

Case Name:

D. v. D.

**Between
D.D., applicant, and
D.A.D., respondent**

[2004] O.J. No. 5022

135 A.C.W.S. (3d) 682

Court File No. 14425/03 Newmarket

Ontario Superior Court of Justice

Olah J.

Heard: April 20-23 and 26-28, 2004.

Judgment: December 8, 2004.

(128 paras.)

Family law -- Husband and wife -- Marital property, distribution orders -- Calculation of property subject to distribution -- Divorce -- Corollary relief, maintenance and awards -- Retroactive awards.

Application by the wife for an equalization of the net family property, retroactive child support, and spousal support. The 44-year-old wife had sole custody of the parties' two children, with the 55-year-old husband allowed access once per month. The husband was paying \$1,500 per month in child support based on his imputed annual income of \$125,000. The parties were married for 19 years before their separation in 2002. The wife was a homemaker. The husband was a dentist. The wife alleged the husband underreported his income and diverted patients to associates in order to insulate himself from an obligation to pay support. Associates testified that the husband had not diverted clients to them. Both parties presented expert evidence valuing the dental practice. After the separation, the husband deposited \$24,000 in an account for the wife's use and paid several debts. The wife had been searching for employment to no avail.

HELD: Application allowed in part. There was no diversion of clients. Both experts had flaws in their valuations. A midpoint value between the two was accepted for a total value

of the dental practice at \$249,500. The total liabilities of the practice were proven at \$164,605. The value of other assets retained by each party was assessed as were their debts. The husband's dental licence was not family property. There was no reason to merit an unequal division. The husband had arranged his business affairs to increase his debt load and decrease his income. His income was imputed at \$125,000. After the separation, the wife had funds available for support. Her claim for retroactive child support was dismissed. She was entitled to compensatory support on the basis of her ongoing need. She was given a year to upgrade her skills, after which an income of \$20,800 would be imputed to her. The husband was to pay monthly spousal support of \$2,500 for a year, after which his obligation would be reduced to \$1,750 per month. Arrears of spousal support were set at \$38,250. The wife's equalization payment was reduced to \$22,596 after subtracting the amounts owed by the wife for mortgage payments and the difference in arrears of support and the husband's payments.

Statutes, Regulations and Rules Cited:

Child Support Guidelines, s. 19.

Children's Law Reform Act.

Divorce Act, R.S.C. 1985, c. 3, s. 15.2(4).

Family Law Act, ss. 4(1), 4(3), 5(6), 14.

Counsel:

Steven Benmor, for the applicant

Mark Greenstein, for the respondent

1 OLAH J:-- This case comes before me for determination pursuant to the Divorce Act, the Family Law Act and the Children's Law Reform Act.

2 The outstanding issues for determination are divorce, equalization of net family property, retroactive child support, spousal support, and costs.

3 The balance of the issues, namely custody, access and child-support were settled pursuant to a consent order of Madam Justice Wildman dated December 11, 2003 which provided that the applicant wife have sole custody of the two children, the respondent have access to the children once per month, and that the respondent shall pay child support of \$1,500 per month based on the respondent's attributed income of \$125,000. Further, the order provides that the respondent's attributed income for the calculation of child support shall not be used for the determination of spousal support and is based on the respondent's goodwill.

4 As the trial was originally scheduled for January 5, 2004, and as the respondent appeared without counsel and requested an adjournment, in consideration of the granting of the adjournment, the respondent husband was ordered to pay the applicant wife, pending

trial, interim interim spousal support of \$2,500 per month commencing January 1, 2004; and, the subsequent trial was to proceed peremptory on the respondent husband.

Background:

5 The parties were separated on February 28, 2002, after a 19-year marriage.

6 At the time of trial, the applicant wife was 44 years old and the respondent husband was 55 years old. They have two children, a 14-year-old daughter and 18-year-old son. The parties are of Romanian descent.

7 After completing grade nine high school in Romania, the applicant wife emigrated from Romania to Canada. She did not pursue her education after 1978. Further, in 1983 she returned to Romania to marry the respondent husband, who had been practicing dentistry in Romania for 10 years. Shortly after the marriage, the wife applied to have the respondent husband immigrate to Canada and she signed the standard 10-year sponsorship agreement. She was employed before and after the marriage, both on a full-time and part-time basis, until the birth of their eldest child, when the parties jointly decided that the applicant would be a stay-at-home mother and a homemaker. Subsequently, the applicant did provide some remunerative services to the husband's dental practice; however, she was out of the mainstream workforce for 15 years prior to the separation.

8 Upon his arrival in Canada, from 1983 to 1988, while he worked part-time and his wife worked full-time, the respondent studied and wrote his accreditation examinations to become a licensed dental surgeon in Canada. Since July 1, 1988, the respondent has practiced dentistry in Canada and has been associated with 7 different dental practices.

9 Prior to the ultimate separation, both parties agree that they separated for six months, from October 1998 to March of 1999. During this brief separation, the parties retained counsel, exchanged financial disclosure and received legal advice with respect to their rights and obligations.

10 The applicant wife described the marriage as rocky. The marital tension escalated to the point that the husband allegedly assaulted the wife, at which time their daughter called the police and the husband was criminally charged with two counts of assault against his wife. He pled guilty to one count of assault and received an absolute discharge. The other count was withdrawn. As a result of this unfortunate incident, the parties finally separated with no prospect of reconciliation.

11 Both children have been living with the wife since separation and the children have minimal contact with their father. At present, the father only sees the children one access visit per month, such that the wife has assumed the totality of the care giving responsibilities for the two children, such arrangement being necessitated by the father's requirement to expend an extraordinary amount of time at his dental practices.

The Issues:

12 I. Net equalization payment:

a. Value of the Dental Practice:

As at the date of separation on February 28, 2002, the husband was operating a dental practice in Thornhill, Ontario. During the period 1998-1999, he also operated a practice in

Pickering with an associate, but sold his interest to the associate for \$1 and her assumption of all liabilities, which were significant. Post separation, the respondent built a dental practice at the Fairview Mall, which he currently operates with 3 associates, as well as a practice in Kitchener which he currently operates with 2 associates. As at the date of trial, the respondent operated 3 dental offices: Thornhill, Fairview and Kitchener.

13 The applicant alleges that the respondent, after the first separation and reconciliation (March 1998) to the date of the second separation in February 2002, made a conscious effort to reduce his declared income to insulate himself from the payment of appropriate support. Her thesis is premised on the following:

- (i) The Respondent did not historically record or declare his cash income, such that his income is under-declared in the amount of \$50,000.00 annually. Such under-reporting, she alleges, affects the value of the practice.
- (ii) After separation, the respondent diverted many of his old patients and new patients to the associates and his new practices.
- (iii) His geographical expansion to Fairview and Kitchener were part of the plot to increase his debt to income ratio, such that he would not have the income he had historically prior to separation.

14 In order to provide a historic perspective and comparison of the value of the respondent's dental practice goodwill, the applicant alleged that in 1991 the respondent sold his share of his Toronto practice for \$40,000. In 1996, he purchased a 50% share of another practice for \$147,000 and subsequently sold the entire practice, one year later for \$365,000. Although, the husband did not seriously dispute these allegations, his evidence suggested that the applicant's sales figures were reflective of gross figures rather than reflective of the net proceeds after payment of outstanding liabilities.

15 Much evidence was also led by the applicant with respect to the respondent's practice to engage associates and enter into arrangements with them that did not reflect market value. In other words, after separation the applicant alleged that the respondent paid the associates greater than market fees and diverted his clients to them. The respondent's witness, Dr. Dilsun Aluca was a forthright and credible witness. She denied any diversion of clients from the respondent to herself at the Fairview Mall, that the majority of the Fairview patients were hers prior to the move. On the balance of the evidence, I find that there was no diversion of clients in order to devalue the Thornhill practice or decrease the respondent's income.

16 So what was the value of the practice at the date of separation? The wife's witness T.A.B., A.L.A., Registered and Licensed Business Broker and Professional Practice Appraiser was qualified as an expert for the purpose of providing a valuation of the dental practice. He provided a limited scope forensic letter of opinion only and relied solely on the appraisal prepared by Mr. G.T., the husband's valuator.

17 Mr. B's conclusions were:

- (i) that the dental practice was in growth mode at the date of separation, revenues increasing by 18% whereas the Ontario Dental Association summary suggests 8-9%;
- (ii) He applied a multiple or market factor to the cash flow and to the income;
- (iii) He then looked at recent historical sales of similar practices, culled from his company's sales data;
- (iv) He was aware that in 2002 there was a shortage of supply and there was a high demand for the purchase of dental practices;
- (v) Based on the existence of 3 associates with no written agreements or restrictive covenants, he estimated the goodwill to be valued at \$115,000.

18 According to Mr. B., if cash income was established at an annual amount of \$50,000, this figure would affect his goodwill value by a mid point of \$22,500 for a value of goodwill at \$139,500.

In cross-examination, Mr. B. conceded that:

- (i) He never spoke to Mr. T.
- (ii) He never visited the Thornhill dental practice.
- (iii) He never reviewed the patient records.
- (iv) He never saw the location of the practice.
- (v) He never checked the equipment.
- (vi) He never interviewed the associates.
- (vii) He did not have a knowledge of the patient base.
- (viii) Increase in income could be attributable to the increase in associates.
- (ix) A letter of opinion is not a satisfactory valuation of a dental practice.
- (x) His valuation of the practice and goodwill would be subject to the practice's liabilities.
- (xi) Liabilities such as staff wages, lease, and accounts payable are generally assumed by the vendor.

19 The husband's witness G.R.T., H.B.A., C.A., Broker, is the principal of Professional Practice Sales (Ontario) Ltd., and was originally contacted by Mrs. D. to prepare a valuation of the dental practice, and accordingly, the valuation dated January 30, 2003 was remitted to both Dr. and Mrs. D.. The cost of the retainer was to be shared by the parties; however, as Mrs. D. did not pay her share, Dr. D. paid in order that the parties receive the valuation on a timely basis. Although his qualifications were somewhat different than the wife's witness, this expert had several years experience in the valuation and sale of professional practices and because of his C.A. qualifications, he prided himself on his particular strength in the review of financial statements in the process of the valuation.

20 His report is a detailed examination of the dental practice and includes: description of the practice, treatment policy of the practice, patient flow, appointment and recall system,

demographics, market data, personnel and professional services, office hours, facilities design and use, fees, payments, collections and prepayment plans, systems and records, income, expenses and earnings, basis of valuation, valuation analysis, and summary of current market values. The appendix to the report includes a list of dental equipment, practice financial statements, copy of lease agreement, photographs, information on area and demographics.

21 Mr. T. personally attended the practice and interviewed Dr. D. and his staff, reviewed the patient charts and conducted a patient chart count by sampling 10% of the charts. He also compared the value of Dr. D.'s practice with 8 similar practices sold that had an ethnic composition in the same geographic vicinity.

22 After the recognition of the uniqueness of Dr. D.'s practice, with its high Romanian clientele, payment to associates of a 10% increased fees, and location, the husband's valuator applied a 19% capitalization rate on the after tax net cash flow, rather than the standard 15% recommended by T.B.

23 Accordingly, the husband's expert valued the dental practice on valuation date as follows:

- | | | |
|----|---------------|----------------|
| 1. | Equipment - | \$85,000 |
| 2. | Leaseholds - | \$50,000 |
| 3. | Supplies - | \$12,000 |
| | 4. Goodwill - | \$65,000 ----- |
| 5. | Total - | \$212,000 |

The key differences between the 2 experts were the following:

1. The B. report was a 2-page letter of opinion whereas the T. report was a detailed analysis of some 23 pages, excluding the appendices.
2. T. attended the practice, interviewed the dentist, and staff, did a review of 10% of the charts, whereas, B. did not.
3. T. saw no evidence of underreporting cash as in his review of 10% of the charts he traced the patient record for 12 months, and found nothing unusual about the payments of the patients; whereas B.

simply provided an analysis on examination, of the effect of a notional underreporting of \$50,000 cash annually on his opinion of value.

4. T. discussed the recall patient base of the practice as well as the billings per patient and their impact on the capitalization rate, whereas B. made no similar analysis or comment.
5. T.'s analysis included the financial information of the management company "D&N", whose financial statements he combined in the valuation of the practice, thus eliminating the necessity of separately valuing the management company. B. presumably accepted this approach, as he made no comment about the need to separately value the management company.

24 T. replied to B's letter of opinion, as follows:

"From our experience valuing dental practices in the greater Toronto area and the above factors, a simple overview may well lead us to the same conclusion whereby the value could well range from 64 to 72% of gross. This would be well within the general guidelines where practices are sold, but an in-depth review would highlight other very key components which would limit the attractiveness of this practice when establishing the fair market value such as:

1. There is a very high Romanian component in the patient base, up to 60%, whereby the practice would only be of interest to Romanian speaking dentists who generally do not pay for Romanian speaking patients at the same price at which generic Canadian patients would be valued.
2. The patient base is limited to 510 recall patients. This is less than half of a full-time practice patient base. This is higher risk for the purchaser.
3. The billings per patient were very high, \$805 per patient, compared to most practices in the \$400-\$500 range, again high risk to the purchaser.
4. The associates are all paid 50% of the net billings whereas the vast majority of associates are paid 40%. This limits the net income but may be necessary to attract Eastern European speaking dentists to treat the patient base.
5. The practice is in an area that has a much higher than average number of dentists. There are 5 other dentists in the building with 2 on the main floor and the subject practice is on the 2nd floor with limited visibility.
6. The practice is not computerized which means that the purchaser would generally be computerized and this would be an additional cost to the purchase price of the practice ...

In valuing a dental practice Professional Practice Sales [Ontario] Ltd. would start at a capitalization on the after-tax net cash flow of 15% over a 10-year period and modify up or down to impact the special circumstances of the subject practice. At 15%, a similar neutral Canadian patient base practice, with the same net cash flow, would have a value of about \$249,000 with each recall chart being worth \$199.36.

Because of the negative impact of the above items, we utilized the capitalization rate of 19% which gave us a good will value of \$65,000 with a chart value of \$127.77 each which for an ethnic practice is quite normal."

25 Further, despite the evidence of 3 witnesses that they paid Dr. D. cash for services, there was no direct evidence that this cash income was not recorded and declared. Nor was there any direct evidence that payment to the associates of a premium of 50% of billings was for the purpose of reducing cash flow and value.

26 In assessing the evidence of the two valuers I was concerned with the undisputed fact that Dr. D. sold his previous practice at Keele and Sheppard after 6 years of practice for \$365,000, with goodwill valued at \$215,000. The valuation date practice at Thornhill was operated for 4 years. Both practices used the same management style and office protocols. Both practices were made up of the husband's Romanian patient base. Since the application of the capitalization rate is a subjective decision, it must withstand the litmus test of commonsense and market comparison. It must also relate to the reality of the sale of a similar practice. No explanation was given as to why there was such a marked difference between the value of the goodwill of the Keele practice and the Thornhill practice. Even B. fails to explain why there is such a differential between the value of the Keele goodwill of \$215,000 and B's assessment of the Thornhill goodwill of \$130,000.

27 Despite the fact that in its totality I preferred the evidence of T. to that of B. in its thoroughness and completeness, I must analyze the Keele goodwill in relation to the Thornhill goodwill, and it becomes clear that the selection of the capitalization rate is pivotal in establishing the value of goodwill. I conclude that Mr. T's choice of capitalization rate with respect to the goodwill was too high, whereas Mr. B's choice of 15% did not reflect the reality of the sale of a Romanian client based dental practice.

28 Accordingly, I fix a midpoint value between the two at \$102,500 for the goodwill and a total value of the dental practice at \$249,500 at the date of separation.

Accounts Receivable:

29 According to T., the valuation of the husband's practice did not include the calculation of the accounts receivable; however, Mr. T. testified that his notes reflected the existence of \$39,000 as the accounts receivable as at March 1, 2002. I prefer Mr. T.'s evidence in that regard rather than the husband's one-write system photocopies, which are deficient and incomplete. Further, the husband suggested that I discount this figure by 50%, as these monies were owed to the associates who generated approximately 50% of the dental practice's income. There is merit in the suggestion; however, there was minimal

evidence to that effect. A review of Mr. T.'s evidence is that in 2002 Dr. D.'s gross billings were: \$201,423 and the associates' gross billings were: \$190,204. Accordingly Dr. D. will receive a credit for 51.4% of the accounts receivable as an asset as at the date of separation, namely (\$39,000 x 51.4%) \$20,046.00

(ii) Dental Practice Liabilities:

30 Of course, the husband claims that the liabilities of the practice ought to be deducted from the asset value. Although such a proposition seems sensible, the husband has produced minimal evidence of the existence and actual value of the debts as at the date of valuation. Mr. T's valuation refers, at page 13, to "the method of accounting and recording all disbursements is by use of check stubs."

31 At exhibit 11, tabs 11 and 12, Dr. D. established the following liabilities via cheque stubs, receipts or bills, and as such the following will be included in the liabilities of the practice:

| | | | |
|----|---|----|----------------------|
| 1. | Employee wages: (\$368.97, \$102.20, \$574.40, \$738.12, \$117.36) | | \$1,901.05 |
| 2. | Associate payments: (\$4,871.75, \$795.95, \$2,154.41, \$585.21) | | \$8,407.32 |
| 3. | Lab charges: | \$ | 925.00 |
| 4. | Taxes: (\$3149.00) for 2 months: | \$ | 524.83 |
| 5. | Condominium charges: | \$ | 659.66 |
| 6. | Other payables: (\$125.35, \$100.00, \$124.98) | | \$ 350.33 ----- |
| | Total: | | \$12,768.19 ----- |

I was not able to locate the evidence to support the following expenses: government taxes (\$1,621.78), write-offs (\$2,063.88), utilities (\$652.34), vacation pay. Pursuant to s. 4(3) of the Family Law Act, and on a balance of probabilities, the husband bears the onus of proof

to establish that such expenses exist. He did not discharge such onus. Accordingly, I have not included these expenses in his liabilities as at the date of separation.

Equipment Lease

32 Both the husband's and the wife's valuers confirmed that from the value of the dental practice, the vendor (Dr. D.) would be responsible for all outstanding liabilities, in particular the outstanding equipment lease. B's evidence was that in his experience the lease cost must be deducted from the value of the dental practice.

33 A review of the lease, exhibit 21, identifies that on default, all rental installments and other amounts due and owing, as well as a 6% premium, called a "loss of bargain", are owed to the leasing company. Exhibit 11(10) confirms the term of the lease to be 7 years with an expiry date of August 31, 2005.

34 Despite the husband's personal calculations of \$160,680.24 as owing to the leasing company, by applying the monthly lease cost for the balance of the term, such amount does not conform with Exhibit 22, a letter from the leasing company indicating the gross balance owing on the lease as at February 28, 2002 is the amount of \$142,903.32. I accept the evidence of the leasing company letter, to which 6% will be applied, in the amount of \$8,934.20, for a total lease liability, on valuation date of (\$142,903.32 + \$8,934.20) \$151,837.52

35 Therefore the total liabilities of the practice proven by the husband are (\$12,768.19 + \$151,837.52) \$164,605.71.

Outstanding Asset Values

36 There was much trial time spent on establishing the respective parties views of the values of various assets.

b. Contents of the Matrimonial Home:

37 As the husband was abruptly removed from the matrimonial home, the majority of the contents remained with the wife and children. The wife alleges that there was an agreement that the contents were to be equally divided. The evidence discloses no such agreement. The husband received a portion of the contents, but certainly received no items of significance or worth. Also during the course of the separation and prior to the sale of the matrimonial home (13.5 months) the husband was dispossessed of the home and the wife sold some of the contents.

38 The wife's Jenco valuation of the contents of her current apartment was dated January 5, 2004, and does not reflect valuation day values. Further, although the wife accepts the valuation of her contents, she does not accept the value of the Syrian cabinet in the amount of \$2,500.00, primarily because the husband's valuator, Empire Auctions, appraised it at \$10,000.00. The Empire Auctions valuation includes a disclaimer, in that the Syrian cabinet was not inspected or viewed by the husband's valuator. The wife alleges that the husband purchased the cabinet for \$2,000, whereas the husband alleges that he purchased it for \$3,000. As Jenco did not establish its credentials for valuing antiques, Jenco's valuation appears somewhat low. The Empire Auction valuation, without the benefit of a personal examination and without any comparables, appears excessive. The value of the Syrian cabinet is fixed at \$4,000.00 and shall be included in the husband's net family

property and deducted from the value of the wife's contents. The onus to prove that the Syrian cabinet was gifted to him was on the husband. He did not discharge that onus.

39 The evidence confirms that the husband bought the Syrian cabinet and it is to be returned to the husband in the condition it was at the date of separation. Any damage to the item should be repaired at the wife's expense.

40 The evidence also confirms that the husband was gifted certain paintings by his friend, Scott McDermid. The McDermid paintings are included in the Jenco valuation, in an unknown amount. The gifted McDermid art is to be returned to the husband, included in his net family property statement and exempted as gifts (2 large paintings - Escalator and Toaster/Horse and 2 small paintings). Mr. McDermid indicated that he earned \$1,000 per annum from the sale of his art and that there has not been a market for his art for 7-10 years, such that he primarily sells to his friends. On cross-examination Mr. McDermid was comfortable with valuing the art at \$2,200. Accordingly the sum of \$2,200 shall be deducted from the value I will set for the art. This value for the art shall be included in the husband's net family property and exempted in the same amount as gifts.

41 The evidence suggests that the contents, prior to the sale of certain items, and at the date of separation had a greater worth than the Jenco valuation. The husband's evidence was that he received only 10% of the contents, whereas the wife indicated that he received 50% of the contents. Upon a review of the evidence, I prefer the evidence of the husband on this point. With respect to the value of the contents, without a specific valuation, the husband estimates the value of the matrimonial home contents to be \$20,000 of which he received 10% or \$2,000.00. Accordingly, the wife retained contents valued at \$18,000 from which will be deducted the art above and the Syrian cabinet in the total amount of \$6,200.00. The value of the wife's contents is fixed at \$11,800 and the husband's contents are fixed at \$8,200 of which \$2,200 to be excluded as gifts.

c. Jewellery

42 Neither party provided valuation of their respective jewellery. The wife alleges that the jewellery was divided between the parties to their mutual satisfaction. The husband denies such allegation. It is clear that the parties accumulated significant jewellery during the marriage. It is not clear from the evidence, which, if any, of the jewellery was gifted to either of them from third parties, although it would appear that the wife retained the larger portion and clearly the majority of the jewellery. Exhibits 13 and 14, a series of glossy photos, represented a portion of the jewellery, the majority of which was retained by the wife, ostensibly for the benefit of her daughter and/or identified as gifts from the wife's mother. Interestingly, although the wife's mother attended much of the trial she was not called as a witness to identify the items that were gifted to the wife. The only extrinsic evidence of value is a bill from Empire Auctions contained in Exhibits 13 and 14 evidencing the wife's purchase of emerald and diamond earrings in the amount of \$1,075.25, 2 months prior to separation. Further, the wife conceded that several items of jewellery, not included in the extensive photographs, were left with Voyage Jewellery as follows:

1. 2 diamond rings, to be cut down because they were too large;
2. 1 emerald ring to be reset for daughter;
3. 2 small diamonds gifted by mother;

4. 2 gold chains.

The wife further provided an incredible story that, in advance of trial she went to the trouble to reset some jewellery, rather than have it valued. Further, she alleges these items were stolen one week before trial, and she still awaits their replacement. She did not produce the police report. She did not produce the insured value of the jewellery.

43 In her financial statement, dated July 22, 2003, the wife identified the value of the jewellery at \$7,000, although she indicated that all was gifted to her. Subsequently, in Exhibit 8, she valued her jewellery at \$3,000. with no exclusion of same as gifted.

44 The husband suggests, without a proper valuation, that the jewellery in the wife's possession was worth between \$20,000 and \$25,000. Upon a review of the pictures of more than 100 items of jewellery, at least 20 of the items appear to be significant in size and value. Further, it would appear that the husband has retained only a small portion of the jewellery.

45 I conclude that the wife deliberately did not provide a valuation of her jewellery, although she easily could have, the implication being that the value of all the items would have exceeded her valuation of \$7,000.

46 The onus to provide the valuation lies on the possessor of the item. The majority of the items were in the possession of the wife. The wife had a positive obligation to prove the values and the gifting. She has done neither. On this point, I prefer the evidence of the husband and fix the value of the jewellery in the wife's possession at \$18,000.00 and those in the husband's possession at \$2,000.00.

d. Romanian Apartment:

47 It is the wife's position that in 1992, the parties purchased a Romanian apartment. Since the option to purchase came as a result of the husband's mother's tenancy, legal title was put in her name. The purpose of the purchase was to provide the D. family with a place to stay during their visits to Romania. Beneficial ownership vested in the husband because, in the same year, the husband's mother bequeathed the unit to the husband. The will expressly states that the apartment shall be the property of the husband. The wife's evidence was that similar units have sold in Romania for 25,000 euro at \$1.62 Canadian and that its value at the date of separation was \$40,000.00 Canadian.

48 The husband's evidence was that the apartment in Romania was purchased by his mother from the Romanian government and that all funds for the purchase of the apartment [approximately \$300 US] came from his mother and not from family income.

49 On this point, I prefer the evidence of the wife. I find that the husband has a contingent and beneficial interest in the Romanian apartment and it is to be reflected in his net family property in the amount of \$40,000.00.

e. Dental Licence:

50 For 5 years after the husband arrived in Canada the husband expended time, energy and money to obtain his accreditation to practice dentistry in Canada. While he was doing so, he was employed intermittently on a part-time or full-time basis, while the wife was employed full-time. The parties agree that the cost of obtaining the licence was \$40,000.

51 No reference was made to compensatory support in the wife's opening statement, and the wife's counsel originally relied on the trial decision of Madam Justice Van Camp, *Caratun v. Caratun*, 10 O.R. (3d) 385, wherein Justice Van Camp found that the husband's dental practice was "property" pursuant to s. 4(1) of the Family Law Act. The Court of Appeal found otherwise. See *Caratun v. Caratun*, 10 O.R. (3d) 385.

52 Accordingly, the dental licence not being an asset for valuation pursuant s. 4(1) of the Family Law Act, it shall not be included in the husband's net family property.

f. Air Miles:

53 As with other assets, much time was spent on a minor issue, yet inadequate evidence was adduced by either party on this point. Dr. D. testified that he obtained his CIBC Aerogold credit card in January 2002 and that during the two months that he utilized his card, and by the end of February, 2002 he had earned 5416 aeroplane miles. Although the 2 statements at Exhibit 11(13) reflect the totals of the earned aeroplane miles, nowhere in the document is there a calculation of the market value of such aeroplane miles. The best evidence available is Dr. D.'s estimation in the amount of \$80.00, as he stated that it would take the acquisition of 70,000 air miles to obtain an airplane ticket to Romania. I accept his valuation as the best evidence of value.

g. D. Family Trust:

54 The husband admits to the creation of the D. Family Trust with a declaration of trust dated September 22, 1997. According to the husband's accountant, at Exhibit 12(5) the sum of \$81,837 was used to satisfy this trust. These funds represented the net operating gain for the year ending January 31, 1997 for D&N Management Services Corp. (management company owned by Dr. D. for the dental practice). However, no trust bank accounts have been produced. No tax filings for the trust have been produced. The husband's accountant knew nothing of the family trust. The only documents relative to the trust produced by the husband were 2 letters dated June 21, 1999 confirming a resolution rescinding a \$50,000.00 dividend for the trust.

55 Dr. D.'s evidence was that he could not take advantage of the trust since D&N Management did not generate enough income from 1997 to 2002 to put money into this investment income. There is some support for this position from the husband's accountant, summarized D&N's income results as follows:

1. January 31, 2000 -- loss [\$5,474.39]
2. January 31, 2001 -- loss [\$3,663.65]
3. January 31, 2002 -- loss [\$27,813]

Accordingly, I find that the family trust had no value at the date of separation.

h. Condominium:

56 The Thornhill condominium, out of which the husband operates the dental practice, was purchased in 1997 for \$151,110. Some leasehold improvements were effected, and according to the husband's financial statements, the condominium has a book value as at the date of separation of \$154,885.

57 A valuation was obtained for the condominium by a real estate appraiser who provided a market value, with comparables at \$112,000.

58 In this case, market value prevails over book value. The value of the condominium is accepted at \$112,000.00.

i. Life Insurance:

59 In the wife's first two financial statements she included two policies of insurance with a face value of \$100,000. On her July 23, 2003 financial statement, contained in the trial record, she declared a cash surrender value of the London Life policy in the amount of \$3,000. The wife's current net family property statement does not include any value amount for her life insurance. Certainly, no evidence was led by the wife with respect to the market value of the life insurance. However, the husband's concluding net family property statement values the husband's and the wife's cash surrender values of their insurances at \$1,000.00 each and I accept such statement as an admission of value.

j. Debts and Liabilities of the Parties:

60 I have already discussed the debts and liabilities of the dental practice above. What remains is a discussion of the balance of the debts and liabilities of the parties. Although the parties agreed to the quantum of certain debts, what follows is the discussion of the debts and liabilities over which there is a dispute.

Income Taxes

61 The calculation of the taxes owing by the husband as at the date of separation are complicated by the fact that the practice fiscal year end was January 31, whereas the income tax reporting period is governed by the calendar year. According to the evidence of the husband's accountant, S. Soliman, for the taxation year ending in December 31, 2001, (2001 taxes) the husband's financial statements for the year ending January 31, 2001 would be applicable. To calculate the taxes that are due and owing as at the date of separation, S. Soliman included the following:

- (i) fiscal year - February 1, 2000 - January, 31, 2001 - \$16,414.70
- (ii) fiscal year - February 1, 2001 - January 31, 2002 - \$19,829.92
- (iii) 1 month - February, 2002 - 1/12th of \$19,829.92 - \$1,652.50

S. Soliman calculated that the total taxes owing at the date of separation was \$37,897.12.

62 The wife's counsel suggested that the amount owing for taxes was that reflected in the notice of reassessment for the taxation year 2000, in the amount of \$14,229.19.

63 I accept the evidence of S. Soliman and find that the taxes owing as at the date of separation by the husband were \$37,897.12. The wife's taxes owed at the date of separation were accepted at \$3,714.98.

Credit Card Balances

64 Although the husband alleges that the credit card balances are not in dispute, his net family property statement states that the wife's credit card balances as at the date of separation were accepted at \$3,714.98.

ration were \$2,230.00, whereas the wife's credit card statements confirm that the wife's credit card balances were \$7,285.82.

There being no evidentiary justification for the husband's figures, I accept that the credit card balances for both parties as follows:

1. Husband - \$7,566.21
2. Wife - \$7,285.82

RRSP Disposition Costs

65 The parties are not in agreement with respect to the notional disposition costs of the husband's RRSPs. The wife has applied 24% disposition tax cost whereas the husband has applied 30%. Given the husband's and wife's income tax bracket, I find the 30% disposition costs to be more appropriate. Accordingly, \$10,500 shall be deducted from the value of the husband's RRSPs and \$4,134.90 from the wife's RRSPs.

CIBC Line of Credit:

66 Although the line of credit was a joint debt, the wife has admitted that she has made no payments on this debt since March 26, 2002. The husband, subsequent to the separation, assumed sole responsibility for this line of credit and transferred it to his name only. Accordingly, the full line of credit balance as at the date of separation will be reflected in the husband's net family property statement in the amount of \$18,698.08.

Royal Bank Condominium Mortgage

67 The Royal Bank mortgage is registered against the condominium from which the husband operates his Thornhill dental practice. The parties are in agreement with respect to the balance due on this mortgage as at the date of the separation, however, the husband is claiming the full amount of the debt on his net family property statement. The wife has never paid this debt and it has always been the husband's responsibility. As he has the obligation to declare the condominium in his net family property statement, he is entitled to include in his net family property statement the mortgage in the full amount of \$90,891.66.

k. Exclusions:

68 The husband makes several claims for exclusions from his net family property statement. He alleges that he had lent to his sister, also a doctor, money to purchase a house in Bucharest prior to meeting the applicant. He had also forgone an inheritance from his father so that money could be provided to his sister for the same purpose. The sister reimbursed the husband during the course of the marriage in the amount of \$25,000 with a release provided by Dr. D. to his sister.

69 The husband's sister also provided to the husband a cheque in the amount of \$3,000 dated July 23, 2001 which was provided as a present to him for the purchase of the Cale-

don land. He indicated that there was a verbal agreement between the parties that this money would be returned to him with interest if the parties separated.

70 Lastly, the husband gave evidence that he received the Syrian cabinet as a gift from his sister and that it was worth a \$10,000 on valuation date according to the appraisal of this asset. I have already ruled on its value and its ownership in previous subparagraphs.

71 Of note is the fact that although the husband's sister is a resident of Ontario, she was not called as a witness. No payments were produced to demonstrate the existence of the loan. It was only after the separation in 2002 that the husband disclosed its existence. The wife alleges that this is just another example of the husband's creativity to manufacture deductions and exclusions and cloud the fact that the monies were indeed flowing between him and others, in a non-arm's-length manner, so that the wife would be unaware of his financial dealings and thus be financially disadvantaged.

72 However, the husband further alleges that he deposited both the loan monies and the gifted monies into the purchase of the Caledon property that was jointly owned. Pursuant to s. 14 of the Family Law Act, there is a legal presumption that "property held in the name of the spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants." The husband has failed to rebut the presumption.

73 Also, pursuant to section s. 4(3) of the Family Law Act, and on a balance of probabilities the husband has not discharged the onus imposed on him to prove the exclusions.

Net Equalization Payment:

74 Having made findings of value above, I have recalculated the net equalization payment as follows:

NET FAMILY PROPERTY STATEMENT

| ITEM | HUSBAND | WIFE |
|-----------------------------|--------------|--------------|
| 1. Assets | | |
| Caledon property | \$169,500.00 | \$169,500.00 |
| CIBC Investments (RRSPs) | \$0.00 | \$13,783.00 |
| CIBC Chequing Account | \$500.00 | \$500.00 |
| TD Chequing Account | \$0.00 | \$292.30 |
| Royal Bank Chequing Account | \$0.00 | \$22.00 |
| Antique Syrian cabinet | \$4,000.00 | \$0.00 |
| RRSP | \$35,000.00 | \$0.00 |
| Condominium | \$112,500.00 | \$0.00 |
| 1997 Toyota Forerunner | \$20,000.00 | \$0.00 |
| CIBC Chequing Account | \$5,000.00 | \$0.00 |
| Dental Practice | \$249,500.00 | \$0.00 |

| | | |
|-------------------------------|--------------|--------------|
| Diamond Shares | \$0.00 | \$79.00 |
| Household Contents | \$8,200.00 | \$11,500.00 |
| Accounts Receivables | \$20,046.00 | \$0.00 |
| Air Miles | \$80.00 | \$0.00 |
| London Life Whole Life Policy | \$1,000.00 | \$1,000.00 |
| Apartment in Romania | \$40,000.00 | \$0.00 |
| Jewellery | \$2,000.00 | \$18,000.00 |
| D&N Management Services Corp. | \$0.00 | \$0.00 |
| Dental License | \$0.00 | \$0.00 |
| D. Family Trust | \$0.00 | \$0.00 |
| | | |
| TOTAL 1. | \$667,326.00 | \$214,676.30 |

2. Debts and Liabilities

| | | |
|--|--------------|-------------|
| Dental Practice liabilities (A/P and lease) | \$164,605.71 | |
| Bank of Montreal Line of Credit (Caledon) | \$27,843.52 | \$27,843.52 |
| CCRA | \$37,897.12 | \$3,714.98 |
| Credit Cards | \$7,566.21 | \$7,285.82 |
| CIBC Personal Line of Credit | \$18,698.08 | \$0.00 |
| Royal Bank Mortgage (Condominium) | \$90,891.66 | \$0.00 |
| CIBC Overdraft | \$742.13 | \$742.13 |
| | | |
| CIBC Line of Credit (Dental Practice) | \$51,281.00 | \$0.00 |
| RRSP disposition costs | \$10,500.00 | \$4,134.90 |
| | | |
| TOTAL 2. | \$410,025.43 | \$43,721.35 |

3. Property Owned at Marriage

| | | |
|----------|--------|--------|
| TOTAL 3. | \$0.00 | \$0.00 |
|----------|--------|--------|

4. Excluded Property

Art \$2,200.00

TOTAL 4. \$2,200.00 \$0.00

5. Net Family Property

(Total 1 minus Totals 2, 3 and 4) \$255,100.57 \$170,954.95

6. Equalization Payment

Husband pays
to Wife \$42,072.81

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Unequal Division of Net Family Property:

75 Pursuant to section 5(6) of the Family Law Act, the wife seeks an unequal division of the parties' net family property. The section reads as follows:

"VARIATION OF SHARE - The court may award a spouse an amount that is more or less than half of the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,

- (a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
- (b) the fact that debts or other liabilities claimed in reduction of a spouses' net family property were incurred recklessly or in bad faith;
- (c) the part of a spouse's net family property that consists of gifts made by the other spouse;
- (d) a spouse's intentional or reckless depletion of his or her net family property;
- (e) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;
- (f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;
- (g) a written agreement between the spouses that is not a domestic contract; or
- (h) any other circumstances relating to the acquisition, disposition, preservation, maintenance or improvement of property."

76 The evidence on which the wife relies is as follows:

- (a) the husband's failure to disclose debts at the date of marriage - the wife alleges that the husband's loan to the sister was a debt to be considered. In fact this loan was not a debt, but an accounts receivable owing to the husband, such that this fact alone does not advance her position.
- (b) Debts incurred recklessly or in bad faith to reduce net family property - the wife alleges that the Pickering dental practice debt was incurred recklessly. However, the evidence established that the husband disposed of the Pickering dental practice by virtue of the purchaser assuming all of the debt, such that this fact does not advance her position.
- (c) Intentional or reckless depletion of net family property - the wife alleges that the husband burned the financial records and liquidated his RRSPs; however, I did not find these acts to be a reckless depletion of the net family property. In fact, the liquidated RRSPs served as income to address a cash flow deficit.
- (d) Other circumstances relating to the acquisition, disposition, preservation, maintenance or improvement of property - the wife alleges that she should receive an unequal division by virtue of her contribution to the acquisition of the dental licence, her development of the dental practice, the husband's sheltered cash income so as to reduce valuation of dental practice. However, the wife was compensated by way of spousal support and income during 19 years of marriage from her labours relative to the acquisition of the dental licence and development of dental practice. She failed to establish that the husband sheltered significant cash income. Accordingly, these facts do not advance her position.

77 Even if I should be in error with respect to the above factual findings, the wife has failed to establish the fact that equalizing the net family properties would be unconscionable. In the decision of *Roseneck v. Gowling*, 62 O.R. (3d) 789, Weiler J.A. concurred with the parties that the "unconscionable" threshold is higher than "unfairness", "harshness" or "injustice". Having reviewed the evidence, none of the wife's allegations give rise to unconscionable circumstances, either individually or in their totality, such as to merit an unequal division. Accordingly, this claim is dismissed.

Support:

78 The condition precedent to the calculation of both child and spousal support, if any, is the quantification of the husband's income.

The Wife's Position with Respect to the Husband's Income:

79 The wife alleges that the husband earned between \$150,000 and \$250,000 per year. She has knowledge of this fact because the husband brought home cash after work in the

estimated amount of \$4,000-\$5,000 per month. Further, she reconstructed her recollection of the family expenses pre-separation in 2000 in the annual amount of \$136,661 in after-tax dollars.

80 According to the wife, the family enjoyed a high standard of living, which included owning a five-bedroom house with a swimming pool, bar and sauna, in a "high-class" neighborhood in Nobleton, driving expensive cars, taking 1-3 vacations per year, purchasing expensive and beautiful clothing, giving the children their own bicycles, skates and roller blades, piano lessons, summer camp, soccer, volleyball, skating, dancing and skiing. The family also hosted many social gatherings, barbecues, dinner receptions and lunches. The family was well recognized in the Romanian community for their glamorous party events. Before separation, the parties were making plans to build a dream home in Caledon, Ontario.

81 It is the wife's position that after his arrest, her husband took the necessary steps to reduce his income to avoid support, by:

1. not declaring his cash income;
2. diverting income to his associates;
3. opening 2 new practices for which debt the Thornhill practice paid.

82 The wife asks that I impute income to the husband, per s. 19 of the Child Support Guidelines. In that regard, she asks that I consider the following facts:

1. that the husband agreed to pay child support, on a final basis, on an imputed income of \$125,000;
2. that the husband alleges that he earns \$36,000-\$65,000 per year whereas he is paying his fulltime associates \$82,000 to \$86,000 per year;
3. that the husband has been practicing as a dental surgeon for 14 years, managing 3 dental offices with a staff (including associates) of more than 12 people, such that his declared income of between \$36,000-\$65,000, cannot be believed;
4. that the average income of a dentist in Ontario in 1995 was \$113,679 and in 2003 was in excess of \$175,000;
5. that the husband is not devoting his full-time attention to the Thornhill practice thus he is intentionally underemployed;
6. that the husband has unreasonably increased his expenses by establishing 2 new offices and paying his associates 10% more than the provincial norm.
7. The wife asks for a final order for support in the amount of \$3,500.00 plus a cost of living adjustment per month based on the husband's income of approximately \$175,000 per annum.

The Husband's Position:

83 Although the husband agreed that the family lived a comfortable lifestyle, he denies that it was lavish. Further, the wife's assumption that any cash brought home from the practice was not declared was fanciful and without any basis in reality.

84 The husband alleged that during the marriage there were \$120,000 of RRSPs in their combined accounts. At the time of separation, the quantum of RRSPs was reduced to \$50,000 in total. The husband's evidence was that the purchase of significant RRSPs was made following the sale of his dental practice at Keele and Sheppard Avenue in 1997 but that \$70,000 of these funds were spent in the ensuing four years of the marriage to support the lifestyle of the parties. Such evidence is confirmed upon a review of the parties' income tax returns. According to Dr. D., there was a cash flow problem in the D. household regardless of the comfortable lifestyle of the parties during the marriage. They were living beyond their means.

85 A review of the parties' income tax returns indicate combined earnings of between \$80,000 and \$100,000.

86 Dr. D. also alleges that the financial "bottom" line of the Thornhill practice was affected by the following:

1. The separation of the parties meant that the income saved by having Mrs. D. prepare the practice's financial books had to be outsourced to a bookkeeper that was paid the sum of \$10,000 per annum.
2. One of the most productive associates of the practice, Dr. Dilson Uluca, indicated in May of 2002 that she needed to move to Toronto to accommodate her patient base. To avert what he perceived to be a significant loss to his practice, he agreed to move her practice to a new office that he planned to open at the Fairview Mall in the summer of 2002.
3. To open the Fairview Mall practice, Dr. D. obtained financing in the amount of \$145,000 and retired his line of credit on the Thornhill practice in the amount of \$51,000. In essence, he increased his debt load by \$94,000 to develop this Fairview Mall practice.
4. As a result D&N, the management company, was required to pay additional funds to pay this increased loan balance resulting in more money being paid to D&N from the dental practices; namely the dental expenses increased from \$54,179 at the end of fiscal year 2002 to \$74,333 at the end of the fiscal year 2003.
5. In 2003, Dr. D. opened a new dental office in Waterloo, Ontario. As with the Fairview Mall office, there was hope that the practice would become financially solvent in a short period of time and provide him with a source of income. This income has not materialized, as the Waterloo practice does not have a large patient base.
6. The consolidated financial statement indicates that the Fairview Mall practice almost breaks even. However, one must keep in mind that the CIBC loan for Fairview is paid by Thornhill. To do so, Thornhill

pays increased management fees to D&N in the amount of \$84,000 as at January 31, 2004.

7. A review of the consolidated statement of income and expenses of all three practices indicates a total income to Dr. D. from all three offices in the amount of \$36,001.

Dr. D. alleges that a review of his gross revenues and that of his associates at the Thornhill practice for the year ending January 31, 2004 indicates that Dr. D. has billed \$215,000, an amount consistent with his previous billings. Therefore the claims and that his wife makes that, he is not working as hard as during the marriage or that he is diverting patients to other dentists, is clearly inaccurate. Furthermore, the two associates confirm that Dr. D. has not diverted patients to their practices other than orthodontic clients, which procedure has never been performed by Dr. D.. A staff member witness also attested to the fact that there has been no change in Dr. D.'s work habits since separation to suggest that he is not working as hard now as he was when he was married.

87 Dr. D. alleges that the problem has been with the fact that although he assumed more debt and subsidized the growth of the dental practices of his associates, he has not been able to grow these businesses or develop his own patient base at the Fairview Mall and Waterloo locations, as he had presumed. He assumed all of the risk, paying large amounts of debt for these 2 offices, while the associates received 50% of gross revenue. He candidly conceded that such has not been a successful financial move for him. In his attempt to increase income, he essentially lowered his earnings by extending his debt load. He claims that he should not be punished for making poor business decisions as he was only attempting to improve his financial situation.

88 Dr. D. alleges that he would like to immediately sell his 2 other offices (Fairview Mall and Waterloo) to eliminate the debt attributable to these 2 offices. He is confident he can sell the Fairview Mall practice in the near future which would provide him with a reduction in management fees of approximately \$25,000 per year and as such increase his income to \$65,000, the amount he requests that the court find as his current income for support purposes.

89 As further evidence of his limited income, he alleges:

1. To meet his expenses, including child-support orders, Dr. D. has had to borrow significant amounts of money from friends and family.
2. Exhibit 11(24) reflects payments from Dr. D. sister in the amount of \$8,900 from the fall of 2002 to the fall of 2003.
3. Exhibit 12(10) reflects Western Union payments from a Romanian friend in the spring of 2003 for the total amount of \$5,760.36.
4. Dr. D.'s bookkeeper and girlfriend provided him with monies as follows: November 2002 - \$2,000; spring, 2003 - \$7,000; spring, 2004 - \$11,000, for a total of \$20,000.
5. In total, Dr. D. has borrowed \$34,660.36 in the last two years to pay his personal and living expenses.

Analysis of Husband's Income:

90 Although previous orders were made based on imputed income, these orders did not have the benefit of viva voce evidence from the husband's accountant and valuator and documentary evidence by way of financial statements and the valuation of the dental practice.

91 In their preparation and review of Dr. D.'s financial statements and valuation, neither the accountant nor the valuator noted any underreporting of cash income.

92 Although Dr. D. gratuitously increases his taxable income to \$65,000 (presumably reflecting increased monies available for income from the sale of the Fairview Mall location), he doggedly ignores the fact that, at least for child support, the court is governed by the Child Support Guidelines, which read as follows:

- s. 19: IMPUTING INCOME - (1) The court may impute such amount of income to a parent or spouse as it considers appropriate in the circumstances, which circumstances include the following:
 - (b) the parent or spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent or spouse;
 - (c) the parent or spouse is exempt from paying federal or provincial income tax;
 - (d) the parent or spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
 - (e) it appears that income has been diverted which would affect the level of child support to be determined under these guidelines;
 - (f) the parent's or spouse's property is not reasonably utilized to generate income;
 - (g) the parent or spouse has failed to provide income information when under a legal obligation to do so;
 - (h) the parent or spouse unreasonably deducts expenses from income;
 - (i) the parent or spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
 - (j) the parent or spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.
- (2) REASONABLENESS OF EXPENSES - For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act (Canada).

93 The best source of information in such analysis is the valuation of the dental practice for March 1, 2002, Exhibit 20, which is included in Appendix B. This document normalizes Dr. D.'s financial statements with "add backs". With respect to 2002, Mr. T. summarized as follows:

1. Total professional billings: \$410,605
2. Total expenses: \$349,730
3. Net income per Financial Statements: \$60,875
4. Add back to Normalize Statement:
 - a. advertising - \$2,971
 - b. associate fees - \$95,102
 - c. payment to spouse - \$33,300
 - d. automobile - \$4,591
 - e. equipment leases - 0
 - f. loan interest - \$7,579
 - g. management fees - GST - \$3,820
 - h. management fees and payment to spouse - \$30,001
 - i. payment to spouse - salaries and benefits - 0
 - j. professional fees - \$840
 - k. rent adjustment - \$15,098
 - l. Depreciation adjustment - \$22,000
5. Total add back: \$185,106
6. Net operating income before debt servicing and taxes: \$245,981
7. Remuneration at 40% for dentist's work: \$80,569
8. Remuneration at 50% for associate's work: \$95,102
9. Net income before taxes from ownership: \$70,310

94 A s. 19 Child Support Guidelines analysis of the husband's income ending January 31, 2004, similarly requires the normalization of the husband's income. I do so upon a review of the husband's consolidated statement of income and expenses for 3 dental practices, his current financial statement, and D&N Management Services Corp. balance sheet:

(i) Consolidated Income and Expenses:

1. Revenue - \$745,614
2. Expenses - \$709,613
3. Net Income - \$36,001
4. Add back to normalize income:
 - (a) advertising and promotion - \$4,001
 - (b) auto expenses - \$6154
 - (c) bank charges and interest - \$7,466
 - (d) credit card fees - \$964
 - (e) fees to girlfriend - \$10,000
 - (f) membership dues - \$2,848
 - (g) general office supplies - \$1,000

(h) telephone and paging - \$2,000

5. Sub total of add backs - \$32,433

(ii) D&N Management Financial Statements:

1. Depreciation and Amortization: Of note was the fact that there was no production of the consolidated D&N Management financial statement for the year ending January 31, 2004 including the balance sheet reflecting the accumulated depreciation for the 3 practices. Dr. D.'s evidence was that he borrowed funds to equip both the Fairview and Waterloo offices in the amount of \$100,000 + \$10,000. A review of the January 31, 2003 D&N statement reflects an accumulated depreciation of \$35,883 (does not include Waterloo). As I cannot guesstimate what the accumulated depreciation and amortization would be for the year ending January 31, 2004, which would include Waterloo, I add back the depreciation of \$35,883 of 2003 to normalize the husband's income.

(iii) Husband's Current Financial Statement:

1. The husband alleges his income to be \$72,500 annually which is supplemented by loans from family and friends in the amount of \$30,000 annually for a total income of \$102,500.

95 Not reflected in the above add backs is the fact that the husband opened 2 practices, Fairview and Waterloo, after the separation. It is not sufficient or appropriate to pass such arrangement off as merely poor business judgement. The evidence points to the fact that Dr. D. arranged his business affairs to increase his debt load and to decrease his income. He knew what he was doing and he knew that to do so would apparently decrease his bottom line from which a court could determine appropriate child and spousal support. To add insult to injury, he now concedes that he will sell both Fairview and Waterloo to eliminate the income drain. The court can only conclude from this contrivance that the husband consciously diverted his income potential from the Thornhill practice to Fairview and Waterloo in the imputed amount of \$20,000 per annum.

96 Accordingly, pursuant to s. 19 of the Canadian Support Guidelines, I impute income to Dr. D., for support purposes, in the sum of: (\$36,001 + \$32,433 + \$35,833 + \$20,000) \$124,317, say, \$125,000 per annum.

97 I take some comfort in making this finding given the fact that the husband agreed that this would be the amount of imputed income for child support purposes before Justice Wildman on December 11, 2003; and the husband's current financial statement reflects an income of \$102,500 without add backs.

Child support:

98 In light of my finding that the husband's income is \$125,000 per annum, the husband shall pay child support in the base amount pursuant to the Child Support Guidelines, the

sum of \$1,500 per month for 2 children, commencing January 1, 2005. The husband's motion to change, which preceded this trial, should be dismissed.

Arrears of Child Support:

99 The wife requests an order for retroactive child support from the date of separation to the date of the final order of Justice Wildman dated December 11, 2003. She requests \$1,500 per month for 10 months, based on the husband's attributed income of \$125,000 per year, subject to the deduction for the husband's payments.

100 On its face, this requests seems reasonable, but for the fact that for a period of 4 months, prior to the orders, from March 1, 2002 to June 30, 2002, the husband deposited the sum of \$24,000 to the joint CIBC account from which many of the household expenses were paid and the monies were used by the wife and children.

101 Further, the husband was not in occupation of the matrimonial home from the date of separation to the date of its sale. Yet, from the joint proceeds of sale, arrears of taxes were paid in the amount of \$4,279.78 (inclusive of interest and penalty) as well as mortgage arrears in the amount of \$10,344.82. By way of occupation, the wife was responsible for one-half of the tax arrears and mortgage arrears in the amount of $(\$4,279.78 + \$10,344.82 / 2)$ \$7,312.30.

102 Also, the wife accessed lines of credit for which the husband became responsible and paid as follows:

1. The wife withdrew from a joint CIBC bank account the sum of \$1,800.03.
2. The wife withdrew from the joint CIBC line of credit between March 11 and March 21, 2002, the sum of \$11,000. The wife repaid \$1,125 of this money to the line on March 26, 2002, and the husband has been responsible for its repayment since the date of separation. He alleges that he should receive the credit of \$9,875 from the wife for this debt.
3. The wife withdrew from the Bank of Montréal the sum of \$4,000.00 between March 14 and March 21, 2002 and never paid it back.
4. The husband also requests credit for estimated interest payments on the CIBC and Bank of Montréal lines of credit in the sum of \$2,000 since the separation. Although I accept the husband's evidence with respect to the lines of credit and bank account withdrawals, he has failed to prove the interest component with respect to these payments.

103 In light of the above the wife had funds available for support in the amount of (\$1,800.03, \$9,879, \$4,000 and \$24,000) \$39,675.03 available for the support of the children and herself. Accordingly, her claim for retroactive child support fails.

Spousal Support:

104 It is the wife's position that the marriage was a long and traditional one. It produced two children for whom she is primarily responsible. She recognizes that she will not be

able to maintain the standard of living that the parties enjoyed prior to separation, however, is concerned that her current financial situation has required her to move into an apartment in an undesirable, low income community. Further she is concerned that her car is in constant disrepair and she has been required to borrow money from family and friends to survive. She wishes to provide her children with the amenities to which they had become accustomed prior to the separation. She requests that the court attempt to maintain a semblance of the former lifestyle for herself and her children by an appropriate award of spousal support.

105 In that regard, she relies on two passages from the Supreme Court of Canada decision in *Moge v. Moge* (1992), 43 R.F.L. (3d) 345, as follows:

"Insofar as economic circumstances permit, the Act seeks to put the remainder of the family in as close a position as possible to the household before the marriage breakdown."

"As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be presumptive claim to equal standards of living upon its dissolution."

106 In the context of the longevity of the marriage and the respective roles played by the parties during the marriage, the court must also examine what steps have been taken by the wife to become self-supporting. From the time she entered Canada in 1979 until the birth of her first child in 1989, the wife was employed in various capacities primarily as a picture framer, sales, cleaning, answering phones with a salary of \$9 per hour. She has a Grade 9 Romanian education.

107 After the birth of their first child, the parties decided that the wife's primary role was that of a "stay-at-home" mother. Accordingly, the wife did not return to any form of employment until the children grew older, when she became more involved in the dental practice by doing the husband's bookkeeping at home. After the reconciliation, in 1999, she did work at the husband's dental practice for approximately 1 year performing dental assistant and cleaning duties, as well as continuing as the practice's bookkeeper. In this manner the husband and wife enjoyed the economic benefits of income splitting and appropriately reducing the income taxes payable by both.

108 Through the intervention of a friend, the wife secured an eight-month contract working for the Osler Health Center, from August 26, 2002 to May 2, 2003, at a salary of \$26,000 per annum. During this contract, the wife made a serious effort to obtain continued employment; however, she was not rehired as the position was a maternity leave contract and her friend was no longer employed by the same facility, such that she received Employment Insurance benefits for a further period to November 29, 2003.

109 Wisely, to give her guidance for job applications, the wife completed a Planning for Employment course (PFE), which included a battery of tests. Her short-term goals were expressed to become a property manager, apartment rental agent, or property rentals manager. Her long-term goals were stated as: dental assistant, medical laboratory technician. The Report summarized as follows:

"D. GATB scores do not meet the requirements for her short-term goal. The result of D. CAAT test are in alignment with the results of the GATT and in her level of education. They point to the need for academic upgrading in English and mathematics.

Should Danielle decide to change her occupational goal for any reason, the attached list suggests additional short-term options in accordance with the GTE results."

110 The attached list included: nurse's aides and orderlies, orthopaedic technologist, pharmacy assistant, stencil maker, wardrobe attendant, food and beverage servers, baby-sitters, parent helpers, manicurists and pedicurists, grocery clerks and shelf stockers, foodservice counter attendants and food preparers, kitchen helpers, foodservice helpers, dishwashers, light-duty cleaners, carpet and upholstery cleaners, caretakers and building superintendents.

111 Instead the wife has made application for jobs for which the report has found her to be ill-suited but more in line with her goal and need to replicate the types of jobs she performed at the Osler Health Centre and her husband's office: administrative manager, legal secretary, experienced bookkeeper, receptionist, research and development assistant, office manager.

112 I accept her evidence that upgrading in English and math are crucial in order to obtain upgraded employment. Further, I accept her evidence that, but for a 1 month period when her children were ill with chicken pox, she searched for employment on a daily basis.

113 The problem with her search is that she is not searching for employment for which she is qualified pursuant to the Y.M.C.A. PFE report. She could be applying for employment as recommended, including picture framing, which may generate an income of \$10 per hour. To date, she has not done so. Instead, she cites the limits on her time to be employed as a result of parenting obligations to the 2 very busy children - one who is 14.5 years old and one who is 11 years old. She must chauffeur the children to their extra-curricular school activities and help them with their homework.

114 Does her parental obligation to the children trump her obligation to become self-supporting? If the children were infants, then I would conclude in the positive; however, the children are not infants. The wife has an obligation to become self-supporting. Further, she has a positive obligation to upgrade her English and mathematics if she is to achieve her employment goal.

115 The question then is whether a wife of 19 years must look to upgrade and retrain to a position that she did not contemplate at the date of marriage. D.D. took limited upgrading or training before and after the marriage. Prior and during the early stages of the marriage, she was primarily employed as a framer. Her income in 1984 was \$9 per hour. However, her economic position during the marriage has improved. On the face, she may not have been economically disadvantaged as a result of the marriage but these questions can only be answered in the context of a review of the statutory bases for granting support. Support in this case is governed by the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 [as am. by S.C. 1997, c. 1], s. 15.2(4);

FACTORS - 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 the cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

116 The marriage was of a long duration, during the course of which it is conceded that the wife assumed the majority of the household and childrearing responsibilities. She also assisted in the husband's practice such that the husband was able to devote his energies to his work. The evidence, however, does not indicate that the wife was disadvantaged from a more lucrative career. She was disadvantaged from improving her skills (English and math), such that she lost an opportunity to be better employed than she was at the date of marriage.

117 The wife has also suffered as a result of the separation. She no longer resides in a large home. She does not operate an expensive motor vehicle. She has lost the enjoyment of the social esteem that the family enjoyed prior to the separation. Her standard of living has been drastically reduced. The wife should not be relegated to a standard of living significantly below that she enjoyed during the marriage.

118 The wife's closing statement made reference to her request that the \$40,000 reflect her contribution to the husband's licence by way of compensatory support, relying on the Caratun appeal decision, wherein the Court of Appeal awarded Mrs. Caratun lump sum compensatory support pursuant to s. 11(1) of the old Divorce Act. The facts in that case are in many respects similar to the case at hand, save for one major fact. In the Caratun case, the husband informed the wife that he wished a divorce 2 days after qualifying to practise dentistry. In the case at hand, the husband began his practice on July 1, 1988 and continued to practice dentistry throughout the marriage to the date of separation, for approximately 13.5 years. The D. family received the economic benefit of such practice during this period of time.

119 D. D. is entitled to compensatory support and support on the basis of her ongoing need. However, she is not entitled to compensatory support by way of lump sum, given the fact that she and her husband enjoyed the fruits of their mutual labour during the course of 15 years of Dr. D.'s dental practice.

120 In the consideration of the quantum of spousal support, the husband argues that his wife could find employment if she made a modicum of effort to do so. Dr. D. is requesting that the court impute the sum of \$25,000 to \$30,000 per annum to the wife in determining the appropriate quantum of support to be payable.

121 As she is currently unemployed, no income can be attributable to her, but it is reasonable to expect that, on a long-term basis, she is capable of contributing to her needs through employment. Given the fact that D. D. was employed for almost a year after sepa-

ration, she can become employable in the near future. She must upgrade and exert all her energies in the next 12 months, from January 1, 2005 to December 31, 2005 to achieve this upgrading. Whether she does so remains to be seen. In any event, she is capable of employment at a rate of at least \$10 per hour, full-time, such that income will be attributable to her, commencing January 1, 2006 the annual sum of \$20,800.

122 Having regard to the legislation and its objectives, Dr. D. is ordered to pay spousal support as follows:

1. March 1, 2002 - August 30, 2002 - 6 months @ \$2,500 = \$15,000;
2. September 1 - May 30, 2003 - 9 months @ \$1,250 = \$11,250;
3. June 1, 2003 - November 30, 2003 - 6 months @ \$2,000 = \$12,000;
4. December 1, 2003 to date @ \$2,500 per month.

123 Ongoing spousal support shall continue at the sum of \$2,500 per month until December 31, 2005. Commencing January 1, 2006, spousal support shall be reduced to \$1,750 per month as commencing that date I impute income to the wife \$20,600 per annum. Spousal support shall continue at the rate of \$1,750 per month thereafter. On the 5th anniversary of the separation, on March 1, 2007, there may be a review of the support payable at the instance of the husband, and the wife shall have a positive obligation to establish her efforts to exceed her imputed income.

Accounting Between the Parties:

124 The wife requested retroactive child support in the amount of \$9,200.00 (tax neutral). The husband has arrears of spousal support pursuant to his Judgment of \$38,250 to December 1, 2003. However, this amount is taxable. The husband being in the 50% tax bracket, the lump sum of arrears is valued at \$19,125. The total of tax neutral child and spousal support that would be properly owing is the sum of (\$9200 + \$19,125) \$28,328.

125 At paragraph 103, the Court found that the husband either paid or became responsible for lines of credit in the amount of \$39,675.03.

126 As the husband did not plead occupation rent; did not adduce evidence with respect to the market value of the occupation of a 5-bedroom home, his request for occupation rent fails. However, given the fact that I have calculated child and spousal support retroactive to the date of separation, it is fair and equitable that the wife be responsible for a one-half share of the mortgage, tax arrears and ongoing taxes paid by the husband. Accordingly, the wife owes the husband the following:

1. one-half the mortgage arrears of \$10,678.33 = \$5,339.17;
2. one-half the realty taxes owing of \$4279.78 = \$2,139.89;
3. one-half the realty taxes paid by husband of \$1,300.00 = \$650.00
4. sub-total owing by wife: \$8,129.06.

127 In light of the above calculations the wife owes the husband the following:

1. the difference between arrears of child and spousal support and accounting for husband's payments (\$28,328 and \$39,675.03)
\$11,347.03
2. mortgage and realty payments - \$8,129.06
3. Total owing by the wife to the husband - \$19,476.09.

The monies owed by the wife to the husband shall be subtracted from the net equalization payment owed by the husband to the wife, such that the husband shall make a total net equalization payment to the wife of (\$19,476.09 - \$42,072.81) \$22,596.72 together with prejudgment interest.

128 I note that the Caledon property continues to be listed for sale. Upon its sale the husband shall be given credit for one-half of the payments made by the husband with respect to the Bank of Montreal line of credit, and realty taxes and same shall be payable from the wife's share of the proceeds. As well, should there be any current fixed costs or payment for the valuation owing from one party to the other, these shall be paid to the other from their respective net balances due upon the sale of the Caledon property.

ORDER:

1. There being no prospect of reconciliation, Divorce Judgment to issue effective 31 days.
2. Child support for 2 children in the amount of \$1,500 monthly, commencing January 1, 2005, as per the order of Wildman J., dated December 2003.
3. Spousal support in the amount of \$2,500 commencing January 1, 2005 in accordance with the above reasons.
4. The husband shall pay an equalization payment to the wife in accordance with the above reasons, the sum of \$22,596.72 together with prejudgment interest.
5. Upon the sale of the Caledon property, the husband to be reimbursed for one-half of all payments of taxes and payments on the line of credit/mortgage relative to this property by the husband from May 1, 2002 to the date of closing, with the quantum of money owing to the husband to be paid from the wife's share of the net proceeds of the sale. Costs, including valuation costs owed, are to be paid from their respective shares of the proceeds.
6. All other claims are dismissed.
7. If counsel are unable to agree as to costs, brief written submissions may be made within the next 20 days.

OLAH J.