2012 CarswellAlta 2064, 2012 ABCA 345

Kretschmer v. Terrigno

Monica Valerie Kretschmer, Respondent (Plaintiff) and Maurizio Dante Terrigno, Appellant (Defendant)

Antonietta Terrigno, Appellant (Plaintiff) and Monica Valerie Kretschmer and Maurizio Dante Terrigno, Respondents (Defendants)

Alberta Court of Appeal

Constance Hunt J.A., Marina Paperny J.A., Frans Slatter J.A.

Heard: October 9, 2012
Judgment: November 29, 2012
Docket: Calgary Appeal 1101-0112-AC, 1101-0198-AC

Proceedings: Affirmed, 2011 CarswellAlta 564, [2011] A.W.L.D. 3078, [2011] A.W.L.D. 3081, [2011] A.W.L.D. 3083, [2011] A.W.L.D. 3084, [2011] A.W.L.D. 3086, [2011] A.W.L.D. 3087, [2011] A.W.L.D. 3091, [2011] W.D.F.L. 4161, [2011] W.D.F.L. 4171, [2011] W.D.F.L. 4179, [2011] W.D.F.L. 4185, [2011] W.D.F.L. 4194, [2011] W.D.F.L. 4201, [2011] W.D.F.L. 4221, 2011 ABQB 221 (Alta. Q.B.)

Counsel: D.L. Harms, for Respondent, Monica Valerie Kretschmer

D.P. Castle, for Appellant, Antonietta Terrigno and Appellant / Respondent, Maurizio Dante Terrigno

Subject: Family; Property

Family law

Cases considered by *Frans Slatter J.A.*:

A. (D.L.) v. A. (R.T.) (2006), 2006 ABCA 204, 2006 CarswellAlta 813, 377 W.A.C. 266, 391 A.R. 266 (Alta. C.A.) — considered

Bak v. Dobell (2007), 281 D.L.R. (4th) 494, 2007 CarswellOnt 2324, 2007 ONCA 304, 86 O.R. (3d) 196, 38 R.F.L. (6th) 7, 224 O.A.C. 10 (Ont. C.A.) — considered

Belgiorgio v. Belgiorgio (2000), 2000 CarswellOnt 3060, [2000] O.T.C. 556, 10 R.F.L. (5th) 239 (Ont. S.C.J.) — considered

Carmichael v. Carmichael (2007), 2007 CarswellAlta 1, 2007 ABCA 3, 404 A.R. 144, 40 R.F.L. (6th) 21, 394 W.A.C. 144, 78 Alta. L.R. (4th) 69 (Alta. C.A.) — considered

Hill v. Hill (2003), 2003 CarswellAlta 424, 2003 ABCA 94, 37 R.F.L. (5th) 134, 327 A.R. 51, 296 W.A.C. 51 (Alta. C.A.) — considered

Hodgson v. Hodgson (2005), 13 R.F.L. (6th) 339, 361 A.R. 190, 339 W.A.C. 190, 2005 ABCA 13, 2005 CarswellAlta 29, 248 D.L.R. (4th) 95, 40 Alta. L.R. (4th) 212 (Alta. C.A.) — followed

J. (D.) v. J. (M.) (2009), 2009 ABCA 272, 13 Alta. L.R. (5th) 1, 70 R.F.L. (6th) 63, 2009 CarswellAlta 1238, *(*sub nom. *D.R.J. v. M.J.)* 467 W.A.C. 16, *(*sub nom. *D.R.J. v. M.J.)* 464 A.R. 16 (Alta. C.A.) — considered

Jackson v. Jackson (1986), 1986 CarswellOnt 342, 5 R.F.L. (3d) 8 (Ont. H.C.) — considered

McDonald v. McDonald (1995), 1995 CarswellOnt 1086, 17 R.F.L. (4th) 258 (Ont. Gen. Div.) — considered

Verwey v. Verwey (2006), 2006 MBQB 149, 2006 CarswellMan 232, 207 Man. R. (2d) 41 (Man. Q.B.) — considered

Cases considered by *Frans Slatter J.A. (dissenting in part)*:

Apex Corp. v. Ceco Developments Ltd. (2008), 2008 ABCA 125, 2008 CarswellAlta 416, 88 Alta. L.R. (4th) 26, 41 B.L.R. (4th) 1, 66 R.P.R. (4th) 188, 70 C.L.R. (3d) 184, 429 A.R. 110, 421 W.A.C. 110, [2008] 6 W.W.R. 393 (Alta. C.A.)

Campbell & Co. v. Pollak (1927), [1927] All E.R. Rep. 1, [1927] A.C. 732, 137 L.T. 656, 43 T.L.R. 495, 51 Sol. Jo. 450, 96 L.J.K.B. 1093 (U.K. H.L.)

Clayton's Case, Re (1816), 1 Mer. 572, [1814-23] All E.R. Rep. 1, 35 E.R. 781 (Eng. Ch. Div.)

Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115, 1976 CarswellNat 434, 1976 CarswellNat 434F (S.C.C.)

Conway v. Zinkhofer (2008), 2008 ABCA 392, 2008 CarswellAlta 1764 (Alta. C.A.)

Deans v. Thachuk (2005), 48 C.C.P.B. 65, 52 Alta. L.R. (4th) 41, 23 C.P.C. (6th) 100, 376 A.R. 326, 360 W.A.C. 326, 261 D.L.R. (4th) 300, 2005 ABCA 368, 2005 CarswellAlta 1518, 2005 C.E.B. & P.G.R. 8177, 20 E.T.R. (3d) 19, [2006] 4 W.W.R. 698 (Alta. C.A.)

Dool v. Nazarewycz (2009), 2009 ABCA 70, 2009 CarswellAlta 252, *(*sub nom. *Dool Estate, Re)* 447 W.A.C. 1, *(*sub nom. *Dool Estate, Re)* 448 A.R. 1, [2009] 7 W.W.R. 636, 2 Alta. L.R. (5th) 36, 46 E.T.R. (3d) 159 (Alta. C.A.)

Elsom v. Elsom (1989), 37 B.C.L.R. (2d) 145, [1989] 1 S.C.R. 1367, [1989] 5 W.W.R. 193, 59 D.L.R. (4th) 591, 96 N.R. 165, 20 R.F.L. (3d) 225, 1989 CarswellBC 95, 1989 CarswellBC 707 (S.C.C.)

Gahir v. Alberta (Workers' Compensation Board Appeals Commission) (2009), 1 Alta. L.R. (5th) 290, 82 Admin. L.R. (4th) 172, 448 A.R. 135, 447 W.A.C. 135, 2009 ABCA 59, 2009 CarswellAlta 203 (Alta. C.A.)

Ghirardosi v. British Columbia (Minister of Highways) (1966), [1966] S.C.R. 367, 55 W.W.R. 750, 56 D.L.R. (2d) 469, 1966 CarswellBC 47 (S.C.C.)

Hamilton v. Open Window Bakery Ltd. (2003), 2004 SCC 9, 316 N.R. 265, 235 D.L.R. (4th) 193, 2003 CarswellOnt 5591, 2003 CarswellOnt 5592, 2004 C.L.L.C. 210-025, 184 O.A.C. 209, [2004] 1 S.C.R. 303, 70 O.R. (3d) 255

(note), 40 B.L.R. (3d) 1 (S.C.C.)

Harrower v. Harrower (1989), 1989 CarswellAlta 105, 68 Alta. L.R. (2d) 97, 97 A.R. 141, 21 R.F.L. (3d) 369 (Alta. C.A.)

Hickey v. Hickey (1999), [1999] 2 S.C.R. 518, 172 D.L.R. (4th) 577, 1999 CarswellMan 254, 1999 CarswellMan 255, 46 R.F.L. (4th) 1, 240 N.R. 312, [1999] 8 W.W.R. 485, 138 Man. R. (2d) 40, 202 W.A.C. 40 (S.C.C.)

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.)

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604, [2005] 1 S.C.R. 401 (S.C.C.)

Larter v. Universal Sales Ltd. (1991), *(*sub nom. *Larter v. Freightliner of Canada Ltd.)* 113 N.B.R. (2d) 18, *(*sub nom. *Larter v. Freightliner of Canada Ltd.)* 285 A.P.R. 18, 50 C.P.C. (2d) 66, 1991 CarswellNB 56 (N.B. C.A.)

Lavesta Area Group, Re (2012), *(*sub nom. *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board))* 522 A.R. 88, *(*sub nom. *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board))* 544 W.A.C. 88, 2012 CarswellAlta 385, 2012 ABCA 84, 40 Admin. L.R. (5th) 331 (Alta. C.A.)

M. (N.) v. W. (F.) (2004), 2004 ABCA 151, 2004 CarswellAlta 559, 348 A.R. 143, 321 W.A.C. 143, 2 R.F.L. (6th) 87, 47 C.P.C. (5th) 253, 243 D.L.R. (4th) 220, 8 E.T.R. (3d) 117, 33 Alta. L.R. (4th) 17 (Alta. C.A.)

MacDonald Estate v. Martin (1990), [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 121 N.R. 1, *(*sub nom. *Martin v. Gray)* [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, 70 Man. R. (2d) 241, 1990 CarswellMan 384, 285 W.A.C. 241, 1990 CarswellMan 233 (S.C.C.)

Mahe v. Boulianne (2010), 81 R.F.L. (6th) 4, 2010 ABCA 74, 2010 CarswellAlta 396, 84 C.P.C. (6th) 263, 21 Alta. L.R. (5th) 277 (Alta. C.A.)

Moge v. Moge (1992), [1993] R.D.F. 168, [1993] 1 W.W.R. 481, 99 D.L.R. (4th) 456, [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, 30 W.A.C. 161, 43 R.F.L. (3d) 345, 145 N.R. 1, 1992 CarswellMan 143, 1992 CarswellMan 222 (S.C.C.)

Morton v. Morton (2008), 52 R.F.L. (6th) 248, 2008 CarswellAlta 488, 2008 ABCA 144 (Alta. C.A.)

P. (L.) v. H. (D.J.) (1987), 55 Alta. L.R. (2d) 227, 1987 CarswellAlta 224, 10 R.F.L. (3d) 418, 81 A.R. 276 (Alta. C.A.)

Polish Combatants' Assn. Credit Union Ltd. v. Machnio (1984), 1984 CarswellMan 142, 9 D.L.R. (4th) 60, [1984] 5 W.W.R. 97 (Man. C.A.)

R. v. Curragh Inc. (1997), 113 C.C.C. (3d) 481, 144 D.L.R. (4th) 614, 1997 CarswellNS 88, 1997 CarswellNS 89, 159 N.S.R. (2d) 1, 468 A.P.R. 1, [1997] 1 S.C.R. 537, 5 C.R. (5th) 291, 209 N.R. 252 (S.C.C.)

R. v. Regan (2002), [2002] 1 S.C.R. 297, 2002 CarswellNS 61, 2002 CarswellNS 62, 2002 SCC 12, 282 N.R. 1, 91

C.R.R. (2d) 51, 49 C.R. (5th) 1, 201 N.S.R. (2d) 63, 629 A.P.R. 63, 161 C.C.C. (3d) 97, 209 D.L.R. (4th) 41 (S.C.C.)

R. v. S. (R.D.) (1997), 161 N.S.R. (2d) 241, 477 A.P.R. 241, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 1997 CarswellNS 301, 1997 CarswellNS 302, 10 C.R. (5th) 1, 218 N.R. 1, 1 Admin. L.R. (3d) 74, [1997] 3 S.C.R. 484 (S.C.C.)

Roberts v. R. (2003), 2003 SCC 45, 2003 CarswellNat 2822, 2003 CarswellNat 2823, 19 B.C.L.R. (4th) 195, [2004] 2 W.W.R. 1, *(*sub nom. *Wewayakum Indian Band v. Canada)* 309 N.R. 201, *(*sub nom. *Wewayakum Indian Band v. Canada)* [2003] 2 S.C.R. 259, 231 D.L.R. (4th) 1, 7 Admin. L.R. (4th) 1, 40 C.P.C. (5th) 1, *(*sub nom. *Wewaykum Indian Band v. Canada)* [2004] 1 C.N.L.R. 342 (S.C.C.)

S. (D.B.) v. G. (S.R.) (2006), 61 Alta. L.R. (4th) 1, 31 R.F.L. (6th) 1, 391 A.R. 297, 377 W.A.C. 297, 2006 SCC 37, 2006 CarswellAlta 976, 2006 CarswellAlta 977, 351 N.R. 201, [2006] 10 W.W.R. 379, 270 D.L.R. (4th) 297, [2006] 2 S.C.R. 231 (S.C.C.)

Tomich Estate, Re (2011), 2011 ABCA 257, 70 E.T.R. (3d) 1, 2011 CarswellAlta 1590 (Alta. C.A.)

Wilde v. Archean Energy Ltd. (2007), 415 W.A.C. 41, 422 A.R. 41, 82 Alta. L.R. (4th) 203, 62 C.C.E.L. (3d) 1, *(*sub nom. *Wilde & Schott v. Archean Energy Ltd.)* 2008 C.L.L.C. 210-002, 2007 ABCA 385, 2007 CarswellAlta 1633 (Alta. C.A.)

Statutes considered by *Hunt J.A. and Paperny J.A.*:

Family Law Act, R.S.O. 1990, c. F.3

s. 4(1) "net family property" — considered

s. 4(1) "net family property" (a) — considered

s. 4(1) "net family property" (b) — considered

Matrimonial Property Act, R.S.A. 2000, c. M-8

Generally — referred to

s. 7 — considered

s. 7(2) — referred to

s. 7(4) — referred to

Statutes considered by *Slatter J.A.*:

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

s. 15.2 [en. 1997, c. 1, s. 2] — considered

Family Law Act, R.S.O. 1990, c. F.3

s. 4(1) "net family property" (b) — considered

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

Generally — referred to

Matrimonial Property Act, R.S.A. 2000, c. M-8

Generally — referred to

s. 7 — considered

s. 7(3)(b) — considered

s. 8(d) — considered

Rules considered: by *Slatter J.A.*:

Alberta Rules of Court, Alta. Reg. 124/2010

Generally — referred to

R. 4.29(2) — considered

R. 10.29(1) — considered

Regulations considered by *Hunt J.A. and Paperny J.A.*:

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

Federal Child Support Guidelines, SOR/97-175

s. 19 — considered

Regulations considered by *Slatter J.A.*:

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

Federal Child Support Guidelines, SOR/97-175

Generally — referred to

s. 7 — considered

s. 17(1) — considered

s. 18(1) — considered

s. 19 — considered

s. 19(1)(i) — considered

s. 19(1)(f) — considered

***Frans Slatter J.A.*:**

1 We have had the opportunity to read the judgment of Slatter JA. We agree with him that there was no reasonable apprehension of bias on the part of the trial judge, the fresh evidence application must be dismissed, and the trial judge committed no error in his grant of spousal support. We also agree with Slatter JA's disposition of the mother's costs award. We agree with his statements about standard of review.

2 We respectfully disagree with other aspects of his judgment. Specifically, we are not persuaded that the trial judge erred in his attribution of income to the husband or in his treatment of matrimonial debt. Nor would we interfere with his findings about the purported loan agreement with the restaurant, Osteria. Given this, we would not interfere with his award of costs against the husband.

3 By way of context, we note that this highly contentious trial lasted 22 days and generated nearly 1900 pages of transcript. For the appeal, the parties together put forward nine binders of key evidence for our consideration. The husband's lawyer acknowledged that the trial developed into a credibility contest and described one of the husband's witnesses as having had a "petulant and irrelevant outburst" during his testimony: Transcript at pp. 1134, 1132.

Attribution of Income

4 The trial judge found that during cohabitation and marriage and "*since their separation*, the Husband has managed the Osteria and his income is directly or indirectly derived from this enterprise [emphasis added].": para 5. The income he attributed to the husband must be seen through this lens.

5 The trial judge also emphasized that the purpose of s 19 of the *Federal Child Support Guidelines* is "to attribute income to a spouse who has not supplied the court with a true indication of his or her income.": para 8. In the next paragraph he added that the court could draw an adverse inference against a spouse who fails to give adequate financial information to the court. His attribution of income must be seen through this lens as well.

6 The 2005 and 2006 cashflow statements prepared by Osteria's Chief Financial Officer (CFO, who is the husband's brother) were accompanied by notes. The 2005 statement gave a "Required Earnings before Taxes' number of $233,920, adding that "this is only the stuff we can track and *does not* include what you have taken from princess and other sources that we are unable to track or that you have been successful at conceiling (sic)." An additional note (which compared the husband's earnings to someone at Spruce Meadows) led the judge to conclude at para 11 that the husband must have been earning the equivalent of $260,000 in 2005.

7 The 2006 cashflow statements gave a figure of $293,969.99 as Required Earnings Before Taxes, along with the note, "This is the amount you would need to earn to sustain your lifestyle." At para 13 the trial judge stated: "I am convinced that these cash flow summaries as well as other evidence produced at trial demonstrate that the Husband has or has had access to resources or "means" other than his reported income from the Osteria."

8 At para 17-19, the trial judge said:

> [17] I agree with the submissions on behalf of the Wife that an amount of income should be imputed to the Husband to capture the "means" which are not reflected on his income tax returns. This in my view should include the housing and Osteria benefits on an ongoing basis some of which have been demonstrated in the Cashflow summaries for the time the marriage was intact. I further agree with the Wife's submissions that the Husband was and is still treated as a self-employed business man and this is how he holds himself out publicly. For example the records of Probation

> Services ... and the oral testimony of his Probation Officer demonstrates that the Husband claimed to "own his own business" and "have an extensive amount of money".
>
> [18] The Wife submits and I agree that it is only post-separation and within the context of these divorce proceedings that he has purported to be something less than self-employed or an owner of the Osteria and to be financially challenged.
>
> [19] This is an appropriate circumstance where the Court should exercise its discretion pursuant to Section 19 of the FCSG. I agree with the Wife's submissions in this case that the Husband was and may still be the owner-manager of the Osteria together with his family members and their inter-related companies and family trusts. Whether he did nor did not sell his shares in the Osteria, he is in a non-arms length relationship with his employer. As the CFO of the family enterprises has said and to repeat "also note this is the only stuff we can track and does not include what we are unable to track or that you have been successful in concealing".

9 At para 20, the trial judge noted the wife's evidence that during the cohabitation and marriage, the parties shopped and ate at Osteria, adding "I have no doubt that *this continues to be the case* for the Husband....sections 17-19 of the FCSG may be employed for instances like this one to add back the means and benefits and resources that the husband enjoyed from the Osteria or related family companies, members, or trusts [emphasis added]".

10 While the judge acknowledged at para 20 that the husband had probably cut back somewhat since 2005 and 2006, he referred to the CFO's suggestion in 2005 that the husband should cut back by $20,000. But even with such a cut-back, "the CFO's own notes show that the Husband's income would be reduced therefore from $260,000 per year in 2005 to $240,000 per year."

11 As for the husband's evidence that his income from Osteria was $60,000 per year, the trial judge described its basis as "unclear and contradictory": para 25. In the same paragraph he noted evidence that costs over $140,000 for a lavish wedding party had been written off by Osteria but could be included as a benefit to the husband that would go toward imputing income (although, in the event, he did not do so).

12 He concluded that pararaph by saying, "I have no concerns whatsoever in imputing an amount of income to the Husband in the amount of $197,926 per annum. This was the amount requested by the Wife...in my view *it could have been a larger amount*.... [emphasis added]". Moreover, this amount was consistent with the wife's testimony that "the husband represented to her and demonstrated that his every living expense was paid for by or through the Osteria but for tax purposes he claimed a nominal salary.": para 27.

13 Although lifestyle is not income, it is "evidence from which an inference may be drawn that the payor has undisclosed income that may be imputed for the purpose of determining child support.": *Bak v. Dobell*, 2007 ONCA 304, 86 O.R. (3d) 196 (Ont. C.A.) at para 43. There was considerable evidence of the husband's lifestyle in this case to support an attribution of income. Moreover, inadequate disclosure can provide a basis for imputing income: *Verwey v. Verwey*, 2006 MBQB 149, 207 Man. R. (2d) 41 (Man. Q.B.). That was very relevant to this case. At several points in his reasons, the trial judge emphasized the difficulties with disclosure faced by the wife in this trial: see for example, paras 73(i) (j) and (l) and 65(d) of the trial judgment.

14 To deal specifically with the trial judge's allocation of $60,000 of income from Osteria, the fact that he found the basis for this to be contradictory did not disentitle him from using that figure in his calculations in the context of this case. Both the brother and the husband testified that this was the correct number. The husband said so repeatedly, even in the face of his tax statements which might have suggested otherwise: see, for example, pp. 1481, 1487, 1496, 1501,

1594-5 of the Transcript. Osteria's accountant testified to the same number and said that no tax was deducted by Osteria: Transcript, p. 653. Accordingly, there was no error in grossing up that amount as part of the calculations made by the trial judge to attribute income to the husband.

15 When all the reasons of the trial judge are taken into account, it cannot be said that he committed palpable and overriding error in attributing the amount of income that he did or that the amount he attributed was not based on evidence. Conflicting and confusing testimony along with late and inadequate disclosure by the husband made it virtually impossible to determine his real income. As he clearly said, the trial judge was convinced the husband's income was likely higher but he restricted the attributed amount to that requested by the wife. We see no reason to interfere with the exercise of his discretion on this point.

16 As for his decision to attribute the same amount on an ongoing basis, his reasons are apparent from para 26:

> I accept the Wife's submission that the parties are unlikely ever to easily ascertain the Husband's income and that the prospect of adjusting his child support obligations on an annual basis in the ordinary course are simply inviting a revisitation of all of the issues which have now been tried at untold expense.

17 This observation was made at the end of a long, arduous trial with much evidence from the husband that the trial judge found confusing and incredible. Disclosure, such as it was, was late and difficult. The husband had every opportunity to reveal the real state of his affairs at the trial, but resisted doing so. Some of the passages canvassed above make it clear that, notwithstanding the husband's testimony, the trial judge was satisfied that his circumstances remained similar to what they had been, as reflected in the 2005 and 2006 cashflow statements. In such circumstances, we cannot say that the trial judge improperly exercised his discretion in attributing the amount of income he did on an ongoing basis.

Treatment of Matrimonial Debt

18 Slatter JA concludes that the trial judge made a palpable and overriding error in his treatment of premarital debt. We disagree. In our view, the trial judge did not err in his apportionment of the premarital debt. The trial judge's role was to ascertain what the matrimonial property division ought to be having regard to the purpose of the legislation. In conducting his analysis he was obliged to consider the debts of the parties, incurred before, during and after the marriage. He concluded that neither spouse should be burdened with the other's premarital debt, that the parties should be jointly liable for debt incurred for or during the marriage, and that most debts incurred after separation should be the burden of the respective debtor. That conclusion is entitled to deference.

19 The purpose of the *Matrimonial Property Act*, RSA 2000, c M-6 is to recognize "marriage as an economic partnership, founded on the presumption that the parties intend to share the fruits of their labour during and as a result of it, on an equal basis.": *J. (D.) v. J. (M.)*, 2009 ABCA 272 (Alta. C.A.) at para 1. Later in the same decision, the Court elaborated that the *Act* is designed to "protect against inequities arising from the dissolution of marriage". This is accomplished, in part, by the equitable division of matrimonial property. The exercise, put simply, is to ascertain what matrimonial property is available for distribution, its value, what exemptions are available, their value, and how the property should be divided: see *Hodgson v. Hodgson*, 2005 ABCA 13 (Alta. C.A.).

20 In undertaking that exercise, a trial judge is necessarily involved in ascertaining and distributing the net assets of the parties. While s. 7 of the *Act* does not expressly refer to debts, this Court has held that the obvious intention of the regime is to divide "net matrimonial property", which by definition includes a consideration of debt: *Carmichael v. Carmichael*, 2007 ABCA 3 (Alta. C.A.) at para 21; *A. (D.L.) v. A. (R.T.)*, 2006 ABCA 204 (Alta. C.A.). The goal of the *Act* could not be achieved by dividing assets and ignoring the liabilities that may be associated with them, either with specif-

ic assets or with the value of the matrimonial property generally. Thus, it is generally accepted that debts brought into the marriage, and unrelated to the marriage, should be considered in the division of matrimonial property.

21 No single approach to pre-marital debt is mandated by the legislation. This court has sanctioned several possible methodologies, each developed by trial judges in response to the particular circumstances of the case. For example, in *A. (D.L.) v. A. (R.T.)*, 2006 ABCA 204 (Alta. C.A.), the trial judge took the view that certain alleged debt owing against a particular asset was not genuinely incurred or owing. This Court upheld the decision that concluded that the value of s. 7(2) exempt property available for distribution should be diminished only by the value of the legitimate debt associated with it. In doing so, the Court noted that matrimonial debt is generally understood to be that debt which is incurred during a marriage and to the extent that the debt relates to s. 7(4) property, the presumption is an equal division of the "net" equity. Insofar as s. 7(2) exempt property is concerned, the presumption of equal division does not govern; the division is left to the discretion of the trial judge having regard to the factors outlined in s. 8, which include any liabilities of the spouses at the time of marriage. In *Hill v. Hill*, 2003 ABCA 94, 327 A.R. 51 (Alta. C.A.), this Court overturned a decision where the trial judge failed to take into account that certain funds used to pay down premarital debt came from matrimonial property, and thereby reduced the value of the respondent's claimed exemption.

22 Premarital debt is specifically included in the division of property in other jurisdictions. The Ontario *Family Law Act*, RSO 1990, c F.3, s. 4 defines "net family property" as "the value of all the property ... that a spouse owns on the valuation date, after deducting, (a) the spouse's debts and other liabilities, and (b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse's debts and other liabilities...". In equalizing assets under the Ontario *Act*, the court must calculate each spouse's net family property and then award one half of the difference to the spouse with the lesser amount.

23 In making this calculation, several decisions out of Ontario tend to treat premarital debt as a form of "negative premarital property", adding it to the net family property of the spouse who owed the debt: see *Jackson v. Jackson*, 1986 CarswellOnt 342, 5 R.F.L. (3d) 8 (Ont. H.C.); *McDonald v. McDonald*, 1995 CarswellOnt 1086, 17 R.F.L. (4th) 258 (Ont. Gen. Div.); *Belgiorgio v. Belgiorgio*, 2000 CarswellOnt 3060, [2000] W.D.F.L. 746 (Ont. S.C.J.). In an annotation to *Jackson*, the late Professor James G. MacLeod suggested this approach is justifiable as supporting the policy behind the Ontario *Act*:

> The purpose of the Act is to divide the assets acquired by spousal effort during marriage. If a spouse pays off premarital debts with marital income, he is using for his own purpose property belonging to both parties. The property he holds on separation does not reflect what was acquired during marriage; he also acquired sufficient funds to pay off the debt. The marital acquisitions then include what the party has at separation plus the premarital debts retired. If the purpose of the Act is to effect an equal distribution of marital acquisitions, premarital debt must be factored into the accounting.

24 The same policy is at play here. Under the Alberta regime, in order to equitably divide matrimonial property trial judges must determine what constitutes premarital, joint and post separation debt, all with a view toward fairness in property division. Where these numbers or their proper characterization are at issue, it is incumbent on trial judges to find the facts necessary to do a proper calculation of net matrimonial property and exempt property. The trial judge in this case engaged in that exercise. He concluded that neither party should be burdened financially with the other's pre-marital debt on divorce. Accordingly, as an example, he held that $7,119 outstanding on the husband's CIBC credit card at the date of marriage should not be considered marital debt and should not reduce matrimonial property. He also determined that certain debt was joint debt, accumulated during and for the marriage, the burden of which should be mutually assumed by the parties.

25 The analysis suggested by Slatter JA imposes a tracing requirement on all premarital debt that has been paid off or paid down during the course of the marriage, akin to the tracing of exempt assets. The effect of the suggested approach would be that once a premarital debt is paid during the course of a marriage, regardless of how or with what money, it should never enter into the reckoning of matrimonial property on divorce. It is not reasonable to assume that the parties intended that the premarital debt would be extinguished, and thereby be unaccounted for in the division of matrimonial property. We see nothing in the *Act* nor in the jurisprudence that would or should preclude a spouse who did not incur the premarital debt from arguing that he or she should not be burdened with that debt in a division of property, or from arguing that credit must be given where matrimonial assets, or matrimonial income, are used to pay off the other spouse's premarital debt.

26 Moreover, we see nothing that would limit a trial judge's discretion to deal with premarital debts in the manner in which the trial judge here dealt with them, that is subtracting both parties' premarital debt from the marital debt that will reduce the value of matrimonial property available for distribution.

Treatment of the Purported Loan Agreement to Osteria

27 Although Slatter JA accepts many of the inferences drawn by the trial judge concerning this matter, he concludes that the judge made a palpable and overriding error because he said it was dated July 16, 2007 when in fact it was dated January 16, 2007 (before the parties separated in February). Since the trial judge made no specific finding that it had been back-dated, Slatter JA concludes the entire matter must be revisited.

28 We do not agree. We acknowledge that the trial judge once mentioned the wrong date for the agreement (July 16 instead of January 16). At the same time, it is apparent that he realized the debt was supposedly incurred before February 28, 2007, since he specifically said so elsewhere in his judgment: para 75(v).

29 In any event, the faulty date was mentioned at the very end of para 75 of his judgment, in which he set out eight specific reasons for concluding that the purported loan agreement was "a fiction". Those reasons included the following:

> 1. In a March 8, 2007 affidavit - shortly after separation - the husband outlined his debts. An examination of that affidavit reveals that it has no reference to the Osteria debt even though the husband describes himself in the affidavit as being "financially distressed": Appellant's Extracts of Key Evidence, p. A649.
>
> 2. The trial judge rejected the explanation that the husband's counsel had not mentioned the Osteria debt in the affidavit because "they rushed to complete the Affidavit". The trial judge considered these explanations to have no reliability or credibility, adding that the counsel was not called as a witness.
>
> 3. During the trial the husband testified he had received nearly $500,000 as a result of a sale of his shares in Osteria. But he gave no adequate explanation for why he would not have used some of these proceeds to retire his debt to Osteria, if he had one.
>
> 4. The trial judge had examined Osteria's financial information from 2003-2006, up to September 30, 2006. Nothing showed the debt the husband claimed to owe. Indeed, he was specifically mentioned as having a shareholder's loan of only about $1,200.
>
> 5. The trial judge rejected the Osteria's CFO's evidence that in the 2007 statements the loan owed by the husband was part of a total debt due from related parties, in the amount of $466,352. The trial judge added that it defied logic for the CFO to suggest that the husband had incurred a debt of such amount by February 2007, when only a few

months earlier (on September 30, 2006) the *total* receivables were over $502,000, without showing an amount owing by the husband. Moreover, the evidence of the husband and his witnesses at trial contradicted this information "and explains perhaps why the details of the $466,352 were not produced at trial": para 75 (v).

6. The husband's and brother's evidence regarding the husband's finances was not credible or reliable. The documentation about the alleged Osteria debt was not produced until April 2008.

30 There are other places in the judgment that help to explain the trial judge's views about this purported debt. For example, at para 16 he found that "[m]ost of these monies were for the personal benefit of the Husband while some others were legitimate expenses incurred on behalf of the Osteria for which he was repaid."

31 When the totality of his reasons are considered, and taking account of the fact that since the husband alleged the existence of this debt it was his responsibility to prove it, we are not persuaded that the trial judge's one wrong reference to the date of the loan agreement constitutes palpable and overriding error on this issue. His explanation for concluding that the debt was a fiction was thorough and well-grounded in the evidence.

Miscellaneous Issues

32 Slatter JA also sets out three issues to be "revisited and corrected".

33 In fact, one of these points was raised by the husband's counsel when counsel appeared before the trial judge to deal with costs: see the transcript beginning at p 1803. The husband's counsel said there were a few minor issues arising from the judgment that needed to be dealt with to finalize the judgment roll. One concerned the $15,000 loan from the husband's parents which, in the judgment, was said to be owing to Osteria. The trial judge explained that he had done this deliberately because he considered the parents to be in control of Osteria: Transcript at p 1814. There was considerable evidence upon which he could come to that conclusion.

34 As for the Flight Centre debt, which supposedly was not dealt with in the final calculations, this is the sort of error-correcting that should be put to the trial judge after a long and complex trial like this one. The husband's counsel could have dealt with it when he raised the matter of the above $15,000 debt, but he did not. It is not appropriately dealt with now at the appellate level.

35 As for the matter of the two RBC visa cards, the trial judge appears to have taken account of the possibility that they were related in para 73(p). We note also that some of the difficulty over this issue seems to have arisen from different references between the husband's trial testimony and his post-trial brief. This is not the sort of matter that can be dealt with on appeal, nor are we persuaded that it is practical to have it revisited in the context of this litigation.

Conclusion

36 Given the above analysis, we are not persuaded that the costs award against the husband should be altered.

37 Accordingly, the appeal is dismissed except for the costs award against the mother, which is allowed as set out in Slatter JA's judgment.

***Frans Slatter J.A. (dissenting in part)*:**

38 This is an appeal from a decision of a trial judge, who attributed income to the appellant husband, set child and

spousal support, and divided matrimonial assets and debts: *Kretschmer v. Terrigno*, 2011 ABQB 221 (Alta. Q.B.).

Facts

39 The parties commenced cohabiting in January of 2004, they were married in September of 2005, had one child in July of 2006, and separated in February of 2007. The total cohabitation was 38 months, during 18 months of which the parties were married. A divorce was granted in March of 2010, and the property trial was held in September and October of 2010.

40 The appellant husband's financial situation is unorthodox and complex. During the marriage he was employed at the Osteria de Medici, a restaurant owned by himself and his family. In addition to drawing a modest salary, he derived other financial benefits indirectly from the corporation that owned the restaurant. He lived in a house ostensibly owned by his mother, but the mortgage and some other expenses were paid through the restaurant, and the rental revenue from the house was attributed to him. All of his investments, income, expenses, and business dealings were interconnected with those of his family, and a number of family corporations and trusts.

41 The litigation that resulted was complex. By the time the 22 day trial started, this short marriage had spawned 12 separate legal actions, about 35 court applications, and two appeals. The main support and matrimonial property action was tried together with a related action by the husband's mother claiming an interest in certain matrimonial property. The litigation was marked by the appellant's failure or refusal to make full disclosure of his financial documentation. Some relevant documents were only disclosed during the trial, and then only in a heavily redacted form. Financial documents were possibly created and backdated, causing the trial judge to conclude at para. 75 that they were a "fiction", and that they were "an after the fact concocted fabrication designed to deny the Wife her share of matrimonial assets".

Issues and Standard of Review

42 The appellant husband raises a number of issues. In a related appeal, his mother also challenges the decision below. At a general level, the standard of review for questions of law is correctness. The findings of fact of the trial judge will only be reversed on appeal if they disclose palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras. 8, 10, 25, [2002] 2 S.C.R. 235 (S.C.C.). Inferences drawn from the facts are also reviewed for palpable and overriding error. Absent an error of law or of principle, exercises of discretion are generally reviewed for reasonableness.

43 The appellant argues that the trial judge should have recused himself, in order to avoid a reasonable apprehension of bias. The Court reviews a finding on apprehension of bias for correctness, although the view of the trial judge is entitled to some weight: *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para. 102; *Lavesta Area Group, Re*, 2012 ABCA 84 (Alta. C.A.) at para. 16, (2012), 522 A.R. 88 (Alta. C.A.); *Gahir v. Alberta (Workers' Compensation Board Appeals Commission)*, 2009 ABCA 59 (Alta. C.A.) at para. 15, (2009), 448 A.R. 135, 1 Alta. L.R. (5th) 290 (Alta. C.A.).

44 The trial judge attributed income to the appellant, and awarded spousal support. Such decisions are entitled to deference, and will only be overturned on appeal if they are unreasonable. A support order should only be disturbed if it reflects an error in principle, a significant misapprehension of the evidence, or if the award is clearly wrong: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 (S.C.C.) at paras. 11-12; *S. (D.B.) v. G. (S.R.)*, 2006 SCC 37 (S.C.C.) at para. 136, [2006] 2 S.C.R. 231 (S.C.C.); *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.), at 832-833.

45 The appellant husband challenges the division of matrimonial property, and particularly the way the trial judge dealt with matrimonial debt. The standard of review of matrimonial property orders is deferential. Absent some error of

principle or law, or a clearly unreasonable finding amounting to an injustice, the Court of Appeal will not interfere: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.), at 1374-1375; *J. (D.) v. J. (M.)*, 2009 ABCA 272 (Alta. C.A.) at para. 14, (2009), 464 A.R. 16, 13 Alta. L.R. (5th) 1 (Alta. C.A.); *Morton v. Morton*, 2008 ABCA 144 (Alta. C.A.) at para. 4, (2008), 52 R.F.L. (6th) 248 (Alta. C.A.).

46 The appellants also challenge the costs awards. Costs awards are discretionary and will not be interfered with, unless it is shown the judge made an error in principle or the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 (S.C.C.) at paras. 24-27, (2003), [2004] 1 S.C.R. 303 (S.C.C.); *M. (N.) v. W. (F.)*, 2004 ABCA 151 (Alta. C.A.) at para. 7, (2004), 33 Alta. L.R. (4th) 17, 348 A.R. 143 (Alta. C.A.); *Conway v. Zinkhofer*, 2008 ABCA 392 (Alta. C.A.) at para. 32, citing *Deans v. Thachuk*, 2005 ABCA 368 (Alta. C.A.) at para. 16, (2005), 376 A.R. 326 (Alta. C.A.); *Dool v. Nazarewycz*, 2009 ABCA 70 (Alta. C.A.) at para. 53, (2009), 448 A.R. 1 (Alta. C.A.).

Reasonable Apprehension of Bias

47 The trial judge was appointed to the bench in 2003, prior to either the cohabitation or the marriage. Before then the trial judge was in private practice with a firm in Calgary. Other lawyers in that firm, but not the trial judge, provided legal services to the appellant, his family, and the family corporations. The trial judge apparently patronized the restaurant owned by the appellants' family before and after his appointment, but had not done so in recent years.

48 At a pretrial hearing a few days before the trial commenced, the appellant husband's father interjected:

> Sir, just one sec. I know personally the judge. I know him, the judge here. I know the judge. He know me, I know him personally. He's come from the one - the law firm that I work with.

After observing that the father was not a party to the litigation, but might be a witness, the trial judge stated:

> Okay. Let me put it on the record here that, yes, I know who he is. I've never had any business dealings of any sort with him. I believe he - being a witness - was at one point a client of my firm or law firm long before this issue arose and - and I have been appointed to the bench since 2003. I've never met or had any personal dealings with the litigants in this matter. So, you may want to consider that information, Mr. Zinner [counsel for the appellants].

Nothing further was said on that date.

49 When the trial commenced a few days later, counsel for the appellants touched on the matter again:

> Lastly, Sir, during our last attendance, the Court heard some representations from [the father], a non-party and a non-lawyer, about whether or not you should try this case, and I must confess that I was surprised by the unanticipated and unsolicited intervention.

Counsel for the appellants advised the Court that the family's finances, the family's restaurant, and related companies would be discussed during the trial. Several of the family members would be witnesses. There was a concern that the trial judge may have been privy to some confidential information prior to his appointment to the bench in 2003. Counsel concluded:

> Having said that, Sir, this is simply being offered by me as an explanation. You did make your ruling. As stated at the outset, these comments are offered merely by way of explanation and as a courtesy because of the unorthodox nature - unorthodox nature of the intervention.

Counsel for the respondent then observed that if there was to be any allegation of a reasonable apprehension of bias, it should come from the respondent, not the appellants, and that the respondent had no such concerns.

50 The trial judge concluded:

> Okay, just one small addition, Mr. Zinner. Yes, it's correct, I think the other day I said that I didn't know the litigants, being [the husband and the wife], but I have met [the mother], at the restaurant, which I haven't been in for, I think, four years. So that is the only slight addition to what I said the other day, and my comments stand and my ruling stands.

The trial proceeded. On appeal, the appellants now argue that the trial judge's findings of credibility were perhaps tainted by his prior involvement. The appellants have tendered fresh evidence alleging that the law firm and the litigants had a falling out after the trial judge left the firm, and the appellants speculate that this may have coloured his views of the matter. That potential source of an apprehension of bias was never put to the trial judge.

51 The test for a reasonable apprehension of bias is whether a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking things through, would have a reasonable apprehension of bias: *R.D.S.* at para. 31; *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at p. 394; *Roberts v. R.*, 2003 SCC 45 (S.C.C.) at para. 74, [2003] 2 S.C.R. 259 (S.C.C.).

52 This record does not disclose circumstances that would create a reasonable apprehension of bias. The trial judge's only connection with the litigants was indirect, through other partners at the law firm, and it arose only because of a rebuttable presumption that members of a firm would share confidences: *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) at para. 46. That presumption is weak here because the supposed source of the confidential information is remote from the issues arising from the marriage. The trial judge was appointed to the bench prior to this cohabitation and marriage, and therefore prior to the occurrence of most of the events which were the subject of the trial. Merely eating in the family restaurant, and meeting the proprietors in that context, would not create an apprehension of bias in the eyes of a reasonably informed bystander. The trial judge clearly had no recollection of any private information he may have overheard while in practice. A reasonable observer would not assume that a trial judge would adopt any speculative grudges that his former law firm may have developed after he left the firm.

53 Further, a party that perceives a reasonable apprehension of bias must act promptly. It is notable that none of the litigants ever clearly made an application to the trial judge to recuse himself. If anything, counsel's comments appeared to distance his clients from the objection of the father. The ground now relied on (a grievance transferred from his former law firm) was never raised.

54 As noted, the appellants applied to introduce fresh evidence on this topic. The test for fresh evidence requires, in part, that the fresh evidence would likely have an impact on the outcome. The tendered evidence disclosed that the appellants discussed the situation with their counsel, and for tactical reasons declined to bring a recusal application. It is not open to a litigant to take a chance on being successful in the trial, and if that does not work to argue an apprehension of bias on appeal: *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537 (S.C.C.) at para. 11; *Ghirardosi v. British Columbia (Minister of Highways)*, [1966] S.C.R. 367 (S.C.C.) at p. 372. The evidence is not admissible, and this ground of appeal is without merit.

Findings of Credibility

55 In many respects the trial judge preferred the evidence of the respondent to that of the appellant husband and his

family. The appellants complain that in some respects the respondent contradicted herself at trial. Determining the credibility of the witnesses is particularly within the mandate of the trial judge. A trial judge is entitled to believe some, all, or none of a witness's testimony. Just because there are flaws in the testimony of a particular witness does not preclude the trial judge from concluding that, overall, that witness is more reliable than the other witnesses. The basic findings of credibility made by the trial judge do not disclose any reviewable error.

Attribution of Income

56 Determining the income of the appellant husband was an important foundation to awarding child support. Because of the unconventional way that the appellant husband derived his income, it was not possible to simply look at his tax returns. The trial judge paid particular attention to cash flow statements prepared by the restaurant's chief financial officer (the appellant husband's brother) prior to the separation, which appeared to have been designed to show to the husband and wife that they were living beyond their means. The brother had just returned from university, and apparently prepared the statements to show that the husband was drawing more from the restaurant than his entitlement. These documents outlined the benefits the brother thought the appellant husband derived from his employment at the restaurant.

57 The trial judge also noted that the appellant husband had resisted the production of all of the documents that were necessary to determine his income. The trial judge resolved at para. 19 to attribute income to the appellant husband under s. 19 of the *Federal Child Support Guidelines*. The trial judge concluded at para. 24 that his income should be calculated as follows:

$60,000.00	the Amount the Husband claims to be his salary from the restaurant
$39,000.00	the equivalent of the mortgage costs paid by someone other than the Husband in the amount of $39,600.00 per year net of cash as per the cash flow statements
$15,093.00	for the value of the Husband's paid for automotive costs which is the average for the years 2005/2006 ($11,600 + $16,566) as per the cash flow statements
$8,400.00	rental revenue from the basement suite as per the cash flow statements
$20,300.00	"paid for" RRSPs as per the cash flow statements. The average of $25,600 + $15,000 for the years 2005-2006
$142,793.00	Total
$197,926.00	Marginal Tax Rate Gross Up @ 39.00%

The "cash flow statements" referred to are the statements prepared by the chief financial officer for the 2005 and 2006 years, which were designed to show that the litigants were living beyond their means. The resulting imputed income of $197,926 for 2007 was stated by the trial judge to be "the amount requested by the Wife in argument". The trial judge then attributed this same level of income to the appellant for the years 2008 and on. The appellant husband challenges several aspects of this calculation.

58 The *Federal Child Support Guidelines* give trial judges an extraordinary power to attribute income in some circumstances, even absent evidence:

> 19(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> . . .

> (f) the spouse has failed to provide income information when under a legal obligation to do so;

The trial judge's finding in support of using this discretion were:

> 26 I accept the Wife's submission that the parties are unlikely ever to easily ascertain the Husband's income and that the prospect of adjusting his child support obligations on an annual basis in the ordinary course are simply inviting a revisitation of all of the issues which have now been tried at untold expense. The Wife's evidence at trial was that she tried to settle matters through mediation and that the Husband told her that there was no way that he was going to let her get away that easy and that he was going to take every penny she had. I accept the Wife's evidence in this regard.

This is a finding that supports using s. 19(1)(f), but that jurisdiction must be exercised on a principled basis. Amounts attributed must be reasonable, not punitive, and have a rational base. Specifically, it is not an acceptable method for the court to attribute income to a spouse in a way that is inconsistent with the evidence that is on the record.

Rental Income

59 The appellant husband challenges the attribution of the rental income from the matrimonial home to him. He argues that the house is owned by his mother, that she is entitled to the rent, and that the rent is therefore a gift to him. He correctly notes that gifts are not income.

60 The evidence was that the matrimonial home was registered in the mother's name, but that the appellant husband had lived in the house for a number of years prior to the cohabitation, and that it was the matrimonial home. The respondent testified that the appellant represented to her that he owned the house, and she did not find out the true arrangement until after the marriage. The mortgage payments on the house were paid by the restaurant corporation, and the chief financial officer attributed the subsequent benefit to the appellant husband.

61 The evidence would have easily permitted an inference that the mother was not the beneficial owner of the matrimonial home, and that she was merely holding title for her son, the appellant husband. While it is unfortunate that the trial judge never made a clear finding to that effect, the way he dealt with the house discloses that he must have concluded the appellant husband was the true beneficial owner. This can be seen by his attribution to the appellant husband of the mortgage payments made by the restaurant corporation. It is also consistent with the way he dealt with the rental income from the house as belonging beneficially to the appellant husband. While the trial reasons lack some transparency, when read as a whole no reviewable error of law is shown.

Mortgage Payments

62 The appellant husband also argues that the full amount of the mortgage payments should not have been categorized as income, because a large portion of those payments would be payments of principal. While that is true, that does not affect the attribution of income. The corporation made a benefit of $39,000 available to the appellant husband, which was applied to the mortgage. That was a resource available to him, no matter how he spent it, and it was reasonably added to his income. Many spouses use a significant proportion of their income to pay a mortgage (which payments are partly principal and partly interest), but the amount used to pay the mortgage is still income.

Base Salary

63 The trial judge attributed $60,000 to the appellant husband as his base salary. This is the amount that the appellant husband asserted was his total income (in all forms) from the restaurant. The appellant husband claims that it is un-

reasonable to use this as a base amount, and then to attribute other collateral sources of income to him as well. Further, he argues that this amount should not have been grossed up for income tax.

64 The trial judge acknowledged at para. 25 that this assertion of income by the appellant husband was "unclear and contradictory". He noted that it did not correspond with line 150 of the appellant husband's tax returns. The trial judge was entitled to attribute income to the appellant husband under the *Federal Child Support Guidelines*, both because of the unorthodox way he derived his income, and also because of his failure to make full disclosure.

65 However, it represented a palpable and overriding error for the trial judge to take the total asserted income of the appellant husband, and then add other attributed amounts to him. The appellant husband asserted the $60,000 figure as the final figure, not the base figure. As the trial judge noted at para. 27 "the Husband represented to her and demonstrated that his every living expense was paid for by or through the [restaurant] but for tax purposes he claimed a nominal salary". Since there was no clear support for the asserted number in the evidence, the trial judge was entitled to reject it, but having rejected it he should not then have used it as a base. The appropriate method would be to take the appellant husband's "nominal salary" received from the restaurant for tax purposes (based on his T4 slips), and then add any other attributed items.

66 Having noted that the basis for the husband's claimed base salary from the restaurant of $60,000 was "unclear and contradictory", the trial judge went on to note that the average of the husband's line 150 income for the years from 2003 to 2007 was $120,853. This, however, was not a comparison of the same amounts. Salary income from the restaurant (that is, the nominal salary received for tax purposes) would be recorded on line 101, not line 150. Further, as the trial judge noted, the income for 2005 included a taxable capital gain of $230,625, which clearly was not salary from the restaurant, and clearly not a recurring item.

67 The trial judge could have proceeded to use an average line 150 income over a number of years, although under s. 17(1) of the *Federal Child Support Guidelines* some account would have to be taken of the very large, nonrecurring capital gain. He also could have attributed income to the appellant husband in some manner that was consistent with the record. However, having chosen to identify the appellant husband's base salary for tax purposes, and then add to it other benefits he received from the restaurant, the resulting calculations must be consistent with what the trial judge finds the record actually shows.

68 The appellant husband is also correct in arguing that his base amount of salary from the restaurant should not be grossed up for tax, because it is already a pre-tax number.

RRSPs

69 The trial judge attributed as income in the appellant husband's hands $20,300 of RRSP contributions made by the restaurant on his behalf. Conceptually, that is the correct approach. However, the sum of $20,300 was the average of the RRSP amounts actually paid on his behalf in 2005 and 2006. Absent other evidence, the court might impute averages or other estimates.

70 The record clearly discloses (EKE A479) that the RRSP contribution for 2007 was only $3,754, not the $20,300 used by the trial judge. The trial judge acknowledged at para. 22 that no or lower RRSP payments had been made in subsequent years, but stated: "That is his choice". That is true so far as it goes. RRSP contributions are voluntary; the *Income Tax Act* does not compel them. If the appellant had received $10,000 for RRSP contributions, but had used the funds for other purposes, that amount would still be attributed to him as income. But if he never received any funds at all, there is no choice to make and nothing to attribute. Declaring it a matter of choice was an error unless there was a choice.

Attributed Income

71 Where income is attributed, it must not be inconsistent with what has been proven. Where a valid analytical method is used, the amounts used in the formula must be justifiable. Here the trial judge was entitled to use the method of taking the declared base salary, and adding other benefits to it. But that base salary and the benefits should reflect the record, absent a finding from the trial judge that the amounts are unreliable or inaccurate. There is no finding by the trial judge that the base salary or RRSP numbers are inaccurate.

72 The trial judge's findings of fact, inferences drawn from the facts, and attribution of income to the appellant husband are entitled to appellate deference. They will not be overturned unless they disclose palpable and overriding error. But a high standard of review is not the same thing as immunity from review: *L. (H.) v. Canada (Attorney General)*, 2005 SCC 25 (S.C.C.) at paras. 73, 75, [2005] 1 S.C.R. 401 (S.C.C.); *R. v. Regan*, 2002 SCC 12 (S.C.C.) at para. 118, [2002] 1 S.C.R. 297 (S.C.C.); *Wilde v. Archean Energy Ltd.*, 2007 ABCA 385 (Alta. C.A.) at para. 102, (2007), 82 Alta. L.R. (4th) 203, 422 A.R. 41 (Alta. C.A.). The trial judge's findings must be founded on the record, and cannot simply be pulled out of the air.

73 There was evidence on this record that the brother's return, the parties' unsustainable lifestyle, and other factors meant that the appellant would no longer be in control of the restaurant's funds. There is no finding that the appellant had received other funds but diverted them, for example from RRSP contributions. Trial judges are afforded deference in their fact findings, but they must make such findings. There was significant contradictory evidence on many of these issues. Was the appellant still in control of the restaurant? Had his family limited his access to cash? Was there really a falling out in the family? No fact findings were made on these issues. The critical assumption of the trial judge was that the appellant's income in 2008 and following would be the same as in 2007. There are no findings to support that assumption.

74 Based on the approach selected by the trial judge, the appellant husband's base salary for 2007 should be set at $46,154 (EKE A478, A495). To this should be added the other amounts of attributed income (mortgage $39,000 + car $15,093 + rent $8,400 + RRSP $3,754 = $66,247), grossed up for tax by 39% (1.39 × $66,247 = $92,083). His attributed income for 2007 using the method selected by the trial judge is therefore $138,237 ($46,154 + $92,083).

75 Having imputed the husband's guideline income for 2007 using this method, the trial judge then attributed this same amount of income to the husband for all of the years until trial. Having regard to the entire record, and particularly the conclusion of the brother that the parties were living beyond their means, this represents palpable and overriding error. The trial judge articulated no factual findings or inferences to support the conclusion that the appellant husband's income was unchanged for the years 2008 to 2010. As the trial judge observed at para. 21, it was "probably true and the Husband was probably cut back somewhat". Given that finding, it was a reviewable error to simply attribute the same income number to the husband for all of the subsequent years. While it would be appropriate in some cases, where the record was particularly inadequate, to attribute the same income to one spouse over a number of years, that cannot be done where the result is inconsistent with the record.

76 In this case the appellant husband's declared "nominal salary" for tax purposes was $57,767 for 2008 and $46,154 for 2009. The RRSP contributions appear to be nil for 2008 and 2009. There is no information for 2010 and 2011 on the record. There is no evidence that the husband received rental payments on the house, or that mortgage payments were made on his behalf. The reasons of the trial judge did not give any supportable basis for the income imputed to the appellant husband in these latter years.

77 The appeal on this issue should be allowed. The husband's imputed income for 2007 should be set at $138,237.

The determination of his income for 2008 to 2011 should be referred back to the trial court, to be calculated on the principles set out in para. 24 of the trial judge's reasons. The amounts of child support payable for 2008 to 2011 should be recalculated, but using the general approach outlined by the trial judge in para. 31 of his reasons.

Spousal Support

78 The trial judge concluded at para. 38 that the respondent had suffered some economic hardship during the marriage, particularly due to the interruption of her employment by reason of her maternity leave. He awarded lump-sum spousal support in the sum of $15,000. While the appellant husband challenges this award, it discloses no error of principle or misapprehension of the facts that would make it unreasonable. The appeal from this component of the judgment is dismissed.

Matrimonial Debt

79 A significant amount of trial time was taken up in attempting to determine the matrimonial debt of the two parties. In particular, it was necessary for the trial judge to separate out the premarital debt from the debt that was incurred during this short marriage.

80 The *Matrimonial Property Act*, RSA 2000, c. M-8, does not deal clearly with debts. Section 7 provides for the division of matrimonial property, and trial judges and spouses often proceed on the assumption that this means "net matrimonial property, after payment of matrimonial debt". This is only sensible, because the spouses cannot escape their proper debts simply because they are becoming divorced. There appears to be very little authority analyzing how debt should be dealt with.

81 The *Act* recognizes property that is brought into the marriage as exempt. There is a presumption of the equal division of matrimonial property acquired during the marriage. Only the increase in value of exempt property brought into the marriage is divided, and there is no presumption of the proper ratio of division. The case law does generally recognize that debts unrelated to the marriage should be treated differently on divorce. This concept is recognized by s. 8, which includes in the "matters to be taken into consideration" in deciding on a "just and equitable" distribution:

> (d) the ... liabilities, obligations, ...
>
> (i) that each spouse had at the time of marriage, and
>
> (ii) that each spouse has at the time of the trial;

Pre-marriage debt is therefore clearly a relevant, discretionary factor. It is common for trial judges to regard debt that is brought into the marriage, and that is unrelated to the cohabitation or marriage, to be the responsibility of the party that brought that debt into the marriage. If the debt is related to property that is being divided, or has otherwise been assimilated into the marriage, it will sometimes be treated as matrimonial debt.

82 It is not uncommon for parties to enter into a marriage with some separate debt. During the marriage, at least if the marriage is of any significant length, the parties generally pay that debt off. Newly married couples will often incur new "matrimonial debt" relating to their lifestyles, for example relating to joint holidays, the purchase of furniture, the purchase of a home, etc. After some time it may be very difficult to distinguish which debt is which; for example, the debt on a credit card, which revolves, may start out being pre-marriage debt, and after a few years result primarily from expenditures related to the marriage. It is, however, the long-term shared expectation and financial plan of most married couples that eventually they will be debt free.

83 A common scenario is for married couples to enter marriage with no exempt assets of any significance, but with some debts. For example, it is not uncommon for one or both newly married spouses to have student loans. It is almost invariably the expectation of the couple that those loans will be paid off during the marriage.

84 While the *Act* recognizes some types of "exempt property", there is generally no recognition of any such thing as "exempt income". All of the income of both spouses is generally considered to be income of the marriage, and it is subject to consideration, for example, in setting child support and spousal support. The "means" of the spouses identified as relevant to spousal support in s. 15.2 of the *Divorce Act* does not anticipate there being any "exempt means". Some provisions of the *Federal Child Support Guidelines* (e.g. ss. 18(1) and 19(1)(i)) contemplate the inclusion of income that might frequently arise from exempt assets. There is some limited recognition in s. 7(3)(b) of the *Matrimonial Property Act* of the ability to acquire new exempt property from the income from existing exempt property.

85 Since there is no such thing as "exempt income", there cannot be any rule that premarital debt can only legitimately be paid from a stream of "exempt income". If that was the rule, no spouse could ever pay back premarital debt, other than by encroaching on matrimonial income. The case law does not appear to recognize any rule that premarital debts must be paid out of exempt assets (unless the debt relates specifically to the asset), and in any event that sort of rule would not deal with the common circumstance where there are no exempt assets brought into the marriage.

86 It follows that there is nothing illegitimate about spouses using income earned during the marriage to pay off the debts brought into the marriage. There is often no other way to pay off those debts. It will almost invariably be the expectation of the parties (absent some particular agreement to the contrary) that this is how pre-marriage debt will be retired.

87 Therefore, if pre-marriage debt is in fact paid off during the marriage, it does not linger as an inchoate obligation of the spouse who brought it into the marriage. Upon divorce, the other spouse cannot argue that credit must be given for matrimonial income used to pay off premarital debt. For example, if one spouse brings a student loan into the marriage, the student loan is slowly paid off during the marriage, and then many years later the parties divorce, the other spouse is not entitled to a notional credit because there was premarital debt at the time of the marriage. This is consistent with the way the law deals with exempt assets. A spouse is not entitled to credit for an exempt asset which has been consumed or dissipated. There is no exemption "in the air": *Harrower v. Harrower* (1989), 68 Alta. L.R. (2d) 97, 97 A.R. 141 (Alta. C.A.). So, if one spouse inherits an exempt sum of money, the exemption only exists so long as the inheritance can be traced into a specific asset. If the inheritance is intermingled with matrimonial assets, or if it is consumed (for example on a vacation) credit need not be given for it on a later matrimonial property division. By analogy, if a premarital debt is paid off in the ordinary course during the marriage, it may no longer be a factor in any subsequent matrimonial property division. This principle applies equally to marriages of any duration.

88 In para. 23 of their reasons, my colleagues note the observations of Prof. J.G. MacLeod on the treatment of matrimonial debt under s. 4(1)(b) of the *Family Law Act*, RSO 1990, c. F-3. While this may be an accurate description of the situation in Ontario, having regard to the very specific provision in force there, it does not necessarily represent the law in Alberta. In Alberta, s. 8 makes it clear that the existence of pre-marriage debt is a relevant factor, the treatment of which is within the discretion of the trial judge.

89 From one perspective, the Ontario legislation does not carry any intuitive attractiveness. It seems to assume that in Ontario a spouse can never discharge premarital debt. No matter how long the marriage, and no matter what the circumstances, when the final reckoning comes that party will be saddled with that debt. Assume that on marriage neither spouse had any assets, and one spouse has significant student loans. Assume that during the marriage the other spouse is

not active in the economic workforce, and for many years the parties live comfortably on the income made possible by the education funded by the student loans. Assume also that the student loans were paid off during the marriage, using that same income. It seems inconsistent with the concept of an "economic partnership" that upon the divorce, the spouse who had student loans must bear the full burden of them when the matrimonial property is divided. Why should the other spouse have been able to enjoy the standard of living made possible by the education, but be allowed to disclaim any responsibility for the student loans? That would be contrary to the expectations of most couples. It assumes that the student debt can only be paid off out of "exempt income", when the law seems to recognize no such thing.

90 A particular issue arises with respect to revolving debt, like credit cards. These are credit instruments where new obligations are incurred, and payments are made, on a periodic basis. It is common for both parties to a marriage to have credit card debt. It is common for them to continue to use the same credit cards after marriage, and even to obtain joint cards on the other spouse's premarriage account. At the time of the marriage, all of the debt could be regarded as being pre-marital debt (assuming, possibly, it is unrelated to any cohabitation). As the marriage continues on, many new purchases will be made which are clearly related to the marriage. At the same time, payments will be made on the outstanding balance. After some period of time it will become impossible to say that the opening balance at the date of marriage continues to exist in any realistic way. This is particularly so with longer marriages, but the same principles must apply to marriages of any duration.

91 Some spouses are in the habit of paying down the credit card balance in full each month. In that event, any pre-marriage balance will be extinguished in the first month after the marriage. As noted above, there is no objection to be made because the balance was paid with "matrimonial income"; that is the only source of funds to pay the debt. Even if a spouse does not pay off the balance every month, if at any time during the marriage the balance in fact is zero, any pre-marital debt must have been extinguished. Any new debt incurred thereafter must be matrimonial debt. For the same reason, the pre-marital debt can never exceed the lowest intermediate balance on the credit card.

92 Assume, as an example, that a couple gets new joint credit cards at the date of marriage, and stops using their separate pre-marriage credit cards. Clearly what is charged to the new joint cards is matrimonial debt. And as the pre-marriage balances get paid down, the pre-marital debt will effectively be discharged. The situation should be just the same if instead of getting new cards the couple continues to use their pre-marriage cards for matrimonial expenditures. At some point sufficient payments will be made on the cards to extinguish the old debt.

93 The default rule in Canadian common law, where there is no contractual provision to the contrary and where no appropriation is made by either the debtor or the creditor, is that earlier debts are extinguished first (C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, 2nd ed (Toronto: Carswell, 1995) at 25; *Clayton's Case, Re* (1816), 35 E.R. 781 (Eng. Ch. Div.); *Polish Combatants' Assn. Credit Union Ltd. v. Machnio*, [1984] 5 W.W.R. 97 (Man. C.A.), at pp. 108-9). There would appear to be little, if any, case law on the application of these principles to matrimonial property disputes.

94 As noted, the trial judge has some discretion over dealing with matrimonal debt. As a general rule, where payments are made after marriage on a revolving debt, it should be assumed that those payments are applied to the oldest (i.e. the pre-marriage) balance first. New obligations on the revolving debt incurred during the marriage should be regarded as being expenditures made in the ordinary course of the marriage, and any new balance is therefore matrimonial debt. This general principle must of course be sensitive to the factual context. It will yield to any specific agreement made by the parties as to how they will deal with their premarital debt. If the post-marriage expenditures are not for matrimonial purposes, or relate to exempt assets, a different analysis will be needed. If one of the spouses is using the credit cards to dissipate assets, or is otherwise making expenditures or payments out of the ordinary course, that will be relevant to what is a "just and reasonable" division.

95 It follows that (absent special circumstances, and subject to the discretion of the trial judge in the *Act*), the amount of pre-marriage debt will usually be reduced by all payments made subsequent to the marriage. This effectively means that the pre-marriage debt is eliminated at any time that the revolving credit instrument has a nil balance, the pre-marriage debt can never exceed the lowest intermediate balance that is owed, and once payments have been made on the revolving credit that exceed the balance on the date of marriage all remaining debt is matrimonial debt.

96 The parties to this appeal had a number of term loans, as well as revolving lines of credit and credit cards on the date of marriage. It was generally conceded that the pre-marriage balances were not matrimonial debt. The trial judge at para. 73 proceeded generally by subtracting the premarital balance from the balance at trial, and assumed that difference was matrimonial debt. For example, he ruled at paras. 73(e), (h) and (m) that a particular CIBC debt had a balance of $7,119 on the date of marriage, and $10,887 at the date of separation. He subtracted the two, and assumed that $3,768 was a matrimonial debt.

97 This approach is flawed for the reasons previously given and reflects a palpable and overriding error. The assumption that the difference between the two amounts is the only matrimonial debt presumes that none of the premarital debt is ever paid off. Thus, in a 20 year marriage, where the opening and closing balances of a credit card were both $5,000, but there were thousands of intermediate transactions, the conclusion would be that the final balance is not matrimonial debt, even after 20 years. This is simply unreasonable.

98 The approach of the trial judge is particularly unsupportable when one notes that the particular CIBC credit card debt was completely paid down, and had a nil balance in November of 2006. Whatever portion of this debt might notionally have been premarital debt was essentially extinguished at that point. The balance of $11,298 remaining when it was paid out must have been matrimonial debt.

99 The record in this respect is perhaps incomplete, but the following conclusions appear to arise:

(a) The "CIBC debt", referred to at paras. 73 (e), (h) and (m), consists of credit card debt and a line of credit. The credit card balance is reduced to zero on the January 4 to February 3, 2006 statement, and again on the July 5 to August 3, 2006 statement. The premarital CIBC credit card debt was thus entirely extinguished.

(b) With respect to the CIBC line of credit, the appellant's statement of assets and liabilities states that the balance was $4,883 at the date of marriage and $4,782 at the date of separation. However, during the marriage payments in excess of the opening balance were made, meaning that if all the new purchases were for matrimonial purposes, then all the remaining debt on separation was matrimonial debt. In any event, the line of credit was paid down to $690.57 for the statement issued on October 5, 2006, which is the lowest possible amount that could be pre-marriage debt, under any calculation.

(c) RBC line of credit 752-001 is referred to at paras. 73 (a), (n) and (o) of the judgment. Based on the transaction history listed on EKE A894, the balance on this line of credit was $20,100 on September 15, 2005, which was shortly after the marriage date. It increased continuously to $45,000 on December 15, 2005 and was subsequently paid down as far as $29,000 on August 29, 2006. It then increased again, reaching $45,000 on September 26, 2006, and was paid down again, reaching $30,000 on October 20, 2006. It was then increased again to $45,000, which was the amount of the debt at the time of separation. At no point during the marriage did the balance dip below the $20,100 amount of the pre-marital debt. However, a total of $31,000 was paid towards the principal during the course of the marriage. The trial judge at paras. 73 (n) and (o) expressed concerns about what the debt incurred during the marriage was used for. It is not possible on the record to determine which portion of the RBC line of credit is matrimonial debt.

> (d) RBC Visa 4045/6847 is referred to at paras 73(c) and (p). The balance as of the date of marriage was $22,699.41. The balance on the last statement towards the end of the marriage as of December 7 to January 5, 2007 was $27,454.26. Over the course of the marriage, debts were continually incurred and paid down. The lowest monthly balance over the course of the marriage was $16,509.15 shown on the August 5 to September 6, 2006 statement (EKE A191). Total payments during the course of the marriage far exceeded the balance at the date of marriage, so if all the transactions were matrimonial transactions, the premarital debt was extinguished.

Given the incomplete findings of the trial judge, and the possibly incomplete state of the record, the parties are entitled to have any issues respecting these matrimonial debts re-examined by the trial court.

Financial Issues Relating to the Restaurant

100 The appellant husband was a partial owner of the family restaurant. At trial he testified that he had sold his interest for $495,000, and that he had "signed back" the whole of this amount. His interest in the restaurant would have been exempt, but the trial judge questioned the existence or legitimacy of this transaction. He also questioned how or why the appellant husband "signed back" this significant sum without retiring any of his debt. The trial judge's findings in this respect disclose no reviewable error.

101 The appellant husband also testified that he owed the restaurant $140,093. This debt was said to arise because of his practice of charging personal expenses to the restaurant. At some point these were attributed to him by the restaurant. A dispute arose over the categorization of these amounts. The respondent argued that when they were attributed to the appellant, they were income, and never had to be repaid. The appellant argued that his family concluded he had drawn more than his share, and expected him to pay back the excess.

102 The trial judge concluded at para. 75:

> 75 In my view, the Husband's alleged $140,093 debt to the Osteria is a fiction. I agree with the Wife's submissions that however constructed or concocted there never was this alleged debt owing to the Osteria until it was conceived post-separation as a way of claiming back money from the Wife or recapturing it in the Husband and Wife's matrimonial property division for the following reasons ... (viii) the purported loan agreement ... dated July 16, 2007 together with the promissory note ... amount to an after the fact concocted fabrication designed to deny the Wife her share of matrimonial assets.

The trial judge made express findings that the appellant husband and his brother (the restaurant's Chief Financial Officer) did not tell the truth at the trial, and that they were not credible witnesses in these issues. Such findings of credibility are entitled to significant deference on appeal.

103 By describing the debt as a fiction, the trial judge appears to have concluded at para. 75(vii) that it was income, not a loan, but there is no express finding to that effect. In coming to his conclusion that this debt was a fiction, the trial judge relied on a number of documents that might have been expected to show the debt, but did not. It had not been listed in a draft prenuptial agreement that was never signed. It had not been disclosed in an earlier affidavit sworn by the husband. Earlier financial statements of the restaurant did not show the debt. The fact that the debt was not disclosed in certain earlier documents was clearly relevant. The inferences the trial judge drew in this respect were not unreasonable.

104 However, the trial judge was in error in stating in para. 75(viii) that the "purported loan agreement" was dated July 16, 2007. It was in fact dated January 16, 2007. The significance is that the parties separated in February of 2007, when the husband came home and unexpectedly found that his key no longer fit the lock. This loan agreement could not

have been a "post-separation concocted fabrication", unless it had been backdated.

105 While the loan agreement was dated January 16, 2007, a collateral charging agreement had an affidavit of execution sworn June 11, 2007. That was the latest the loan agreement could have been prepared, but not the earliest. The collateral charging agreement recites the loan agreement dated January 16, 2007, but also a later agreement of May 31, 2007 regarding the acceptance of payments over time, and the provision of security. In any event, absent a finding of the trial judge that the loan agreement was backdated, this document is not conclusive either way.

106 Counsel for the respondent fairly conceded that no witness testified the loan agreement had been backdated. The trial judge made no finding of fact that the document was backdated. The trial judge stated that the loan agreement was dated July 16, 2007, not that it was "prepared in July, and then backdated to January 16, 2007". This error is critical, because it appears to undermine the inference that the document was created post-separation in order to affect the matrimonial property division. The trial judge effectively made a finding of fraud in the preparation of this document; in those circumstances precision in the findings is to be expected.

107 There are undoubtedly a number of problems with the record and the evidence surrounding the alleged debt to the restaurant. Some of the witnesses and some of the documents support the existence of the debt, while others tend the other way. The trial judge's finding that it was a fiction reflects a palpable and overriding error, because he failed to notice that the loan document was apparently entered into prior to the separation, and he made no finding it was backdated. Whether and to what extent it is a legitimate debt is an open question that cannot be resolved on this record.

Miscellaneous Issues

108 There are a number of other difficulties with the reasons:

(a) the trial judge concluded that there was no evidence that two RBC Visa cards were related, whereas the respondent had testified that one was a replacement when the other one was misplaced.

(b) The trial judge concluded that a $15,000 loan from the husband's parents was marital debt, but it is unclear how he divided responsibility for repayment of that debt (Reasons, para. 77(o)).

(c) The trial judge recognized at para. 76(b) that a debt to the Flight Center was matrimonial debt, but failed to deal with it in his final calculations.

These items should be revisited and corrected.

Costs Against the Husband

109 The trial judge ordered the appellant husband to pay the respondent wife double costs of the trial, on the basis that the respondent had been successful, and that the appellant had failed to beat various offers that had been made. Given the conclusion that some significant portions of the trial judgment should be revisited, it follows that this order is no longer appropriate.

110 It should be noted that much of the complexity of the trial was generated by the appellant husband's unorthodox financial arrangements, his inadequate and confusing financial documentation, and his failure or refusal to make full disclosure prior to the trial. The consequences of those factors should not be borne by the respondent wife. It would therefore be appropriate to direct the appellant husband to pay the respondent a single set of costs of the trial. If upon the retrial it was determined that the respondent made appropriately framed and more generous offers than the eventual judg-

ment, it would be open to the new trial judge to award double costs of the first trial from the date of any offer.

Costs Against the Mother

111 The appellant husband's mother commenced a separate action against the appellant husband and the respondent. Initially she claimed a beneficial interest in a condominium in Canmore that had been purchased during the marriage. That action was tried along with the matrimonial property action, and the appeal from the resulting judgment was consolidated with the matrimonial property appeal.

112 The mother's initial claim to a beneficial interest in the condominium in Canmore was based on an allegation that she had advanced funds to purchase that Canmore property. The respondent denied that any funds had been advanced, and pleaded in the alternative that any funds advanced were a gift. The respondent maintained that position throughout the trial, testifying that any funds advanced were a gift (Transcript, p. 119, l. 41).

113 The mother's claim evolved during the proceedings. In a pretrial brief she claimed an interest in the property, and as an alternative the fixed sum of $41,836 (principal advanced plus interest). During the trial the mother abandoned the claim to an interest in the property, and limited the claim to $41,836. At para. 77(d) the trial judge concluded that the mother was entitled to payment of $33,386.50. The trial judge nevertheless directed the husband's mother should pay double costs for the entire action to the respondent.

114 An issue arose as to when the mother abandoned her claim to a beneficial interest in the property, and merely claimed repayment of the money she had advanced. Her counsel recalled limiting the claim in his opening remarks, although the pretrial brief had still claimed an interest in the property as an alternative. The trial judge recalled that the proprietary claim was abandoned "sometime through the middle of the trial" (Transcript, pp. 1822-3).

115 The trial judge directed that the costs payable by the mother be doubled because he perceived that more favorable offers had been made than the eventual judgment. The offers in question were informal offers of judgment, but that does not preclude them being considered when costs are awarded: *Mahe v. Boulianne*, 2010 ABCA 74 (Alta. C.A.) at para. 10, (2010), 21 Alta. L.R. (5th) 277 (Alta. C.A.); *Tomich Estate, Re*, 2011 ABCA 257 (Alta. C.A.) at para. 6, (2011), 70 E.T.R. (3d) 1 (Alta. C.A.). The particular offer relied on was a comprehensive offer primarily designed to deal with the matrimonial issues. It dealt with custody, parenting arrangements, section 7 expenses, divorce, and division of matrimonial property and debts. It was open until the commencement of trial as required by the Rules. There is nothing specific in the offer about the claim of the mother. Further, the scope of the offer was largely beyond the mother's claim, and there was nothing she could do to accept it, or to accept out of it any resolution of her own action. In the circumstances the trial judge could have ignored the offer, or limited its effect on costs, but it was not an error to give it some weight.

116 Trial judges have a very wide discretion in awarding costs, but it is not without limit. As a general rule, a successful party cannot be denied costs, much less be ordered to pay costs, unless there are exceptional circumstances: R. 10.29(1); M. M. Orkin, *The Law of Costs*, (2nd ed.)(Aurora: Canada Law Book, 2010) at s. 205.2 at 2-59 to 2-61; *Campbell & Co. v. Pollak*, [1927] A.C. 732 (U.K. H.L.) at p. 776; *Apex Corp. v. Ceco Developments Ltd.*, 2008 ABCA 125 (Alta. C.A.) at paras. 140-3, (2008), 88 Alta. L.R. (4th) 26, 429 A.R. 110 (Alta. C.A.); *Larter v. Universal Sales Ltd.* (1991), 113 N.B.R. (2d) 18, 50 C.P.C. (2d) 66 (N.B. C.A.); *P. (L.) v. H. (D.J.)* (1987), 81 A.R. 276, 55 Alta. L.R. (2d) 227 (Alta. C.A.). The mother here was successful in advancing her claim for $33,386.50. Even though her recovery was different in kind and amount than her original claim, she was still successful.

117 Where a plaintiff is successful, but less successful than an offer, the usual rule is to award the plaintiff costs up to the offer, and to award the defendant costs after the offer: R. 4.29(2). In effect the defendant gets double costs, by sav-

ing having to pay one set of costs after the offer, and getting a set of costs from that point. There is generally no basis to award the defendant costs of the whole action, much less double costs. The reasons of the trial judge give no basis for departing from these well established principles.

118 The offer made was for the respondent to receive $75,000, which was roughly equivalent to her equity in the condominium at that point. While the trial judge could have ignored this informal, comprehensive offer that was beyond the control of the mother, his decision to give effect to it is entitled to deference.

119 It follows that the order requiring the mother to pay double costs must be set aside. The mother is entitled to the assessed costs of her action against the respondent on column 1 up to the date of the offer. The respondent is entitled to costs from that date. Both sets of costs should be calculated generally on the same basis as set out in para. 1 of the costs judgment of the trial judge, and will be set off.

Conclusion

120 In conclusion, the appeal should be allowed in part. The appellant husband's guideline income for 2007 should be set as $138,237. The attribution of income to the appellant husband for 2008 and thereafter should be referred back to the trial court. The child support calculations should be re-done based on his income as eventually determined.

121 The appeal should also be allowed with respect to the categorization and allocation of the debt owed to MT Consulting, as set out in para. 73 of the trial reasons, and the issue of the alleged debt to the Osteria restaurant, set out in para. 75 of the judgment, and those issues are referred back to the trial court.

122 The appeal with respect to the miscellaneous items in para. 109, *supra*, and with respect to costs should be allowed as previously indicated. Any necessary re-calculations must be done.

123 The trial judgment should otherwise be affirmed.

124 Given the mixed success, neither spouse should be entitled to the costs of this appeal. The appellant husband's mother, having been successful, is entitled to her costs of her appeal.

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