

**Nyberg v. Nyberg, [2015] A.J. No. 1310**

Alberta Judgments

Alberta Court of Queen's Bench

L.D. Acton J.

Heard: November 23-26, 2015.

Judgment: December 3, 2015.

Docket: 4803 166453

Registry: Edmonton

**[2015] A.J. No. 1310** | 2015 ABQB 768 | 2015 CarswellAlta 2223 | 261 A.C.W.S. (3d) 392 | 70 R.F.L. (7th) 405

Between Michael Alfred Nyberg, Plaintiff, and Lia May Nyberg, Defendant

(110 paras.)

## **Case Summary**

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**Family law — Custody and access — Custody — Joint custody — Access — Action by husband for determination of division of family property, parenting and child and spousal support allowed — Parties, who had one child, separated in 2013 after 11 years of marriage — Husband worked overseas on month on/month off basis — Parties to maintain joint custody of child and father to have access two weekends per month when in country — Husband to make equalization payment of \$50,662 to wife.**

**Family law — Marital property — Equalization or division — Considerations — Conduct of parties — Contribution of parties — Duration of marriage — Action by husband for determination of division of family property, parenting and child and spousal support allowed — Parties, who had one child, separated in 2013 after 11 years of marriage — Husband worked overseas on month on/month off basis — Parties to maintain joint custody of child and father to have access two weekends per month when in country — Husband to make equalization payment of \$50,662 to wife.**

**Family law — Maintenance and support — Child support — Child support — Table amounts — Quantum — Payor's annual income — Number of children — 1 — Custodial arrangement — Joint — Order — Final — Monthly award — Special or extraordinary expenses — Extracurricular activities — Payor's obligation (percentage) — Spousal support — Quantum — Relationship — Separated — Duration — Dependent children — 1 — Payor's annual income — Order — Time-limited — Amount of award — Periodic (monthly) award —**

**Action by husband for determination of child and spousal support and other relief allowed — Parties, who had one child, separated in 2013 after 11 years of marriage — Husband worked overseas on month on/month off basis earning \$241,178 — Husband to pay ongoing child support of \$2,124 per month, arrears of \$12,198 and 100 per cent of child's extraordinary expenses — Husband to pay spousal support of \$3,000 per month for two years, then \$2,000 per month for one year, then \$1,000 per month for one year.**

Action by the husband for a determination of the division of matrimonial property, parenting and child and spousal support.

The parties began living together in 1999 and married in 2002. They separated in 2013. They had one child, age 11. The child had been taking dance lessons from a young age and wished to attend a school of the arts. Neither party had any real assets at the time of the marriage. The husband had withdrawn money from his pre-existing RRSP to purchase the family home. After completing high school, the husband joined the military. He left the military at the age of 27 and started

working in the oil patch. In 2005, he began working outside the country on a month on/month off basis. In 2014, he earned \$189,840 USD. Following separation, he continued to reside in the matrimonial home while in the country. In February 2014, he had been ordered to vacate the family home and to pay to the wife \$1,631 in child support and \$4,500 in spousal support per month. As he had assumed payment of expenses relating to the matrimonial home, he was credited \$3,000 per month towards spousal support. When the parties began cohabiting, the wife was working fulltime as a security guard. She later obtained employment as a waitress. Following the birth of the parties' child, she stayed home to care for the child. Throughout the marriage, she controlled the parties finances. Following separation, the husband had cut off her access to funds to run the household and provided her with a monthly allowance. She had enrolled in a course to become a physical therapist assistant.

HELD: Action allowed.

The parties were to maintain their joint custody of the child. When the husband was home from work, he was to have the child stay with him at least two weekends per month. Income of \$31,000 was imputed to the wife. For 2015, the husband had an income of \$241,178. As a result, he was to pay ongoing child support of \$2,124 per month. In addition, he was to pay arrears of support of \$12,198. The child's extracurricular activities were special expenses as they related to the child's special talents and exceeded what the wife could pay. As the wife had no income, the husband was to pay the whole cost. As the parties made equal, but different, contributions to the marriage and the relationship was of significant duration, the parties were to entitled to an equal division of property. The husband was to make an equalization payment of \$50,662 to the wife. The matrimonial home was to be sold. The wife was entitled to spousal support on a compensatory and non-compensatory basis. The appropriate amount of support was \$3,000 per month for two years, followed by \$2,000 per month for one year, followed by \$1,000 per month for one year. □

## **Statutes, Regulations and Rules Cited**

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Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), s. 15.2(4), s. 15.2(6)

Federal Child Support Guidelines, SOR/97-175, s. 3, s. 3(1), s. 4, s. 7, s. 20

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

Matrimonial Property Act, RSA 2000, c M-8, s. 7, s. 8

## **Counsel**

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Collista A. Coles, for the Plaintiff.

Tracy C. Brown, for the Defendant.

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## **Reasons for Judgment**

**L.D. ACTON J.**

### **Introduction**

1 The parties seek a divorce and determination of: child support, spousal support, division of matrimonial property, timing of sale of the matrimonial home, and parenting.

## **Background**

2 The Plaintiff, Michael Nyberg, and the Defendant, Lia Nyberg, began living together in 1999 and were married on July 6, 2002. This was the first marriage for each of the parties. Their daughter, Portia, was born in August 2004. The parties separated on November 1, 2013.

3 Mr. Nyberg completed grade 12 when he was 18 years old and joined the Canadian Military PPCLI. Prior to the parties meeting, he had accumulated an RRSP and acquired a 1993 motorcycle. He left the military when he was 27 and started work in the oil patch as a lease hand.

4 Ms. Nyberg was living with her parents when the parties met. She started working full time as a security guard at Northlands when she moved in with Mr. Nyberg.

5 The parties agree that they had, in essence, "nothing" when they began their life together.

6 Mr. Nyberg began doing offshore drilling work. He moved up quickly to rough neck, motorman, derrick man and then driller. His work became more and more lucrative as he was promoted by his employer and he started to earn an excellent income. He was sent overseas in 2001 on a short assignment.

7 Ms. Nyberg was 25 years old when the couple married in 2002. She obtained a new job as a waitress at a Gentleman's Club which had better hours as she only worked during the day.

8 When Portia was born in 2004, they decided that it was better for Ms. Nyberg not to work outside the home. Mr. Nyberg testified that the plan was for Ms. Nyberg to stay home until Portia was in Grade 3. Ms. Nyberg testified that their intention was for her to stay at home until Portia finished elementary school.

9 In 2005, Mr. Nyberg got his first full time job working "one month on/one month off" as a night tool pusher offshore in Papua, New Guinea. The advantage of this arrangement to the family was that he had more time with the family when he was not working. Both he and Ms. Nyberg agreed this was a benefit to the family.

10 Ms. Nyberg has always been in charge of managing the household and the family finances. Mr. Nyberg testified as to how she cut up his credit cards when they were first married and got him on track to manage his finances more responsibly.

11 During the course of the marriage, the parties had three joint bank accounts: 1) a USD account into which Mr. Nyberg's paycheques were deposited; 2) a joint chequing account that was used for their everyday banking; and 3) another joint account. Mr. Nyberg also had a Visa card to which Ms. Nyberg had access and which she used to make purchases.

12 Mr. Nyberg testified that Ms. Nyberg looked after the banking matters, transferring the monies from the US account to be sure the bills were paid. She did all of the shopping and household management. His job was to be the provider. Hers was to be the homemaker and manager.

13 Mr. Nyberg testified that when they found a house to buy, he took money out of his pre-existing RRSP to use as a down payment for that house. The documentary evidence from Mr. Nyberg's tax returns demonstrates that he withdrew \$12,500 from his RRSP. Ms. Nyberg testified that her parents gave her the \$1,000 to hold the offer until Mr. Nyberg got back from his work overseas so they could close the deal.

14 Mr. Nyberg has been very successful with Weatherford Drilling International. He is currently posted in the Kingdom of Saudi Arabia where he is rig superintendent in charge of three rigs. He testified that the price of oil

determines whether the Weatherford's current contracts will be continued and whether they will get more in the future. This is a major uncertainty. He testified that when contracts are finished right now the company is simply racking the rigs.

**15** A review of the pay information from Weatherford indicates that Mr. Nyberg received \$189,840 USD in income for 2014. From Mr. Nyberg's USD account deposits which he transferred into his chequing account payable to him in Canadian dollars, the remuneration deposits for 2014 total \$211,418.

**16** He explained the effect of the "host country tax credit". This creates problems since the money is added to his gross income, but he never sees the funds and it takes a very long time to get the documentation from the country to provide to Canada Revenue Agency (CRA) in order to obtain the proper credit. Further, his pay is deposited in US currency. He testified he files his tax returns on time every year, but he has been audited and re-assessed every year since 2007, the CRA always finding that he owes more than his accountant said he did. Sometimes, the sums are quite significant. Mr. Nyberg testified that for the period from 2010 to 2012, he owed CRA \$25,000.

**17** The parties separated on November 1, 2013. Mr. Nyberg continued to live in the matrimonial home following the separation because his offshore employment took him overseas every second month. Mr. Nyberg paid expenses associated with the matrimonial home and provided an additional allowance to Ms. Nyberg of \$2,000 per month. However, he provided only \$1,000 for the second half of November 2013.

**18** On November 12, 2013, Mr. Nyberg effectively cut off Ms. Nyberg from any control over funds to run the household. He removed Ms. Nyberg's name from the Visa card, opened a new chequing account in his sole name and moved money into it. He also opened a new USD account into which his paycheque was subsequently deposited. From that point on, he transferred money into the former chequing account for Ms. Nyberg's use, but did not continue to use it himself.

**19** Mr. Nyberg paid the bills that came through the bank accounts directly. However, he neglected to pay some bills that came in the mail. He apologized for missing the ones that resulted in the heat being cut off.

**20** On December 10 and 11, 2013, to Mr. Nyberg's complete surprise, CRA took approximately \$15,000 out of his bank account under an attachment order for income taxes owed as a result of their reassessments, and froze all the accounts. Mr. Nyberg testified that if there was any correspondence suggesting this action was forthcoming, it would have been sent to the matrimonial home and he never received it. He believed that his accountant was still in negotiations with CRA over what was owed for those years. Mr. Nyberg went to his bank and arranged for a line of credit for \$10,000 to tide him over while he dealt with the withdrawal and freezing of his accounts. The only other item for which he had used the line of credit in the past was a \$5,000 motorbike for Ms. Nyberg.

**21** Mr. Nyberg's re-arrangement of the bank accounts and credit put Ms. Nyberg at a distinct disadvantage. Ms. Nyberg and Portia were entirely financially dependent upon him and he acknowledged this. He was on the other side of the world and she no longer had access to the bank accounts as she needed them. He simply put her on a spending allowance and testified that he had intended to pay all of the costs. It did not quite work out as neatly as he had planned as the evidence demonstrated. Being in an impossible situation, with little money, and at his mercy, Ms. Nyberg applied for an order for child support and spousal support.

**22** On February 3, 2014, Lee J. ordered that Mr. Nyberg vacate the matrimonial home. He also ordered:

4. The Plaintiff Husband shall pay to the Defendant Wife the sum of \$1,631 per month in Section 3 Child Support for the support of the child of the marriage, payable on the first day of each month, commencing February 1, 2014, and continuing on the 1st day of each and every month until further Order of the Court.
5. The Plaintiff Husband shall pay Interim Spousal Support to the Defendant Wife in the amount of \$4,500 per month, commencing on the 1st day of February 2014, and continuing on the 1st day of each and every month until further Order of the Court.

6. Recognizing that the Plaintiff Husband has assumed direct payment of the carrying costs of the matrimonial home, he shall receive a credit of \$3,000 per month to be set-off against the monthly Spousal Support payable, referred to in paragraph 5 of the within Order. Specifically, the Plaintiff Husband shall continue to directly pay the carrying costs of the home including the HELCO on the matrimonial home, home insurance, property tax, EPCOR, Direct Energy, water/sewer, telephone, Internet, cable and vehicle insurance on the Dodge Ram, up to \$3,000.

**23** This order was registered with MEP. Ms. Nyberg still had little control over the household funds, but she did have more money to provide for herself and Portia.

**24** Mr. Nyberg moved in with a friend in Sherwood Park, renting a room as his residence during the months when he was not working overseas.

**25** After the separation and to her credit, Ms. Nyberg picked herself up and got on the re-education track forthwith. She enrolled through Norquest College to become a physical therapist assistant. She took two courses immediately and then two more courses. She was then qualified to attend Norquest College on a fast-track program, which she completed this past July. She is doing her practicum at the Sturgeon Hospital in the City of St. Albert. That will conclude at the end of December 2015. She will then be qualified to be employed in this field. During this intensive study, she has been primarily responsible for parenting Portia.

**26** Ms. Nyberg is currently 38 years old. She hopes to obtain employment in a hospital when she finishes her practicum, as the remuneration and hours are better than they would be in the private sphere. However, she testified that she has already received a job offer in a private clinic for work at \$15 per hour. Thus, she knows she can be employed; it is simply the quality and level of employment that remains to be determined once she completes her practicum. Her new employment will probably generate a gross income of between \$31,000 and \$47,000 per year if she successfully obtains and retains full-time work.

**27** It is important to note that Mr. Nyberg is away 50% of the time on the other side of the world. He testified that he declined Ms. Nyberg's request for assistance in transporting Portia to her extracurricular activities, some of which are in Edmonton. He stated that he did not want to be the "taxi-driver dad" as that was not quality time with Portia, and when he came home from his time away, he did the fun daddy/daughter stuff. That was what he wanted to do and he was running out of ideas as Portia was so busy that she did not have time to do things with him. Ms. Nyberg was providing the transportation to dance, theatre and new voice lessons. As well, Ms. Nyberg did the required volunteer work for the dance program. Mr. Nyberg went to the performances whenever he could when he was in the city. He is highly supportive of his daughter's talents and involvement in her artistic activities. He would like to see more of her and to do more things with her.

## **Issues**

**28** The following issues are before the Court:

- 1) divorce
- 2) parenting
- 3) child support
- 4) matrimonial property
- 5) timing of sale of the matrimonial home
- 6) spousal support.

## **Analysis**

### **Divorce**

**29** The parties have been living separate and apart for over one year. They consent to the Court making a judgment directing that a Divorce be granted. The Divorce is granted.

### **Parenting**

**30** Ms. Nyberg testified that Mr. Nyberg refused to take Portia twice when Ms. Nyberg needed child care, and on one occasion he refused saying that he had to wash his jeep. As noted, Mr. Nyberg's own evidence was that he wanted to do the daddy/daughter things he used to do with Portia and he missed that and was running out of ideas. He testified he was aware that she was very busy in the evenings and he did not want to be involved in taking her to her extra-curricular activities. He is mainly interested in having the power to make decisions regarding what she is involved in, and in being consulted before she is allowed to take trips outside of the country. He wants to be provided with information on her school report cards by Ms. Nyberg. He acknowledged that he has not contacted her school directly to obtain any information. He needs to accept this as his responsibility. As Portia's father, he needs to make himself known to the school, to her teachers and to be present to such a degree that the staff is well aware that he is an involved father - not an interfering one, but an interested and participating father available to assist during the months he is home with field trips or whatever else the school needs parents to help with. He has the power to make his daughter proud. But it lies in his hands to exercise this power.

**31** The parties shall maintain their joint custody of Portia. However, some specific directions are required regarding access for Portia to her father. Access is the right of the child and, in my view, Mr. Nyberg needs to promptly take steps to make access to Portia possible in a father/daughter environment without waiting for any future contingency to unfold. Children do not wait for their parents to disentangle their affairs before they grow up and turn into adolescents. The older Portia gets, the less time she is likely to want to spend with either of her parents, if she is a typical teenage girl.

**32** Mr. Nyberg needs to acquire an appropriate property for the two of them and he needs to acquire it now. He has heard the evidence that Portia would like to attend Victoria School for the Arts. It would make sense to inquire as to whether living in the City of Edmonton may well give her a better opportunity to qualify for admission to that school, it being an Edmonton Public School.

**33** Mr. Nyberg will need a home where Portia has a real room to call her own and a key to let herself in and food that she loves in the fridge in a home where the dad she loves lives at least six months of the year. And yes - he has to have a way of keeping her out of that home when he is overseas - an alarm system or something else creative should do the trick. The court was not born yesterday - it is important she not be able to go to that property when Dad is away. That is not an impossible hurdle.

**34** When Mr. Nyberg is home from his overseas employment, he should have Portia staying with him at least two weekends out of the month from Friday after school until Monday morning when he drops her off at school. If it is possible for her to spend more time there, that would be even better. During this time, she must continue doing her regular activities, but Mr. Nyberg is the one who is to take her to them and pick her up and then arrange for any other possible things they could do together that does not interfere with her schooling.

**35** When Mr. Nyberg is home from overseas, he needs to demonstrate to Portia that she is truly important to him. Fathers do that by looking after their daughters when they are sick, and listening to them sing, even when they sing off key; by driving them to the Kiwanis music festival and sitting there and listening to 25 little girls sing the same song off key badly and cheering for their own daughter who does a decent job of the piece even when she forgets a word or two because it is a scary thing to do; and then, going back the next day to repeat the same thing in a different competition. As a parent, it is probably boring. But it is so important to the child. These things happen during the day. Ms. Nyberg will be working. Mr. Nyberg can be there for Portia. He can be a real dad - not just a fun dad.

**36** During the school vacation periods, Mr. Nyberg shall have Portia for one half of the vacation period as his work schedule permits.

37 Communication between the parents shall commence immediately using the "Our Family Wizard" computer program. Mr. Nyberg is directed to purchase this and have it installed on a computer or other compatible electronic device in each household. Each party is directed to follow the directions and use it to communicate to ensure that Portia's best interests are met in the future.

38 Ms. Nyberg testified that she had to hire a lawyer to get a court order allowing her to take Portia to San Diego when they went there with her grandmother, as Mr. Nyberg would not sign the necessary consent. She felt that this expense was unnecessary. Part of the problem arises from Mr. Nyberg being out of the country six months of the year.

39 A separate order apart from this judgment is to be prepared providing for Portia to be able to travel with either parent without the other parent's consent. In that order shall be a paragraph requiring the travelling parent to provide the other parent with a copy of the itinerary and contact numbers for the duration of the trip. Of course, since the travel will take place on the parenting time of the parent then in charge, the non-care giving parent shall not use the contact numbers to contact either the child or the other parent except in an emergency.

### **Child Support**

#### ***Guideline Incomes***

40 The *Federal Child Support Guidelines*, [SOR/97-175](#) provide:

3(1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
- (b) the amount, if any, determined under section 7.

4 Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is

- (a) the amount determined under section 3; or
- (b) if the court considers that amount to be inappropriate,
  - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
  - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
  - (iii) the amount, if any, determined under section 7.

20(1) Subject to subsection (2), where a spouse is a non-resident of Canada, the spouse's annual income is determined as though the spouse were a resident of Canada.

- (2) Where a spouse is a non-resident of Canada and resides in a country that has effective rates of income tax that are significantly higher than those applicable in the province in which the other spouse ordinarily resides, the spouse's annual income is the amount that the court determines to be appropriate taking those rates into consideration.

41 The evidence is that the taxation of Mr. Nyberg's income has been a significant problem for the parties since 2007 and he is consistently re-assessed.

42 Mr. Nyberg's Line 150 income for 2013 has now been finalized with CRA. I am satisfied that his *Guideline* income for 2013 was \$186,891. His evidence was that his negotiations with CRA are concluded and this is the final number.

43 Mr. Nyberg submits that using his Line 150 gross income as his *Guideline* income is not appropriate. He argues that it is inflated due to the "host country tax" which has been added on to his income from year to year. He does not actually realize that additional income.

44 Ms. Nyberg submits that Mr. Nyberg's income should be grossed up for the fact that he might pay less tax than the average Canadian.

45 The *Guidelines* generally mandate that gross income be used for all Canadians for the calculation of child support payments. Section 20 authorizes the Court to use its discretion to determine what is fair where significantly higher tax rates apply to a non-resident spouse's income. While Mr. Nyberg may always have been a resident of Canada, in my view the intent of the *Guidelines* is that the table amounts are based on gross income figures which are assumed to be subject to Canadian tax.

46 The Court is able to determine Mr. Nyberg's relevant annual gross employment income by examining the money that goes into his account from his employer and is then transferred to his Canadian chequing account. The amount in his Canadian account is his net income from employment before any Canadian tax is deducted. In my view, this method of calculating *Guideline* income is fair and will simplify future calculations, regardless of what happens to the overseas tax credit which has complicated Mr. Nyberg's tax return filings.

47 Using this approach for 2014, I find that the Scotia USD account and transfer to the Scotia personal chequing account 122 establish that Mr. Nyberg's guideline income for 2014 was \$211,418.

48 For 2015, only 10 months of bank statements are in evidence. Based on the evidence before the Court, Mr. Nyberg will work one month out of the next two months. Given the deposits to the USD account and the corresponding transfer deposits, it is clear that his "regular monthly remuneration" is close to \$16,000 US in the winter months. When he received approximately \$16,000 US in August 2015, it was exchanged for approximately \$20,000 Canadian upon transfer into his personal chequing account because of the current favourable exchange rate. The exchange rate has not changed substantially since August of this past year. Therefore, I shall add \$20,000 to his pay to date to determine a 2015 income of \$241,178. In my view, this is a fair guideline income for 2015.

49 To summarize, I find that Mr. Nyberg's income is as follows:

2013	\$186,891
2014	\$211,418
2015	\$241,178

50 I will use \$241,178 as the go-forward income for 2016. Mr. Nyberg's evidence is that there is uncertainty in the drilling rig industry and they are racking rigs as the contracts end in many countries. I accept that he may very well not receive the increase in income in 2016 that he has enjoyed over the past years. Of course, if his income increases, he will be required to retroactively adjust his support payments as mandated by the Supreme Court of Canada decision in *DBS v SRG*, [2006 SCC 37](#), [\[2006\] 2 SCR 231](#). Mr. Nyberg will have to be mindful of his responsibility as set out by the Supreme Court in that regard.

51 Ms. Nyberg has had no independent income from 2013 to the present. Having considered the intensity of Ms. Nyberg's studies and her primary care of Portia, I find that she has retrained as quickly as could be expected under the circumstances. She expects to earn income in 2016. I find that this income will be around \$31,000 for the year.

### Child Support Payable

52 In my view, the proper date for commencement of child support is November 12, 2013 when Mr. Nyberg cut off all access to the bank accounts.

53 Child support from November 12, 2013 is calculated as follows:

November 12, 2013 to December 31, 2013	\$2,452
2014	\$22,269
2015 (11 months)	<u>\$23,359</u>
	\$48,080

54 Mr. Nyberg has been paying \$1,631 per month under the Lee J. order since February 2014, a period of 22 months, for a total of \$35,882. The difference which is payable by Mr. Nyberg amounts to \$12,198.

55 Mr. Nyberg shall pay \$2,124 per month in ongoing child support, subject to eventual adjustment if his income varies from his projected income.

### Section 7 Expenses

56 Section 7 of the *Guidelines* provides in part:

7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
  - ...(f) extraordinary expenses for extracurricular activities.
- (1.1) For the purposes of paragraphs (1)... (f), the term "extraordinary expenses" means
  - (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
  - (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
    - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
    - (ii) the nature and number of the educational programs and extracurricular activities,
    - (iii) any special needs and talents of the child or children,
    - (iv) the overall cost of the programs and activities, and
    - (v) any other similar factor that the court considers relevant.
- (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

57 Portia has been taking Ukrainian dance lessons since she was three or four years old and both parents support this activity. She started in theatre five years ago, and commenced singing lessons this past fall. Mr. Nyberg has

been paying 100% of these costs, except the cost of voice lessons which the parents have been splitting 50/50 since the lessons started in September 2015.

**58** Mr. Nyberg submits that the three activities should not be considered s. 7 expenses as the s. 3 child support payments are sufficient in the circumstances to cover the costs of these activities. He relies on the factors outlined in paragraphs 16 to 23 of *MacGregor v MacGregor*, [2010 ABQB 171](#) where I reviewed the law in Alberta on the characterization of s. 7 expenses.

**59** It is important to note that in the *MacGregor* case, Ms. MacGregor was earning \$87,000 per year and was also receiving s. 3 child support for the children. In contrast, Ms. Nyberg has been earning nothing and, if she is fortunate, will be starting to earn an income for the first time in more than a decade next year. The couple mutually decided that it was in the best interest of the partnership that she stay home and do all the childcare and household management while Mr. Nyberg engage in his overseas employment. This circumstance is clearly distinguishable from the facts in *MacGregor*.

**60** The evidence is that Portia aspires to attend the Victoria School for the Arts in September 2016. Thus the special needs and talents of the child are clearly supported by these three activities. The parents have encouraged and supported her in her efforts.

**61** In my view, the evidence demonstrates that these expenses exceed what Ms. Nyberg can reasonably cover, taking into account that she is only now embarking on a career path.

**62** The daycare costs which Mr. Nyberg has been paying will terminate at the end of the school year in 2016. They are, of course, a statutory s. 7 expense. I reject the submission that Ms. Nyberg was obligated to apply for subsidies, and that therefore Mr. Nyberg should not have had to pay these costs. There is no evidence, other than counsel's anecdotal comments, that she would have qualified for them in light of Mr. Nyberg's income.

**63** I am satisfied that the expenses claimed by Ms. Nyberg are all proper s. 7 expenses in this case and in line with the case law considering the applicable principles. Since Ms. Nyberg has had no independent income for the past three years, it was proper for Mr. Nyberg to pay all of the costs. In 2016, the parties will pay their proportionate shares.

### **Exchange of Information**

**64** Each party will exchange their tax returns in the usual manner by the end of July of each year. As well, Mr. Nyberg will provide to Ms. Nyberg a photocopy of his employer's deposits to his designated bank account of all of his income in any future years on or before February 15th of each year. He will not have to disclose his personal chequing account information if he chooses not to do so, or he can redact all but the corresponding deposits which indicate the exchange rate applied. Otherwise, it will be the exchange rate for the 1st of each month that Ms. Nyberg's bank would give her that will apply to the calculations of his annual income on my calculation method.

### **Matrimonial Property**

**65** Many of the assets and liabilities are not in dispute. The parties agree on most values. However, Ms. Nyberg argues that sums owing on account of Mr. Nyberg's CRA re-assessments should not disadvantage her. Mr. Nyberg argues that some of the property should be valued as at the date of separation.

**66** Sections 7 and 8 of the *Matrimonial Property Act, RSA 2000, c M-8* govern the manner in which the Court determines division of matrimonial property. It is trite law that matrimonial property is valued as at trial. Any resulting inequities are to be addressed through application of s. 8: *Mazurenko v Mazurenko* (1981), [15 Alta LR \(2d\) 357](#), [30 AR 34](#), leave denied, [1981] S.C.C.A. No. 108, [\[1981\] 2 SCR ix](#).

**67** Having regard to the s. 8 factors, I find that the parties have made equal, albeit different, contributions to the marriage and to the welfare of the family. This was a relationship of a significant duration. The parties' equal

contributions have enabled the family to acquire the property in question. Ms. Nyberg's contributions on the home front have freed up Mr. Nyberg to maximize his earning capacity. Ms. Nyberg has had sole responsibility for managing the home and finances, and caring for Portia while Mr. Nyberg has been away for significant periods of time. Mr. Nyberg supported Ms. Nyberg taking on the role of homemaker and financial manager.

**68** The parties acquired some property in the two years during which they have been living separate and apart. However, Ms. Nyberg has shown initiative in retraining during the separation period, while maintaining the home and caring for Portia, and as a result has necessarily remained entirely dependent upon Mr. Nyberg's financial support. I reject the argument that Ms. Nyberg should have been working in addition to studying and carrying out her other duties. There was no evidence of dissipation.

**69** Having considered the s. 8 factors, I find that it is just and equitable in this case to divide all of their assets and liabilities equally, valued as at the date of trial, with the exception of exempt property.

**70** Therefore, Mr. Nyberg's Dodge Ram, his Scotiabank account 122, and the cash in the safe are not exempt. For the above reasons regarding the s. 8 factors, I find that they form part of the matrimonial property even though they were purchased or accumulated post-separation.

**71** Likewise, the amounts owing to CRA to this point are joint debts.

**72** With respect to the remaining matters in dispute, I find as follows.

**73** The minor sums of money in the bank accounts for Portia's benefit are not part of the matrimonial property.

**74** The wife's 2007 Dodge Ram is reasonably valued at \$25,000, given the fact that the husband's 2008 Dodge Ram is valued at \$29,000.

**75** The evidence was that the parties did not intermingle their accounts prior to marriage. I am satisfied, based on Mr. Nyberg's evidence, that he withdrew \$12,500 from RRSPs he had accumulated prior to the relationship for the down payment on the first matrimonial home. I accept Mr. Nyberg's claims of exemption regarding: the 1993 GSX 750, 50% of the RRSP for the down payment on the first house, and the RRSP in the amount of \$877.45.

**76** I find that it is fair that the parties share equal responsibility for the outstanding \$6,000 house tax liability despite that it may or may not have been intended to be included in interim spousal support.

**77** Mr. Nyberg argued that he had to remove \$10,000 from the line of credit to keep family afloat when he ran into difficulties with the CRA. I do not find that this warrants special treatment.

<b>Asset</b>	<b>Husband</b>	<b>Wife</b>	<b>Total</b>
Matrimonial home	240,000.00	240,000.00	480,000.00
B2B investments	13,628.98	13,628.98	27,257.96
TD Investments	1,598.52	1,598.52	3,197.04
Transamerica whole life	33,838.00	16,915.00	50,753.00
Joint Scotia Acct 382		348.75	348.75
RBC chequing 908		4,207.41	4,207.41
RBC Savings 129		97.97	97.97
RRSP	887.45		887.45
2007 Dodge Ram		25,000.00	25,000.00
2012 Kawasaki Ninja 250R		4,000.00	4,000.00
Jet boat proceeds	11,000.00	9,000.00	20,000.00
Scotia chequing 122	32,904.29		32,904.29
Scotia USD savings 080	47,318.37		47,318.37
Cash in safe	12,000.00		12,000.00

2008 Jeep Wrangler	25,000.00		25,000.00
2008 Dodge Ram	29,000.00		29,000.00
2004 GSXR 1000	4,800.00		4,800.00
2008 GSXR 750	4,300.00		4,300.00
1993 GSX 750	2,200.00		2,200.00
2006 Quad Can Am	4,400.00		4,400.00
Motorcycle trailer	3,000.00		3,000.00
Pool table and hot tub	2,500.00	2,500.00	5,000.00
1998 Suzuki	2,500.00		2,500.00
<b>TOTAL ASSETS</b>	<b>470,875.61</b>	<b>317,296.63</b>	<b>788,172.24</b>
<b>Liabilities</b>	<b>Husband</b>	<b>Wife</b>	<b>Total</b>
HELOC	187,506.36	187,506.36	375,012.72
Home selling costs/commissions	10,000.00	10,000.00	20,000.00
Taxes owing for 2013	17,282.09		17,282.09
Taxes owing for 2010/11/12 – CRA took 15,028	15,028.00		15,028.00
Joint Scotia Visa	5,563.00		5,563.00
LOC – motorcycle debt paid off	3,624.89		3,624.89
Boat storage	2,223.00		2,223.00
Property taxes on home for 2014/15	3,000.00	3,000.00	6,000.00
Property taxes on home for 2015/16	2,500.00	2,500.00	5,000.00
Mike Scotia Visa	80.19		80.19
Lia Scotia Visa		1,884.71	1,884.71

<b>Total Liabilities</b>	<b>246,807.53</b>	<b>204,891.07</b>	<b>451,698.60</b>
<b>TOTAL ASSETS LESS LIABILITIES</b>	<b>224,068.08</b>	<b>112,405.56</b>	<b>336,473.64</b>
<b>Exemptions</b>			
1993 GSX 750	2,200.00		2,200.00
50% of RRSP for first house	7,250.00		7,250.00
RRSP	887.45		887.45
<b>TOTAL EXEMPTIONS</b>	<b>10,337.45</b>		<b>10,337.45</b>
<b>TOTAL ASSETS LESS LIABILITY AND EXEMPTIONS</b>	<b>213,730.63</b>	<b>112,405.56</b>	<b>326,136.19</b>
<b>EQUALIZATION PAYMENT</b>	<b>(50,662.54)</b>	<b>50,662.54</b>	
<b>EACH PARTY TO RECEIVE</b>	<b>163,068.09</b>	<b>163,068.09</b>	

78 In the end result, Mr. Nyberg shall make an equalization payment of \$50,662.54 to Ms. Nyberg.

#### **Timing of Sale of Matrimonial Home**

79 Mr. Nyberg submits that the matrimonial home should be sold immediately. Ms. Nyberg testified she wants to stay in the matrimonial home until the end of this school year.

80 Ms. Nyberg also testified that Portia hopes to attend the Victoria School for the Arts in September 2016 and, to facilitate that, Ms. Nyberg hopes to find accommodation in north Edmonton close to where her grandmother lives once the matrimonial home is sold.

81 In my view, there is no justification for a delay in selling the home, and it should be listed as soon as possible. Ms. Nyberg should attempt to find suitable accommodation in north Edmonton as she intends. It may well be that a residence in Edmonton will assist in Portia's plans to attend Victoria School for the Arts.

82 Accordingly, I direct that the house be listed forthwith for sale with a MLS realtor on a 60 day listing at the agreed appraised value. If Mr. Nyberg wishes to have the drywall repaired to increase the home's saleability, he must arrange for that repair to be completed within the next six weeks by a reputable contractor. If this repair is to be done, it must be with Ms. Nyberg's consent and the listing can then be delayed for the purpose of this repair. The cost of any such repair will be borne in the first instance by Mr. Nyberg and half of it recovered by him from the sale proceeds.

#### **Spousal Support**

83 The parties agree that Ms. Nyberg is entitled to spousal support. They disagree over the issues of quantum and duration. Ms. Nyberg submits that Mr. Nyberg should pay spousal support in the amount of \$4,500 for a full year,

and then perhaps lesser amounts for three to four years. Mr. Nyberg submits that appropriate support would be one year at \$3,000 followed by one year at \$1,500.

**84** The principles to be applied in determining the award of spousal support are set out in ss. 15.2(4) and (6) of the *Divorce Act*:

15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
  - (b) the functions performed by each spouse during cohabitation; and
  - (c) any order, agreement or arrangement relating to support of either spouse.
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
  - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
  - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
  - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

**85** During most of the parties' 13 year relationship, Ms. Nyberg was entirely dependent on Mr. Nyberg's financial support. She performed all of the homemaking tasks and raised the child while Mr. Nyberg worked offshore.

**86** Mr. Nyberg's evidence demonstrates that even when he returned from his offshore employment, he engaged in the fun activities with Portia. He was very gracious in acknowledging that Ms. Nyberg did all of the heavy lifting on the home front, but testified that he took over the "blue jobs" when he was home. He also acknowledged that Ms. Nyberg managed the finances, as he was not able to get to the bank to do the leg work necessary to make the in-bank transfers of the funds from the US account to the Canadian account which could not be managed on line. As well, she carefully monitored the exchange rate to be sure they received the best possible rates - usually waiting awhile after month end when the rates went up. It is clear that Ms. Nyberg was a very busy and important component of the successful operation of this family unit.

**87** The pattern of Mr. Nyberg's employment throughout the marriage was one of increased financial success each year he was working in his field. His work overseas was facilitated by the partnership he had entered into with his wife to be a team effort on the home front, with her managing everything here, including all of the child care responsibilities, while he maximized the family income.

**88** Mr. Nyberg points to the support Ms. Nyberg has received since the separation. He submits that the Court should take this into account in determining the quantum and duration of ongoing spousal support.

**89** The trial judge generally revisits and adjusts the amounts of support provided for in any interim orders, which are often made on incomplete data based on estimates after summary proceedings in chambers; it is almost inevitable that they will not be completely accurate and the trial judge extends no deference to those interim orders: *Durocher v Klementovich*, [2013 ABCA 115](#) at para 20, [\[2013\] A.J. No. 279](#).

**90** After the parties separated on November 1, 2013, Ms. Nyberg received \$1,000 for November, and then \$2,000 per month on top of the expenses associated with the matrimonial home until Lee J. ordered support on February 1, 2014.

91 With respect to spousal support received under Lee J.'s order, the parties disagree as to how paragraphs 5 and 6 of are to be interpreted. Lee J. appeared to order spousal support of \$4,500 per month, but up to \$3,000 of that amount was to be credited to Mr. Nyberg to reflect his payment of house related expenses.

92 Mr. Nyberg submits that he believed he was to continue paying all of the household costs up to \$3,000, and to provide an additional \$1,500 in cash for Ms. Nyberg, the total of \$4,500 being her spousal support.

93 Ms. Nyberg takes the position that only the \$1,500 was taxable spousal support in her hands. The additional \$3,000 was to be characterized as payments to third parties.

94 Mr. Nyberg did not keep an accounting of the bills he paid over the months he was paying them as required by paragraph 6 of the order. Mr. Nyberg was cross examined on the debits from his bank account from month to month. For most months in 2014, the amount of the carrying costs did not exceed \$3,000. However, on re-direct, it was put to him that his payment of the annual property tax bill puts the monthly average over \$3,000. What is clear from the evidence is that the sums each month were variable and are difficult to ascertain. I accept that the costs were around \$3,000 per month.

95 The law is uncertain as to how the order and payments might be interpreted by CRA when one reads the CRA requirements in the bulletin submitted by counsel. It requires that the recipient have some discretion over the funds, and that the specific section of the *Income Tax Act* be specified for a payment to be considered spousal support so as to be tax deductible for the payor.

96 My reading of the sections provided and the wording of the Lee J. order are such that the actual spousal support that would be tax deductible in this case is the sum of \$1,500 per month. It would be impossible for Ms. Nyberg to meet the conditions set out by CRA to quantify what was specifically received under the *in specie* payments over which she had no control and which she would have to document in order to pay tax. Mr. Nyberg testified he kept no records of what he paid under that portion of the Lee J. order. The Order makes no mention of the requisite section of the *Income Tax Act*.

97 However, for the purposes of this analysis, it is unnecessary to make a definitive determination as to the CRA's characterization of the order. Ms. Nyberg was receiving at least \$1,500 in spousal support from the time of Lee J.'s order to the time of trial. However, Ms. Nyberg also received a significant benefit in addition to the \$1,500 from the fact that Mr. Nyberg was paying the costs associated with the matrimonial home in which she and Portia have resided. At the same time, Mr. Nyberg received a benefit as Ms. Nyberg resided in and maintained the home which forms part of the matrimonial property. Given his work schedule, he would have been unable to do this on his own.

98 Given all of the circumstances, I find that no adjustment to interim spousal support is warranted in this case. However, I recognize the benefits which Ms. Nyberg has received post-separation and which have enabled her to prepare herself for a career.

99 As for ongoing support, Mr. Nyberg cites several cases in support of his position that any quantum of spousal support should not be based on his 2016 income resulting from his promotion to rig superintendent after the parties separated, as Ms. Nyberg did nothing to contribute to that promotion or professional success.

100 Counsel cited cases including *Chalifoux v Chalifoux*, [2008 ABCA 70](#), [425 AR 361](#), *Sawchuk v Sawchuk*, [2010 ABQB 5](#), [485 AR 183](#), *DBC v RMW*, [2006 ABQB 905](#), [69 Alta LR \(4th\) 170](#). In these cases, there was a marked difference in income, for example from \$200,000 per year to \$800,000 per year. In contrast, Mr. Nyberg has seen a moderate increase of \$30,000 on an income of over \$210,000 in the previous year which had increased a similar \$30,000 from the year before. Further, the cases cited usually involve some change in employer or the parties having new partners, rather than the significant promotion and raise every year or so which formed an ongoing familiar pattern in Mr. Nyberg's work with Weatherford during the course of this marriage. In my view, the facts of these cases are distinguishable from the case before this Court.

**101** In *Sawchuk*, the husband asked the Court to disregard his post separation increase in income from \$60,000 to \$100,000 and then \$118,000 with a new employer. Langston J. stated:

21 In my view, Mr. Sawchuk's focus on the argument that Mrs. Sawchuk is self-sufficient and has suffered no disadvantage from the marriage breakdown because of her own employment income ignores the fact that the length and nature of their relationship creates a presumption that their standards of living ought to be equalized, if possible. Even prior to Mr. Sawchuk's post-separation income increase, Mrs. Sawchuk would have to increase her annual earnings by 48% in order to have the same annual earnings as Mr. Sawchuk. Looked at in an alternative manner, Mrs. Sawchuk previously enjoyed the benefits of joint salaries totalling approximately \$110,000, but is now reliant solely upon her own salary, which in 2008 was \$48,700.

22 This is not to suggest that Mrs. Sawchuk is automatically entitled to receive spousal support raising her annual income to \$110,000 per year; even utilizing Mr. Sawchuk's increased salary, it is not possible for both parties to separately maintain the standard of living they enjoyed while together. The point of the discussion is to illustrate that "self-sufficiency", "need", and "disadvantage from the marriage breakdown" are not addressed simply by finding a spouse has the ability to pay expenses. Instead, these concepts are addressed by looking at the totality of the circumstances of the relationship.

**102** Again, in my view, the case is distinguishable in that the husband changed employers and was able to get the far more lucrative work after separation. In this case, the facts demonstrate a continued promotion of Mr. Nyberg, similar to promotions he had enjoyed throughout the course of their family arrangement.

**103** Langston J. concluded in *Sawchuk* at para 52 that the wife was entitled to an equitable distribution of the benefits of the marriage in recognition of all her contributions, monetary and non-monetary, to the collective union. The length of the marriage and the facts that the parties' adult lives started and evolved together led to a presumption that their standards of living ought to be equalized upon separation. The marriage in that case had lasted 24 years, which distinguishes it from the Nyberg's marriage. However, the general principles are important and the analysis is helpful in assessing the facts of this case.

**104** Both parties rely heavily on the *Spousal Support Guidelines (SSAG)* which are of some assistance but are not binding on Alberta courts. The Alberta Court of Appeal has approved *SSAG* calculations as a useful "cross check": *Sawatzky v Sazwatzky*, [2008 ABCA 355](#), [440 AR 267](#):

17 While we recognize that the *Guidelines* were not intended to impose a radically new approach and were instead intended to suggest a range of both amounts and duration of spousal supports that reflects the current law, they cannot be used as a formula or a software tool. We agree with the New Brunswick Court of Appeal that they are best used as a useful "cross check" or "starting point" for spousal support that "will help in the long run to bring consistency and predictability to spousal support awards", encourage settlement and allow parties to "anticipate their support responsibilities at the time of separation"... However, they do not and cannot take the place of analysis of the relevant provisions of the *Divorce Act*.

**105** Yungwirth J. in *Gordon v Gordon*, [2014 ABQB 596](#) undertook a thorough review of the law in Alberta on spousal support. This was a circumstance involving a 20 year marriage with three children and the husband as primary breadwinner. The mother worked part time but needed extensive upgrading to achieve self-sufficiency. The husband earned \$129,000 and the mother earned \$24,000. Yungwirth J. stated:

110 The condition, means, needs and other circumstances of each spouse, which must be considered under s. 15.2(4) of the Act, will necessarily affect the quantum of spousal support awarded, if any, as explained by the Alberta Court of Appeal in *Corbeil v. Corbeil* ([2001](#)), [286 A.R. 330](#), [2001 ABCA 220](#) (CanLII) at para. 47:

The right to support and its quantum will vary with each circumstance and with the abilities of the spouses to support themselves ... Accordingly, quantum and duration of support will vary with the

circumstances ... There is no magic formula. Rather, maintenance is a matter of judicial discretion, taking into consideration those matters set out in the *Divorce Act*. [Emphasis added.]

111 This statement is consistent with *Moge* at paras. 77 and 78, in which L'Heureux-Dubé J. recognized that the best approach to resolving spousal support issues is to vest in the court "an overriding discretion" to be exercised considering the particular facts of each case and having regard to the factors and objectives designated in the *Divorce Act*, in order to achieve equitable sharing of the economic consequences of marriage or marriage breakdown.

**106** The Supreme Court of Canada has stated that employing this discretion is the important judicial function in determining spousal support.

**107** Ms. Nyberg will come away from the relationship with not insignificant assets. She is relatively young, motivated and is now trained for a career. However, she finds herself in a circumstance where she has had to, and will continue to have to, adjust to living without the comforts that the former family income brought her.

**108** Considering all of the s. 15.2 factors in light of the evidence in this case, I am satisfied, based on the principles outlined in *Moge v Moge*, [\[1992\] 3 SCR 813](#), [1992 CanLII 25](#), and *Bracklow v Bracklow*, [\[1999\] 1 SCR 420](#), [1999 CanLII 715](#) at para 15 that Ms. Nyberg is entitled to spousal support on both a compensatory and non-compensatory basis.

**109** In my view the appropriate amount of ongoing spousal support for Ms. Nyberg is: \$3,000 per month for two years, \$2,000 per month the following year, and \$1,000 for a final year.

#### **Costs**

**110** The parties have had divided success in relation to their original positions on the most contentious issues, and in relation to their submissions to the Court during the trial. For that reason each party shall bear their own costs, subject to the legal consequences of any offer.

**Dated** at the City of Edmonton, Alberta this 3rd day of December, 2015.

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L.D. ACTON J.

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