alberta Court of Appeal in *Mazurenko v. Mazurenko* (1981), 15 Alta. L.R. (2d) 357 at 363, indicated "the general principle that the valuation be made at trial", I am satisfied that this was not only reliable information but that there were not, based on the evidence I heard at trial, any significant events which have occurred which would lead me to conclude that these statements were not reflective of an appropriate value of the assets of the Corporation for the purposes of the division of the matrimonial property. Ms. Castle urged a date which would have utilized the Balance Sheet as at June 30, 1994. The problem I have with that date is twofold. First it does not give effect to another full year of Dr. Lauderdale's professional practice and secondly, I do not accept that the Management Bonus of $20,000.00 was not a proper account payable of the Corporation. There was evidence that Ms. Kowel did perform services for the Corporation and one should not lose sight of the fact that Dr. Lauderdale paid Mrs. Lauderdale a salary of $34,500.00 for similar services in 1993. Like amounts were also paid in 1991 and 1992. To me the appropriate place to consider these payments is in assessing the earning potential of Dr. Lauderdale and not in valuing the Corporation. Apart from this $20,000.00 amount, the changes in the Balance Sheet from 1994 to 1995 as indicated on the Source and Application of Funds Statement which is part of Exhibit — 22 do not reveal anything inappropriate. The incurring of a Bank Loan to buy the Mexican Condo, while it maybe an ill-advised investment, is essentially neutral from a funds flow point of view. As far as the ongoing interest cost associated with the loan is concerned, it does not impact on the earning potential of Dr. Lauderdale but rather is merely a potential expense item to be considered and ultimately accepted or rejected in his expense budget.

16 Having regard for the above and the consent of the parties expressed during the trial either in documents

filed or representations to the Court, my Order in respect of the Matrimonial Property Action is that the matrimonial property listed in Schedule "A" shall be valued at and shall be distributed to the person who is currently in possession thereof all as set forth in Schedule "A". Mrs. Lauderdale in addition to assuming responsibility for the TD Mortgage shall also be responsible for the Canada Trust — Line of Credit. In the result, Mrs. Lauderdale shall be required to make an equalization payment of $74,162.86. I will discuss latter how such equalization payment may be satisfied. Dr. Lauderdale on the other hand shall ensure that the Housing Loan Plan is carried out as soon as is reasonably practicable and ensure that the appropriate taxes are paid in connection therewith. I note that there was no attribution of income in Mrs. Lauderdale's 1994 income tax return for the Housing Loan presumable because she was no longer an employee. To the extent additional attributions are required after 1993 or the Housing Loan is found to have been an inappropriate scheme, in my view Dr. Lauderdale should hold Mrs. Lauderdale harmless in respect of any tax liability which might accrue to her. As part of the implementation of the Housing Loan Plan, Dr. Lauderdale shall cause Mark Lauderdale Professional Corporation to deliver to Mrs. Lauderdale an appropriate discharge of her remaining obligations under the Housing Loan which obligation stands at $57,180.00 on the June 30, 1995 Balance Sheet of Mark Lauderdale Professional Corporation.

IV — The Law of Property Action

17 I intend to deal with this aspect of the proceedings next as in my view it is ancillary to the Matrimonial Property Action and in my view may ultimately be a factor in the spousal support and child support claims. While in some ways these are all separate proceedings they are inextricably linked. To the extent Dr. Lauderdale is entitled to receive an occupation rent obviously his income goes up and that impacts positively on his ability to share in the child care costs he must share with Mrs. Lauderdale. In addition, Mrs. Lauderdale is occupying the Matrimonial Home with the children and clearly any rent which could be exigible would have to take into account in determining her income and expenses. Dr. Lauderdale seeks a condemnation against Mrs. Lauderdale when his real complaint is unhappiness with the fact that Dr. True has lived in the Matrimonial Home since December of 1993 and his two children have also lived in the Matrimonial Home since the same date for about 1/2 of the time. I might have more sympathy for that complaint had Dr. Trew had a free ride. He has not. In refusing to award to Dr. Lauderdale an occupation rent in respect of his joint tenancy of the Matrimonial Home, I am mindful of the case of *McColl v. McColl* (1995), 13 R.F.L. (4th) 449 a decision of the Ontario Court of Justice (Gen. Div.) which stated at p. 457 that:

> In assessing occupation rent, the court must exercise a certain amount of discretion in balancing the relevant factors in order to determine whether occupation rent is sensible in the totality of the circumstances of the case.

18 In the totality of the circumstances of this case, I do not believe that I should exercise my discretion and award an occupation rent for a number of reasons. Prior to Dr. Trew commencing to occupy the Matrimonial Home, Dr. Lauderdale was making the mortgage payments for the Matrimonial Home. He unilaterally stopped making such payments, ceased paying the salary to Mrs. Lauderdale from Mark Lauderdale Professional Corporation and in December of 1993 commenced paying $2,500.00 as support for the family. Pursuant to the Interim Order referred to above, spousal support was fixed at $1,750.00 and child support was set at $3,200.00 and payments at that level commenced in April of 1994. The Law of Property Action was commenced in June of 1995 some one year after the Interim Order and I am at a loss to understand what was different in June of 1995 from the circumstances in March of 1994. Certainly not Dr. Trew's presence or that of his children was any different nor was the contribution that he was making to Mrs. Lauderdale to support the Matrimonial Home. Quite to the contrary he has been making a payment of $1,500.00 per month towards the cost of the house and food since he

first commenced living in the Matrimonial Home. In addition, he has made significant contributions to the welfare of Mrs. Lauderdale and the Lauderdale children through the purchase of furniture and fixtures for the Matrimonial Home and to assist in the purchase of a new vehicle for Mrs. Lauderdale. Mr. Vallance says in paragraph 47 of his brief and I quote: "The issue in the case at bar is whether occupation rent should be awarded because another person is living in the matrimonial home without paying rent." Were that the case at bar then my ruling might be different but as I stated earlier such is not the case at bar. Such occupation was also not raised by either party in the economic considerations or value which accompanied their working papers for the division of the Matrimonial Property and for the same reasons as I am not granting an occupation rent, I did not make it a factor in the division of the Matrimonial Property.

V — The Divorce Action

Child Support and Custody

19 Mrs. Lauderdale has asked for child support for the four boys. As noted earlier pursuant to the consent of the parties, the parties have the joint custody of the four children with the day-to-day physical care and control of the children being with Mrs. Lauderdale and Dr. Lauderdale having reasonable access and I invite Counsel to submit an appropriate consent order to give effect to these arrangements.

20 I must now make a determination of the level of child support which should be awarded in this case. It is to be noted that whether or not child support is to be awarded was not an issue in this case merely the level at which it should be.

21 The jurisdiction of the Court to grant a child support Order in divorce proceedings is found under s. 15 of the *Divorce Act*. It is on the basis of the wording of this section that the Alberta Court of Appeal in *Levesque v. Levesque* (1994), 20 Alta. L.R. (3d) 429 (C.A.) enunciated a series of guidelines to be followed when determining the child support obligations of each parent. In that case, the Court was dealing with a situation where both parents worked outside the home and the issue of spousal support was not before the Court. The situation in this case is slightly different in that Mrs. Lauderdale has not had significant employment income outside the home, other than amounts paid to her from Mark Lauderdale Professional Corporation, and spousal support is before the Court as an issue. The guidelines enunciated in *Levesque* have been considered in many cases since then where the issues are broader than just child support and have become the accepted starting point for all child support considerations. These guidelines require that I must consider and make determinations respecting the following: (1) The combined gross incomes of Dr. and Mrs. Lauderdale. (2) The costs of bringing up the four boys. (3) The apportionment of that cost between Dr. and Mrs. Lauderdale. (4) Adjustments to the assigned share for the tax consequences arising from the support award. (5) Adjustments to the assigned share for any special circumstances of the two parties.

(1) Combined Gross Income

22 For the reasons which follow, I find the gross income of Dr. and Mrs. Lauderdale to be $130,000.00 of which $110,000.00 is attributable to Dr. Lauderdale and $20,000.00 is attributable to Mrs. Lauderdale. In *Levesque* (at p. 434), the Alberta Court of Appeal considered that a broad definition of income should be used and that "income" should include "the income the spouse can generate by personal effort and the prudent investment or sale of existing assets". In making the determination of the income of the parties, I did not factor in the sale of any existing assets for a number of reasons. The assets are the object of the Matrimonial Property Action and are being divided equally between the parties pursuant to this judgment. The liquid investments of the

parties, other than their RRSP's and the cash surrender value of a life insurance policy, total less than 1% of the Matrimonial Property and the income is included. I do not in this case see the disposition of their RRSP's with the resultant immediate tax consequences which would result and the long term harm to the retirement benefit they will provide for Dr. and Mrs. Lauderdale as being prudent. The collapsing of the insurance policy for its cash surrender value of $15,500.00 would also not make a significant difference. Investing the proceeds at a yield of 10% would only add slightly more than 1% to Dr. Lauderdale's annual income. Given the circumstances of this case, it does not seem prudent that the Matrimonial Home be sold and more modest surroundings purchased for this would not free up capital which could be spent (which I note itself would not be prudent baring some emergency) or invested to yield additional income. There is a mortgage which does have a significant monthly cost but meeting the payments has not been a burden which cannot be met. In this case the family has already had enough trauma without dislodging the boys from the Matrimonial Home when having regard for all the circumstances in my view sufficient income exists from a more limited definition of income without also considering the disposition of assets.

23 In the case of Mrs. Lauderdale and more will be said on her personal situation under the heading "Spousal Support", she and Dr. True have made a lifestyle choice that she will continue to stay at home and raise the boys. That is of course a choice they are free to make but it is to be noted that the impact of such a choice does not relieve Mrs. Lauderdale of her support obligation to the children. In the case of *Snelgrove-Fowler v. Fowler* (1993), 138 A.R. 192 (Q.B.), Mason J. factored the new spouse's income into the child support calculation and this is what Counsel for Dr. Lauderdale has urged me to do. This case was decided before *Levesque* and it is unclear exactly how they should be reconciled having regard for the comment of the Court of Appeal (at [4 R.F.L. (4th) 375] p. 388) that:

> ... unless a legally recognized parental or guardian's obligation arises as between that person and the child, no obligation of support exists on the part of the new cohabitant.

24 It would seem to me in reconciling the two cases that the relationship between Dr. Trew and Mrs. Lauderdale should be considered a special circumstance which I must consider for absent their relationship Mrs. Lauderdale would have been required to re-enter the workforce in order to discharge her obligation to the children which as Mason J. said in *Snelgrove* (at p. 204) "may be discharged in large measure by the day to day care and nurturing, but not fully". While *Levesque* would in a literal sense say we should adjust the assigned share of child care expenses, attributing income would do the same thing. By so doing, she will share in the child cost allocation. The difficulty is what should be an appropriate attribution. Mason J. attributed one-third of the new spouses income. Counsel for Mrs. Lauderdale has urged me to attribute what she would likely earn were she to re-enter the workforce today. This has a certain appeal in that it approaches the problem with a solution which keeps the Lauderdale relationship and the Trew relationship in relation to the Lauderdale children separate. It also fixes her earning capacity today at a level which is more consistent with where she would be entering the workforce today having regard for her lifestyle choice that was made with Dr. Lauderdale. She clearly has a lower earning capacity today because of that choice for had she been in the workforce her entire marriage she would undoubtedly have a higher earning capacity today given her obvious abilities. If she had such a higher earning capacity, then she would of course pay a greater share than the entry level income Counsel is suggesting for sharing purposes. In adopting this approach, I have set her notional income level at $20,000.00 for child care expense sharing purposes. It is to be noted that in dealing with the living expense budgets for the family and the children recognition will also be given through the allocation of expenses to the special circumstances which exist by the Trew family occupying the Matrimonial Property. I also plan to utilize the approach of Madam Justice Hetherington, a judge of the Alberta Court of Appeal who was sitting as a trial judge of the Northwest Territor-

ies Supreme Court in the recent case of *Shuparski v. Mair* (18 January 1995) Yellowknife CV 05191 (N.W.T. S.C) [reported at [1995] N.W.T.R. 4], namely, that the sums received as child tax benefits should be treated as direct contributions to the support of the children rather than as income to Mrs. Lauderdale which may or not be used for that purpose. In this case, due to Mrs. Lauderdale's present stay at home situation and her common law relationship with Dr. Trew the tax deductibility of "child day care expenses" and the "equivalent to married tax credit" are not relevant to her income or tax position. In respect of the child tax credit, Counsel for Mrs. Lauderdale estimated this at $274.32 per month. The actual amount which will be received by Mrs. Lauderdale is a function of her actual income. Based on the child support payments Mrs. Lauderdale will receive under this judgment, which were determined in part through the use of the Support.Works Version 2.1 (the "Program"), the Program calculated such amount at $154.89 per month. This amount, I believe is slightly low as in the Program she has attributed income. Where I to run the Program again removing her attributed income it would decrease her income but the Program would automatically increase the support payments of Dr. Lauderdale. I am comfortable that the actual child tax credit she receives will be slightly higher. This can only be to her benefit as, in the assumption I made, the credit was included as a reduction of child care expenses.

25 The income level of Dr. Lauderdale has been set at $110,000.00 after a review of the Financial Statements of Mark Lauderdale Professional Corporation for the past several years. In reviewing such financial statements for the years 1991 to 1995 inclusive, the income of Mark Lauderdale Professional Corporation has basically been derived from two sources. Professional income and income from investment and other. This latter category in the aggregate has fluctuated slightly but has never been a significant source of revenue. It was slightly less that 4% in the highest year. Professional income has come from three main sources. They are Alberta Health Care, the Mental Health Society (which includes the Woods Homes) and the Alberta Children's Hospital. Fee's from Alberta Health Care have ranged from $104,000.00 as a low in 1994 to $129,493.00 as a high in 1991 and averaged $116,594.00. In the case of the Mental Health Society (inclusive of Woods Homes) they range from a low of $25,901.00 in 1995 to a high of $30,685.00 in 1994 and averaged $27,859.00. In the case of the Alberta Children's Hospital the low was $3,982.00 in 1995 and the high was $29,406.00. While the average is $27,859.00, this is a misleading number as Dr. Lauderdale is no longer being retained by the hospital in the same fashion and his income from this source in the future is questionable. This leads to an effective average gross income from the two remaining sources of $144,445.00 which I have rounded for the purposes of the Program to $145,000.00. The expenses of Mark Lauderdale Professional Corporation when a salary for Dr., Mrs. and Janice Kowal are removed have been fairly constant. The only items which are more of a personal nature are the business use of a residence, legal fees attributable to personal matters and the Winter Club fees. When these items are excluded, the expenses tend to be around $25,000.00 per annum. Allowing $10,000.00 for these other items we are left with an average net income of $110,000.00 which is the number I used. It is lower than the number urged by Counsel for Mrs. Lauderdale of $120,000.00 but is higher than the number suggested by Mr. Vallance of $85,000.00. It also does not include the investment and other income which has averaged $5,000.00. This may also be quite uncertain as Dr. Lauderdale may have to utilize some of the cash and investments in the Corporation in connection with the implementation of the Housing Loan Plan.

(2) The Costs of Bringing up the Four Boys

26 At trial, there were a number of documents introduced which impact on the determination which must be made by me of the appropriate budget for the raising of the four boys. In this regard, I should mention again something which has already been mentioned namely that two of the boys to some extent have special needs. The economic impact of this is not significant in cost terms as most of such needs are presently being attended to through the normal operation of the medicare system. Specifically the most relevant documents tendered

were: (a) the Financial Statement produced by Mrs. Lauderdale (Exhibit — 12), (b) the Statement of Estimated Monthly Expenses of Dr. Lauderdale (Exhibit — 28) and (c) the Monthly Expenses budget (Exhibit — 17) which was prepared by Mrs. Lauderdale for her application for interim support. Much was made of this document by Mr. Vallance at trial. He questioned why the "Present monthly expenses" associated with such interim application had risen from $4,450.00 in Exhibit — 17 to $8,374.80 in Exhibit — 12. While at first blush this appears significant, a closer examination of the two Exhibits reveals that they are substantially similar in many respects when detailed expenses are analyzed. The primary difference, except for certain categories which have been increased in their dollar amount, stems from the simple fact that one is for total family expenses (Exhibit — 12) and includes in the $8,374.80 expenses for the Trew family and the other (Exhibit — 17) has been adjusted to eliminate the expenses which would relate to the Trew family and thus have only the expenses for the Lauderdale Family appear. When we are dealing exclusively with "Child Care Costs", Exhibit — 12 has them set at $4,743.40 per month and Exhibit — 17 has them set at approximately $3,400.00 per month depending on how you prorate certain expenses between Mrs. Lauderdale and the four boys. When Mrs. Lauderdale applied for and obtained interim support, she was represented by Colleen Kenny Q.C. who is now my colleague Madame Justice Kenny. The expenses which have been increased by her in conjunction with her present Counsel, as they relate to child car costs, are for medical and health which was only $45 at the interim stage and is now $600 and the allowances for savings, vacations and recreation. The medical and health increase is associated with an ticipated dental costs and special needs not covered by medicare. It is to be noted that in the main categories of food, transportation and shelter, the allocations in Exhibit — 12 and Exhibit — 17 would be almost identical. In running the sensitivities which I did through the Program, I aggregated in the "Analysis of Child Support Requirements" the more detailed classifications which appear in the Exhibits to 8 namely, Food, Clothing, Personal Care, Transportation, Day Care, Recreation & Ent, Medical, Other, General and Shelter and determined that an appropriate number for child care expenses for the four Lauderdale boys should be $3,600.00. The costs of Dr. Lauderdale have been set at $400.00 and appear under the heading "General" of the Total Child Care Cost Table. When comparing the annual number of $48,000.00 to the Edmonton ($29,695.00) and Calgary ($30,594.00) standards in the sensitivities, the numbers are of course high. When dealing with the Litmus test as set forth in *Levesque*, I ran the Program two ways. Once using Gross Income for Dr. Lauderdale as $145,000.00 and non-discretionary expenses of $35,000.00 and the other with a Gross Income of $110,000.00. In the first case the Litmus test would indicate the number should be $54,450.00. In the second it should be $42,900.00. In my view, the Litmus test number should be the lower as the $110,000.00 is the only income amount which would be available for the payment of a salary to Dr. Lauderdale by Mark Lauderdale Professional Corporation. The Litmus test is of course only that. These children have enjoyed a comfortable lifestyle and as the sensitivities have demonstrated they can continue to enjoy this lifestyle and their parents will not be required to suffer so that it may be maintained. Each of Dr. and Mrs. Lauderdale have established a new relationship and while their new partners have no direct financial obligation to the Lauderdale children the living arrangements are least special circumstances which bring economies of scale and advantages for all concerned that cannot be ignored completely when determining the budgets.

(3) Apportionment of Child Care Costs and (4) Adjustment for the Tax Consequences of the Support Award

27 These two items will be dealt with together and at this stage the Program has been extremely useful. I have relied upon the Program to apportion the child care costs between the two parties and to calculate the support required to be given to Mrs. Lauderdale. She will receive under this Order $4,773.49 per month before tax to yield approximately $3,100.00 after tax. The Program has that number at $2,903.68 This number is slightly low as the attribution of income moves her into a higher tax bracket which will not in fact be the case. Schedule

"B" to this judgment is printed output from the Program. The first material is the model I chose for the purposes of this judgement. The balance of the materials is comprised of the other sensitivities I ran to ensure the model was appropriate. In reviewing this schedule a few assumptions should be highlighted. The child tax credit, as determined by the Program, which will be received by Mrs. Lauderdale has been shown as a reduction of child care expenses and given the relationships of Dr. and Mrs. Lauderdale neither is entitled to "Married Equivalent" deduction. No amount was included for daycare. The Program makes the necessary adjustments for these assumptions. In reviewing the after tax and support payment cash flow number for Dr. Lauderdale of $3,133.58 per month, it is to be noted that it is in excess of the number he testified at trial that he required to meet his needs. This is of course before any consideration of spousal support or retrospective adjustment to the interim award for child support.

(5) Special Circumstances

28 Under this category of the *Levesque* analysis, two points should be addressed. The first relates to the notional determination of the child support obligation of each parent without regard to the particular parties ability to meet that obligation. There would appear to be a subtle difference of view between the position taken by the Alberta Court of Appeal in *Levesque* and that taken by Madame Justice L'Heureux-Dubé who spoke for the minority in the case of *Willick v. Willick* (27 October 1994)(S.C.C.) [unreported] [reported at 6 R.F.L. (4th) 161]. In *Levesque*, the children's needs came first while in *Willick*, Madame Justice L'Heureux-Dubé held at p 20 of her judgment that "the court should deduct from each party's total income a sum needed to achieve subsistence, in order to arrive at a more realistic assessment of the respective incomes available for child support". In this case the debate on the point is really more academic in nature as Dr. Lauderdale has sufficient net cash after support that will keep him above any subsistence threshold I would have inserted in the Program. Just as a check on the process I ran the Program using $18,000.00 as subsistence and the result was the same. In Mrs. Lauderdale's case, she has made a lifestyle choice with Dr. Trew which will see her cared for and as part of that choice I attributed income to her to take into account that choice. By the attribution of income and the determination and apportionment of the level of expenses in the manner in which I did, I have tried to factor in the position of Dr. Trew as a special circumstance. Absent his presence and his contribution to the living costs of the expanded family which numbers eight when the Trew children reside in the Matrimonial Home, which they do 1/2 of the time, Mrs. Lauderdale could not have made the choice which she did. I do not want to be seen as criticizing her in any way for this, quite to the contrary given her attachment to the boys, the special needs of two of them and the current lifestyle enjoyed by all this is a good story not a bad one. I simply wish to make the point that Dr. Lauderdale could not on his own have been expected to provide for it all at this level as this would not have given effect to the joint obligation of both to contribute and secondly he just does not have sufficient income to meet all of the requirements of everyone at the budgeted expenditure levels. In the case of Janice Kowal her impact on the equation is less direct than Dr. Trew's. She and Dr. Lauderdale share living expenses and to that extent his lifestyle is enhanced. She has been paid a salary by Mark Lauderdale Professional Corporation which I have notionally reduced in determining the acceptable level of non-discretionary expenses for input to the Program when I was determining Dr. Lauderdale's income available for support.

29 Counsel for Mrs. Lauderdale asked that the child support amount include a cost of living adjustment. The same issue was considered by the Court of Appeal in *MacMinn v. MacMinn* (3 October 1995) (Alta. C.A.) (unreported) [reported at 17 R.F.L. (4th) 88] and the Court had the following to say about the issue at p. 14:

> However, we decline, given the current economic circumstances, to provide for an automatic cost of living adjustment. Indeed, which parent should bear the additional costs arising from any increases in child sup-

> port costs will be contingent upon the changes in each parent's financial circumstances relative to the other. In other words, providing for additional costs to be increased in accordance with the apportionment we have made herein would only be appropriate if the father's and mother's respective financial positions improved or deteriorated in exactly the same proportion that each now bears to the other. We have no evidence on this point.

Given the circumstance of this case I adopt that reasoning and decline in this case as well.

30 This brings me to the claim for retroactive child support. In *MacMinn* a recent decision of the Alberta Court of Appeal, the Court had the following to say about this issue at p. 5:

> Dealing first with the issue of the jurisdiction and ability of the trial judge to make adjustments at trial to interim support orders, we note that interim support is just that — *interim* support. It is frequently ordered without benefit of discoveries, full production of documents, viva voce evidence and generally the safeguards of a trial designed to determine the actual state of the parent's respective financial affairs.

In this judgement, I have set the level of child support at $4,773.49 before tax to yield approximately $3,100.00 after tax. On an interim basis Mrs. Lauderdale received $3,200.00 per month before tax for the period commencing April 1994 to date. Leaving aside the impact of the child tax credit, there is a considerable difference between the after tax amount she is currently receiving and the after tax amount she will be receiving under this Order. To calculate the exact difference would involve a series of assumptions the most critical of which would be to determine the marginal tax rate to apply. This would first involve making a choice between whether to apply her marginal tax rate to her spousal support thereby reducing it considerably or applying it to the child support thereby reducing it considerably or alternatively, using some blend of the two. For the 1994 tax year, she had a total tax liability of $11,000.50 based on income of $45,979.17 of which $44,550.00 was alimony or maintenance income (See Lines 260 and 435 of Exhibit - 4). During that tax year, she had a marginal tax rate of 26% and enjoyed the benefit of the Married Equivalent deduction of $5,380.00 which was a benefit to her of approximately $2,000.00 in tax savings ($5,380 x 26%, which is her marginal tax rate, plus her Alberta tax equivalent, roughly 45.5% of the federal tax). If the 26% marginal tax rate is used and it is combined with the Alberta tax equivalent roughly a third of her support payments would have gone to the tax department in 1994 in a worst case scenario. This means that she would have had available from the $32,550.00 (9 x $3,200.00 plus 1/2 of 3 x $2,500.00) only $21,000.00 or $1,750.00 per month. This is of course a worst case as it applies the 26% marginal tax rate to the child support payments and does not factor in the lower marginal rate of 17% which should be applied to at least a part of the such $32,550.00 which should be done in a perfect calculation as the child support payments take her over the 17% marginal tax rate threshold into the 26% level. The payments of $4773.49 per month before tax may actually take her into the 29% marginal tax rate bracket. Be that as it may, it still demonstrates that a considerable variance exists between this award and the after tax amount she was receiving in 1994. The situation in 1995 is roughly comparable to 1994, the primary difference being that the Interim Order was in effect for the full year. The situation for 1993 is however even more complicated for, as noted above under the heading "The Facts", amounts were paid through Mark Lauderdale Professional Corporation to Mrs. Lauderdale as a salary for the work which she was at that time performing plus Dr. Lauderdale paid amounts directly in respect of PIT. Given the after tax level of the disparity and the decision in *MacMinn* should I order an increase. At page 7 of such judgment, the Court of Appeal says that "in general terms, the trial judge should direct his mind to the issue and order an increase where it is obvious that fairness demands an increase". Counsel for Mrs. Lauderdale has sought a lump sum payment of $96,216.00. As I understand her calculation, it is premised on the assumption that child support should have been $5,000.00 per month for 36 months (1993, 1994

and 1995). There is no mention whether this is before or after tax. If it is after tax then it assumes I should award on a basis which would net Mrs. Lauderdale an amount greater than the amount contained in the budget for child care expenses of $4,743.40 referred to above (Exhibit - 12). This is beyond the scope of fairness and into the real of unfairness to Dr. Lauderdale. If the amount is before tax, then on the one-third model (which is a worst case scenario) we are talking about approximately $3,300 per month after tax. In determining the amount paid, such Counsel utilizes the entire gross amount paid for PIT in 1993 and disregards an allocation of any of the amount received by Mrs. Lauderdale as a salary from Mark Lauderdale Professional Corporation in that year. Utilizing the after tax number for child support which I determined above of $3,100.00 per month instead of the $5,000.00 gives a gross amount of $111,600.00 (36 x $3,100.00). From this should be deducted: $96,942,00 which is comprised at (1) the child support payments actually made of $67,200.00, (ii) the allocated amount for the four month period prior to the Interim Order using the 50/50 split proposed by Counsel of $5,000.00 (iii) an allocated amount for the PIT paid of $14,784.00 of $7,392.00 (allocating on the same 50/50 basis) and (iv) finally a portion of the salary received by Mrs. Lauderdale from Mark Lauderdale Professional Corporation for which I credited $17,250.00 (on the same 50/50 basis). This leaves an amount of $15,158.00 as the differential. This, however, is really not an accurate differential as the support received was pre tax and the amount I compared it to was after tax. In addition, it does not account for Mrs. Lauderdale's share of the child care expenses as their obligation is to be shared and that of course brings Dr. Trew and possibly Janice Kowal into the equation. Mrs. Lauderdale's contribution over the three years would cancel out a portion of the $15,158.00. So it really comes down to tax. On these facts and after these calculations and assumptions should I find that there is a clear unfairness and thus intervene to make a retrospective adjustment because of the tax burden? I accept that Mrs. Lauderdale has had the lion's share of the burden of bringing up the children in an uninterrupted way without the support of Dr. Lauderdale in the manner which she once enjoyed but that is partly a consequence of the divorce for which a payment in money is not necessarily a magic solution. This was something she wanted to do and all of the evidence was that she is a good mother. But having regard for the totality of the facts of this case and the actual amounts paid which are not insignificant, I do not think a retroactive adjustment to child support is warranted in this case. That being said I am not satisfied that the scales are properly in balance in this regard as the tax burden was substantial and when I am considering the claim of Mrs. Lauderdale for spousal support any inequity which exists in this area will be a factor in my mind. That it should be a factor in that determination was clearly contemplated in *MacMinn* where the court held (at page 8) that when considering shortfalls in a parents contribution to support "such a shortfall, including any amount of shortfall prior to an interim award, may also be considered in awarding compensatory spousal support". This to me is what should be done in this case as I am quite confident that what has happened during this period is that Mrs. Lauderdale has denied herself so that the boys can go to the summer hockey camps as there is no doubt in my mind that there was sufficient money available for them to have skates.

Spousal Support

31 I dealt with the issue of Child Support first as the income flow of Mrs. Lauderdale had to be made fit the traditional guidelines for this type of case. Having made the determinations I did, I must now turn to the issue of spousal support which in the case at bar really has three facets: (1) the level of spousal support Mrs. Lauderdale should have received on an interim basis, (2) what ongoing obligation should Dr. Lauderdale have to Mrs. Lauderdale having regard for the presence of Dr. Trew, and (3) assuming the net effect of (1) and (2) is a financial obligation should that obligation be satisfied by ongoing periodic payments or a lump sum settlement?

32 Issue (1) arises out of *MacMinn*. Mrs. Lauderdale received $1,750.00 per month before tax under the Interim Order. That is also roughly the amount that I have determined should be her notional income level. In

looking at the budget numbers that were used for the Interim Order and for this application as they relate to her costs, I am satisfied that an appropriate amount was paid. I used the expense amount contemplated by Exhibit - 12 of $8,374.80 and made an allocation for her of this amount on a simple arithmetic basis. By dividing $8,374.80 by seven, which was the formula suggested by her Counsel for substantially all the expenses except housing, yields the amount of $1,196.40. If I gross up this amount on the 1/3 tax formula that I used for the boys it yields the amount of roughly $1,800.00 per month. In the result, there would not appear to be any deficiency in respect of the Interim Order.

33 Issue (2) In making the income level determinations of Mrs. Lauderdale which I did above under the Child Support heading one must not loose sight of the fact that her actual income level and her notional income level are quite different. The notional level was really going forward. In going back, Dr. Trew was only on the scene for one month in 1993. In 1994 and 1995, he is a special circumstance for Mrs. Lauderdale which does not eliminate the obligation of support but is a factor in determining quantum. But what is her spousal claim today, for as regards the future she has made a lifestyle choice with Dr. Trew which will hopefully provide her with the happiness and support she deserves. She has an economic disadvantage in future earning capacity which flows directly from her decision made with the concurrence of Dr. Lauderdale to interrupt her career and become a stay at home mother. (See *Moge v. Moge* (1993), 43 R.F.L. (3d) 345 (S.C.C.)) This disadvantage only arises on the breakup of the marriage. When things are running smoothly on the home front and the parties are working together for their mutual benefit and that of their children, it is a lifestyle choice and should not be seen as creating disadvantaged individuals or second class citizens. Stay at home mothers who do so by choice are fully participating members in the building of a family unit. It is outside the home in the workplace where a diminished value develops by a stay at home mother abandoning her career opportunities. Dr. Lauderdale did not sacrifice his career outside the home to the same extent. Quite to the contrary through Mrs. Lauderdale's efforts he was able to pursue his career without the day to day burden of the children. Mrs. Lauderdale did share the benefits of his success through a very comfortable lifestyle but that has ended and each must rebuild their lives and here Mrs. Lauderdale is clearly behind on the economic front. As regards this latter point, it is to be noted that the relationship which Mrs. Lauderdale has with Dr. Trew should not mean that Mrs. Lauderdale has only theoretically suffered an economic disadvantage and thus Dr. Lauderdale has no obligation of spousal support to Mrs. Lauderdale. This is the position which Counsel for Dr. Lauderdale, Mr. Vallance, would have me accept. On this view of the situation it is only if something were to happen to Dr. Trew which might constitute a change in circumstances for her that the issue of support should arise but in the meantime she is just fine. With respect, I cannot accept that only those who do not find a new partner suffer an economic disadvantage. To accept this view would lead to accepting a logical absurdity namely that Mrs. Lauderdale was not disadvantaged when she divorced Dr. Lauderdale because she has a new prospective spouse. That links Dr. Trew to the lifestyle choice of Dr. Lauderdale and Mrs. Lauderdale. She is still disadvantaged from her choice with Dr. Lauderdale, however, because of Dr. Trew, on her divorce from Dr. Lauderdale she is just luckier than most other spouses who find themselves in the same situation. That does not mean that her decision to marry Dr. Trew is irrelevant. It was an important factor in my determining that the lump sum approach was appropriate in this case. In so doing, I achieve a number of different objectives. I am able to compensate her for the child support inequity which I believe existed due to the tax burden she bore and I am able to compensate her for the very clear economic disadvantage which she would face in trying to provide for herself and to discharge her support obligation to her children on the breakup of her marriage. In essence, I am compensating Mrs. Lauderdale for the situation in which she found herself when the marriage terminated. By not burdening Dr. Lauderdale with an ongoing obligation, I am in part giving recognition to the lifestyle choice which Mrs. Lauderdale has made with Dr. Trew. Put another way if Dr. Trew were not part of Mrs. Lauderdale's future it would be clear Dr. Lauderdale would have had a

substantial ongoing obligation to Mrs. Lauderdale until she had reached that level of self sufficiency the *Divorce Act* mandates be promoted to the extent possible. That obligation would have been partly compensatory in nature for the past and partly transitional for the future to enable her to raise her level of self sufficiency. In her case it would not have been easy for her to retrain herself, integrate herself back into the workforce and at the same time have the primary responsibility to manage the care of the four boys. Why the obligation is seen as part compensatory is that she will never really regain what she has lost in the last 16 1/2 years had she pursued a career. But the purpose of the exercise is not to recreate history. She did receive half of the Matrimonial Property and that compensates her at least in part for their lifestyle choice. Under this head, we are seeking to smooth the transition she must make back to the workforce and self sufficiency. In her case she will not be faced with that obligation to the same extent because of Dr. Trew and to that extent the burden of Dr. Lauderdale is lessened in part but not totally removed. It is this latter consideration that will preserve Mrs. Lauderdale's rights against Dr. Lauderdale in the future should her circumstances change again. Dr. Trew is an intelligent and sympathetic individual who recognized in his testimony the situation he was getting into. He acknowledged the advantage he enjoyed by sharing the Matrimonial Home with Mrs. Lauderdale and the advantages for his own children to spend half of their time in such home. For this he expects to make an economic contribution and he has been doing just that. As I stated this is a factor but does not operate as a windfall for Dr. Lauderdale that he has no residual obligation to Mrs. Lauderdale. In respect of the future, the lump sum payment provided for below should suspend that obligation until there is a change in circumstances for Mrs. Lauderdale.

34 What then would be a appropriate lump sum payment to achieve the objective of compensation contemplated by *Moge* and to deal with the concerns I have regarding the level of interim child support? In choosing this amount again, one should not forget that an income attribution occurred for Mrs. Lauderdale in the child support calculation which was not real income but a notional way to include Dr. Trew in the economies of scale arising from the living arrangements involving him and his children.

35 In my view the net sum of $20,437.14 which for the purposes of this Order I am rounding to $21,000.00 would be appropriate. I have calculated this amount on the following basis. Mrs. Lauderdale has an equalization obligation of $74,162.86 and through the mechanism of the lump sum award she will be discharged from her obligation in that amount. Mrs. Lauderdale has only attended one year of University. That was several years ago and would only be of limited value to her today. She does have some music training but without further education it is of limited value. She really needs an opportunity to retrain herself which inevitably would involve full time attendance at an educational institution. This would involve day care costs, tuition and living expenses and could take at least three years if she chose to complete her post secondary education previously abandoned. In addition, there would be a period of time during which she would reenter the workforce and start to increase her earning capacity. It would be at least one to two years before she began to establish herself in any meaningful way. A payment of $20,000.00 a year for four and one-half years would finance something of this nature and we must add to that the sum of $30,000.00 which I have determined is the additional amount which should have been available for interim child support during the previous three years due to the significant tax burden she absorbed on the amounts received and that the actual payment was slightly lower. I would reduce such payment from $120,000.00 to $95,000.00 to take into account two factors. One, to apply a notional interest factor for the fact it is to be received as a lump sum rather than over a period of time and two, that the payment should be tax free.

Conclusions

36 In the result: (1) Child support shall be fixed at $4,800.00 per month ($1,200.00 per child and rounded

from the $4,773.49 amount appearing above). Payments at this level shall commence with the payment due for January 1996 and shall remain in effect so long as that child is a child as defined in the *Divorce Act*. In addition, all obligations for child support shall be binding on Dr. Lauderdale's Estate; (2) Commencing with the month of January 1996, the monthly payments in respect of spousal support shall cease and Dr. Lauderdale shall be obligated to make to Mrs. Lauderdale a lump sum payment of $21,000.00 and to provide her with a discharge of her equalization payment obligation of $74,162.86 arising out of my decision in the Matrimonial Property Action. Dr. Lauderdale will be given 90 days from the date of this judgment to satisfy this obligation; (3) The Law of Property Action is dismissed; and (4) The Matrimonial Property shall be distributed to the person who is currently in possession thereof all as set forth in Schedule "A", Mrs. Lauderdale shall assume responsibility for the TD Mortgage and for the Canada Trust — Line of Credit and Dr. Lauderdale shall ensure that the Housing Loan Plan is implemented within 90 days of the date of this judgment and that Mrs. Lauderdale, as part of such implementation, receives a discharge of the Housing Loan.

VI — Costs

37 Counsel may speak to me regarding the matter of costs during the next 30 days failing which Mrs. Lauderdale shall be entitled to costs in respect of the Divorce Action and the Law of Property Action in each case in accordance, I believe, with Schedule C and each side will bear its own costs in respect of the Matrimonial Property Action.

Wife's application granted; husband's application dismissed.

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