Ontario Supreme Court
Tauber v. Tauber [1]
Date: 2001-08-09

Tauber

and

Tauber

Court File No. 98-FP-238482

Ontario Superior Court of Justice Mesbur J.

Heard: May 28, 29, 31, June 1, 25 to 29, 2001

Judgment rendered: August 9, 2001

Rodica David, Q.C., and Michael Charles, for petitioner.

T. Bastedo, Q.C., and S. Kennedy, for respondent.

MESBUR J.:—

INTRODUCTION

[1] Sam Tauber has just turned four. For most of his life, his parents have been litigating the issues of how much child support his father should pay, as well as his father's obligation to pay spousal support to his mother. The Taubers had a trial on these issues in 1999,[1] appealed to the Court of Appeal,[2] and are now back before this court for the new trial ordered by the Court of Appeal on child and spousal support. The Court of Appeal described this as "an exceptional case". It remains so. It raises the issue of the appropriate amount of child support for a young child, whose payor parent earns well in excess of $1 million per year. It also raises the issue of spousal support in the context of a very short marriage, a marriage contract, and a wealthy payor spouse.

THE LEGAL BACKGROUND

[2] When this case was first tried in February of 1999, the trial judge was bound by the decision of the Ontario Court of Appeal in *Francis v. Baker*[3] which had held the court's discretion under s. 4(*b*)(ii) of the *Child Support Guidelines*[4] regarding payors with

incomes of $150,000 did not permit the court to reduce the "table amount" of child support under the *Guidelines,* regardless of the size of the award. Having made a finding that Mr. Tauber's income was $2.5 million per year, the trial judge was compelled to order him to pay the table amount of $17,000 per month in child support. He dismissed Ms. Tauber's claim for spousal support. Both parties appealed.

[3] Prior to the appeal being heard, Mr. Tauber was successful in obtaining a partial stay of the child support ordered at the first trial. The Court of Appeal ordered him to pay $11,000 per month in child support, and pay the balance of $6,000 per month into an interest-bearing trust account [reported 1999 CanLII 292 (ONCA), 49 R.F.L. (4th) 429]. As Laskin J.A. stated in his reasons on the stay application, the figure of $11,000 per month "accords with the confidential interim agreement made by the parties in May 1998" [para 8]. Thus, since the parties physically separated in May, 1998, Mr. Tauber has been paying the sum of $11,000 per month, net of tax.

[4] The appeal was heard after the Supreme Court of Canada had rendered its decision in *Francis v. Baker.*[5] In *Francis v. Baker* the Supreme Court held that the court's discretion under s. 4(*b*)(ii) extended to reducing the table amount, if the court were of the view the table amount was "inappropriate". Applying the principles in *Francis v. Baker* to the Taubers, the Court of Appeal held that the table amount of $17,000 per month for Sam was inappropriate. The Court found that the evidence demonstrated that this table amount "exceeded the needs of this young healthy child, even accepting the imprecision of child expense budgets, that the mother had only a limited financial ability to meet those needs and that she was entitled to include a large element of discretionary spending in view of the income of the husband" [para. 37].

[5] Because the trial judge, in dismissing the wife's claim for spousal support had not considered all four of the objectives in s. 15.2(6) of the *Divorce Act*[6] the Court of Appeal held that a new trial on that issue would be necessary. It recognized that the trial judge had not considered all the factors in s. 15.2(6), given his view that the child support order was inappropriately high. The Court of Appeal therefore directed [at paras. 45, 46]:

> … it will now be necessary for the judge on the new trial to consider all the objectives of spousal support. In doing so, the trial judge will have to consider whether the wife's responsibilities for the child prevent her from continuing her career at the same level as prior to the marriage and the birth of the child. Because of those responsibilities she may be no longer free to take every job offered on short notice nor work the kinds of hours that some of the engagements require.
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> [46] In view of the relationship between spousal support and child support in this case, both matters must be returned to the trial court for a fresh determination. In

those circumstances, I need not consider whether the trial judge erred in his appreciation of the evidence and whether as alleged by the wife, she has been uniquely disadvantaged in re-establishing her career, notwithstanding the short duration of the marriage. All of these issues will be for the trial judge at the new trial.

THE FACTS

[6] Mr. Tauber's father owned and operated a very successful printing business in Montreal, Ever-Reddy Duplicating Services Inc. Mr. Tauber, Sr. created a special niche for his company, printing the liner notes for long-playing records. He counted most of the large record companies as his clients, He moved his business to Toronto in 1970, and in 1973, his son joined the business. In 1989, Mr. Tauber bought out his father, and from that point has manufactured compact disc graphics, namely the booklets and the tray cards found in the "jewel boxes" in which CDs are sold. Through a holding company, Tova Investments, which he controls, he is essentially the sole owner of Ever-Reddy. Ever-Reddy enjoys spectacular success, as does Mr. Tauber. Mr. Tauber is now 48. Although this was his second marriage, he has no children other than Sam.

[7] Ms. Tauber is almost 39. This was her first marriage. She and Mr. Tauber met in March of 1995. She was then working as a freelance wardrobe and prop stylist, a career she had been engaged in for some time. A wardrobe stylist obtains the wardrobe for photo shoots, or television commercials. After the models have been chosen, the stylist's job is to go out an obtain everything the models will wear in the shoot, from clothing, to shoes, hats, jewellery and accessories. This involves getting the items, having them approved, attending fittings with the models, and seeing to any required alterations. The job requires the stylist to be available at all times the art director, the talent and the photographer are available.

[8] Although Ms. Tauber began her career as a wardrobe stylist, she was ambitious, and did not wish to limit herself to wardrobe styling alone. In order to broaden her capabilities, Ms. Tauber expanded into doing "propping" for a photo studio, and began to get into food styling for food photography. Like wardrobe styling, this involved going out and getting all the items required for the photography, from plates and cutlery, to linens, accessories and so on. Like the other kinds of styling, the work is intensive and demanding. A typical day requires working for at least 8 or 9 hours, and can easily extend to 12 or 14. It can involve weekend work, and the stylist is often hired on very short notice. As Ms. Tauber described it, she has to immerse herself in the job, "eating and drinking and sleeping" the job. She said it was like preparing for a trial, trying to meet the deadline, even though things could happen and change significantly during the process. She had to see the job through. If there were changes or demands, she had to

meet them. Even though her work was demanding, she enjoyed it, and when she met Mr. Tauber was successful at it.

[9] The parties' courtship was marked by Mr. Tauber's generosity. They ate at lovely restaurants, and went on some luxurious holidays together. Mr. Tauber purchased beautiful gifts for Ms. Tauber. Mr. Tauber was in the process of purchasing and renovating a large and very expensive home on Dunvegan Avenue in the Forest Hill area of Toronto. There is no doubt it is a beautiful property. It is located on a 176 by 193 foot lot in the heart of Forest Hill, has five bedrooms and five baths, a swimming pool, and has nearly 8,000 square feet of living space, including the finished basement. Although the parties had a brief hiatus in their relationship in the early part of 1996, by late February they were back together, and were both actively involved in the renovations of the Dunvegan house. They decided to get married. Unfortunately, the house was not ready, and since Mr. Tauber had sold his apartment on Hazelton Avenue, in April he moved into Ms. Tauber's apartment. They lived there until her lease was up, and then the parties stayed in a suite at the Park Plaza hotel with their two dogs, until the house was ready. They were married on May 17, 1996. The early part of the marriage was wonderful, according to Ms. Tauber. The couple enjoyed their home, eating out, socializing, going to galleries, driving in Mr. Tauber's expensive cars, caring for their animals.

[10] All agree Mr. Tauber is a man of significant wealth. At the time of the first trial in February of 1999, Mr. Tauber estimated his income at $2.5 million per year, and it was held by the court to be that sum. In fact, his total declared income on his 1999 income tax return turned out to be $2.7 million. His home on Dunvegan is now worth about $2.8 million. It is filled with furniture worth an estimated $90,000, and art works valued at about $2.5 million. Since the last trial, he has purchased a Ferrari, worth about $275,000, but which he drives only rarely. He also has a new Ford Excursion worth about $50,000 and was also, until recently, driving a large, leased BMW. At the time he swore his most recent financial statement he had over $1.2 million in his savings account. He was recently looking for potential buyers for his business, and testified he would consider selling at a price of between $12 to $15 million. Although he is wealthy, Mr. Tauber is fiscally conservative in many ways. He buys for cash. His business is self-financed. He has no bank debt of any kind. This has always been his practice, as well as his father's before him. He describes himself as somewhat of a recluse, eating canned tuna for dinner, after he works out, and seldom going out. He does, however, indulge his passions. These include a taste for art, beautiful physical surroundings, and luxurious automobiles. Since the first trial, he has spent about $100,000 on landscaping for his home, has invested an additional $1 million or so on art, purchased a $30,000 Rolex watch, and spent over $300,000 on new cars, including the Ferrari. He paid cash for all of it.

[11] When the parties got married, Mr. Tauber was equally wealthy. At his request, the parties entered into a marriage contract. Both were represented by experienced family law counsel. At the time of the agreement, Mr. Tauber disclosed his net worth at $19,400,000, including the company at about $15 million. His stated income at the time of the contract was $2.5 million a year. Ms. Tauber disclosed her net worth at $115,000, with annual income of about $50,000. The contract's stated purpose is to "avoid any rights and obligations relating to property which arise or which may in the future arise at law or in equity from their marriage and relationship". It goes on to provide that property will only be divided according to ownership. As to the matrimonial home, it provides that at the date of the agreement, Mr. Tauber was the sole beneficial owner of the home, valued at $2.4 million.

[12] The agreement obliges Mr. Tauber to pay Ms. Tauber a lump sum on separation. The calculation of the lump sum differs, depending on whether the parties have had children. In the first five years of the marriage, if there is a marriage breakdown, and no children, the lump sum is calculated at $20,000 per year of cohabitation. In the first five years, if there are children, the lump sum increases to $80,000 per year, commencing in the year there are children. If there is marriage breakdown at any time after the parties' fifth anniversary, the lump sum is $400,000, whether there are children or not. This sum is not indexed. There is also a separate and specific provision in the agreement concerning support. Section 11 of the agreement provides for a complete release of spousal support if there is a marriage breakdown in the first three years of the marriage. However, if there is a marriage breakdown in the first three years, and there are children, Ms. Tauber's "right to receive reasonable financial spousal support from Jeff will be determined by agreement between the parties, or failing agreement, by a court of competent jurisdiction". No one takes issue with the validity of the agreement.

[13] The parties were always committed to the idea of having a family. Ms. Tauber became pregnant in November of 1996. The Taubers were delighted at the prospect of becoming parents. They fitted out a beautiful room in their home for the baby. This included a custom mural, costing several thousands of dollars. They had a full-time housekeeper long before the baby's arrival. Although after becoming pregnant Ms. Tauber had initially continued to work, she suffered debilitating nausea, and fatigue through the first trimester of the pregnancy, which was followed by a kidney infection. Both interfered with her ability to work, although she continued working to some degree up until June at a reduced rate, until her work became too physically demanding. In any case, Mr. Tauber was clear that he did not mind if his wife stopped working altogether. He wanted her to do whatever made her happy. In thinking about the future after the baby's arrival, Ms. Tauber said she could not imagine not working, and envisaged that she would take time off when the baby was born, and would then return to work on a part-time basis.

[14] Sam was born on August 5, 1997. The Taubers had a full-time baby nurse in the home for the first few weeks of his life, as well as a full-time housekeeper. Things should have been wonderful for this new family. Unfortunately, it was not to be. In early December of 1997, the parties had an argument. After a heated exchange, Mr. Tauber said he wanted a divorce, and Ms. Tauber replied in kind. Sadly, matters immediately escalated, and both parties hired counsel. Mr. Tauber wanted his wife and baby to move out immediately, even though Ms. Tauber was not working, and was still nursing Sam. The lump sum Mr. Tauber was to pay, calculated under the agreement, came to $100,000. As the marriage contract provided, he was not prepared to pay it until Ms. Tauber and the baby moved out. For her part, Ms. Tauber felt she could not move out until she knew what kind of financial support would be available for Sam and her. She commenced this lawsuit and sued for support on January 16, 1998. It was not until May of 1998 that the parties came to interim financial arrangements that permitted Ms. Tauber and Sam to move out, and for Ms, Tauber to receive the lump sum. In addition to the lump sum, Mr. Tauber points out that he also provided Ms. Tauber with a new luxury vehicle, and expensive jewellery, but conceded that he did not expect her to sell either to meet her living expenses.

[15] In looking for accommodation for her and Sam, Ms. Tauber searched for centrally located houses for rent. It was agreed she would have a live-in nanny, and so she had to find a home with adequate facilities for herself, the baby, and the nanny. Once the interim agreement was signed, she moved out immediately into an apartment in a large Rosedale home, on Cluny Avenue. She was there from May of 1998 until September of 1999. She moved when the house was sold, but began searching for a new home when Cluny was placed on the market in March of 1999. She looked in the area bounded by Eglinton Avenue to the north, Dupont to the south, Bathurst Street to the west, and Mount Pleasant to the east. She stated she needed a home with three bedrooms, one for each of herself, Sam and the nanny, two full bathrooms, so the nanny could have her own bathroom, kitchen appliances, air conditioning, parking, a backyard, and room for her home office, Any rental home would have to permit both children and pets, since Sam has a dog, a giant schnauzer. In choosing this geographical area, Ms. Tauber said she wanted to be close to Sam's friends, who reside in Forest Hill and Rosedale, wanted to be centrally located for her work, and of course, wanted to be reasonably close to Sam's father.

[16] Ms. Tauber described the general difficulty she has with rental accommodation. In referring to rental accommodation she means houses, rather than apartments in apartment buildings. First, house leases are generally short-term, a year, or at most, two. Second, there is little to choose from, and what there is, rents quickly. Sometimes there are even bidding wars, which drive up the rent. Third, rentals are expensive. Finally, often rental houses are also listed for sale, meaning prospective buyers will be through

to view the property during the currency of the tenancy. Her hope is to find something stable for Sam, without the threat of its being sold. She does not want him to have to move every year or two. As a result, she is seeking lump sum support, for either herself or for Sam, to permit her to buy a house. If she is renting, she puts her total housing costs at $6,660 per month, even though her current rental is only $4,300 per month, plus the cost of utilities, cable, phone and security system, which come to an additional $507 per month. Although her rent will rise to $4,400 per month in September, her total housing costs will still be slightly less than $5,000 per month, in her current home.

[17] Two experts testified at trial concerning the availability and cost of this kind of rental accommodation. Each expert is well-known in the field, and each is known and respected by the other. Barry Lebow, for Ms. Tauber, researched the rental market to ascertain a reasonable rental rate for Ms. Tauber in the geographical area she described, and meeting the physical criteria she needs. His conclusion was that while historically, houses meeting these criteria have rented in the $3,000 to $3,500 per month range, the scarcity of homes on the market led him to conclude that a basic monthly rent of $4,000 per month was more indicative of prevailing conditions.

[18] Suzanne Hubbard testified as an expert for Mr. Tauber. Her mandate was to investigate the availability of rental accommodation in the range of $2,000 to $3,000 per month. She considered both detached and semi-detached homes, as well as the main floor of a duplex dwelling. Any property should be in good condition, have storage facilities, yard space if possible, and room for a live-in nanny. Pets must also be permitted. Her search included first the geographical area investigated by Mr. Lebow; second the area bounded by Eglinton Avenue, Mount Pleasant Road, St. Clair Avenue East, and Yonge Street; and third, the area within Wilson Avenue on the north, Mount Pleasant to its north limit on the east, Eglinton Avenue on the south and Bathurst Street on the west. She concluded that in the three areas she surveyed for rental properties, properties rented quickly, and the current supply is low. While she opined that rental rates appear to have stabilized, she conceded they might increase as the current supply is depleted. Both experts agree with these conclusions. On the basis of her research, however, Ms. Hubbard concluded that Ms. Tauber could find appropriate rental accommodation at rental rates ranging from $2,500 to $3,000 per month.

[19] When I look closely at Ms. Hubbard's analysis, and the properties she uses to support her conclusion, I find her conclusions are not supported by the evidence. Looking first at her first geographical area, she found only three properties that had rented since September of 2000. One did not permit pets, and one Ms. Tauber had seen, and rejected as being in terrible condition, having been recently vacated by three college students. It had outdated wiring, and lacked even a dishwasher. The master bedroom and bath were only accessible through the other bedroom and a sunroom, and the second bathroom was in the basement. To add to its lack of suitability, it was also listed for

sale. The remaining property was rented for $2,750 per month. When Ms. Hubbard investigated listed properties available just prior to trial in the first area, she found only five. Of these, four did not have at least two bathrooms, and the remaining property, listed at $2,900 per month, was on the upper floors of a duplex, taking it out of Ms. Hubbard's stated criteria of considering only ground floor duplexes.

[20] In Ms. Hubbard's second zone, there were only three properties that had rented since September of 2000. One, with only one bath, had rented at $3,000 per month. One, which met the criteria, rented at $2,800 per month, and was snapped up within 33 days. In the second zone, Ms. Hubbard found only three properties currently for rent, none of which was suitable. One did not permit pets, one did not permit children, and the last had only two bedrooms.

[21] The third zone Ms. Hubbard investigated is much further north than Ms. Tauber would like to live with Sam. However, even here, the rents for appropriate housing are higher. Of the five properties rented in this area since December of 2000, four were not suitable, either having only one bathroom, or only two bedrooms. Only one house met the criteria, and rented for $2,200 per month. However, when Ms. Hubbard investigated current properties for rent in this area, she found only four on the market, of which one was not suitable, lacking two bathrooms. The remaining properties were offered for rent at $2,995 per month, and two at $3,200 per month. This suggests to me that currently, in the area least desirable to Ms. Tauber, her rental cost would likely be more than $3,000 per month.

[22] In response to Ms. Hubbard's report, Mr. Lebow did further investigation. He extended the geographical area of his search to what the Toronto Real Estate Board describes as the CO9 district. This district is bounded by the southern boundary of Mount Pleasant Cemetery to the north, the Bayview Extension to the east, Yonge Street to the West, and Bloor Street on the south. This area includes Rosedale, Moore Park and vicinity. It is marked by scarcity. He found only 9 properties that had rented in the period from January to April, 2001. The rent ranged from a low of $2,200 per month on an extremely busy street, to $5,000 per month for two quality residences in Rosedale. The other rentals went from $2,800, to two at $3,000, to $4,200 to $4,300 per month. The average price is $3,800 per month. If one ignores the two highest, and two lowest rentals as perhaps being aberrant, the remaining rentals also average out at $3,850 per month. This lends credence to Mr. Lebow's estimate of current market rents.

[23] It is clear to me that rental accommodation that meets Ms. Tauber's reasonable requirements will cost at least $3,500 per month, to $4,000 per month or more. This does not include the likelihood of rental increases in the future, nor any allowance for the costs of moving and refurbishing on a regular basis, if she and Sam remain in rental housing. There is no question that renters pay for utilities in addition to the monthly

rent. Mr. Tauber concedes that Ms. Tauber's budgeted items for utilities, phone, cable, and the like, at $507 per month, are reasonable. She anticipates these costs will rise. Thus, if she continues to rent, and moves to a property renting at between $3,500 and $4,000 per month, Ms. Tauber will have monthly housing costs of between $4,000 to $4,500 or $48,000 to $54,000 per year. If she remains where she is, her housing costs as of September, 2001 will be $4,400 for rent, plus $507 for utilities and operating costs, for a total of $4,907 per month, or nearly $59,000 per year. Ms. Tauber's current home is located on Alcorn Avenue, in the Summerhill area of Toronto. It is centrally located, and although Ms. Tauber complains that there is really no yard, and she is next to a parking lot, it appears to have all the features she and Sam require. It is only three blocks from his school, and close to shopping and other amenities.

[24] Mr. Tauber did not suggest Ms. Tauber's and Sam's current home is inappropriate, or extravagant, although he has never been in it. He has no complaint about the neighbourhood. He simply thinks that she could, and should, look for something cheaper.

[25] Mr. Lebow also gave evidence about the availability and cost of suitable housing for Ms. Tauber to purchase. He investigated three types of houses, row/attached/townhouses, semi-detached houses, and detached houses. He considered only homes with at least two full bathrooms, nanny's quarters or a finished basement, three bedrooms and on-site parking. Again, his search was limited to the central areas of Toronto, being the first area he investigated for rental housing, and the second area he expanded his search to, namely the CO9 area. The suitable properties he found ranged in price from just under $350,000 for a home near Yonge and Eglinton, which Mr. Lebow described as "somewhat of a bargain", to a high of $749,00 on the fringes of Rosedale. The mid-range of the properties is about $500,000. Interestingly, a home just up the street from where Ms. Tauber currently rents is on the market for $497,000. This suggests to me that Ms. Tauber could find a suitable house to purchase for a price of about $500,000. On an objective basis, Mr. Tauber takes no issue with these requirements, although his view is that Ms. Tauber could find a suitable home to buy for about $250,000. Whatever the cost, his position is that he should not have to fund Ms. Tauber's acquisition of a home. He views his support obligations to Ms. Tauber as having been met by the payments he has already made, together with the lump sum under the marriage contract.

[26] Mr. Tauber, through his own very hard work over the years, is able to enjoy a very high standard of living marked by beautiful surroundings, a large and luxurious home purchased in large part to house his extensive art collection, exotic luxury automobiles, and the financial wherewithal to afford virtually anything he desires. He lives alone in his home, with his two large dogs. Ms. Tauber's counsel described him as somewhat eccentric in his spending habits. Mr. Tauber simply views his spending as reflective of

things he values in life. He disagrees fundamentally with the way his former wife spends money. There is no question he could easily afford to pay the sums she requests. His current financial statement filed for the trial shows his current income at just under $1.4 million per year. Even paying support at the current level of $11,000 net per month, he shows a monthly surplus of just over $40,000, or nearly half a million dollars a year.

[27] Ms. Tauber is of the view that Sam should not suffer just because his parents have separated. She suggests that to maintain a gross disparity of lifestyle between her home and Mr. Tauber's would not be in Sam's interests. Since his father can afford the best, she feels Sam is entitled to the best of everything, and this should be reflected in the child support ordered for him. She also states that her own ability to earn income has been permanently impaired as a result of Sam's birth. This, she says, entitles her to spousal support for herself, both by way of a lump sum, and periodic payments. Her position is that the short duration of the marriage, only eighteen months, is a less important factor to the issue of spousal support than other factors.

[28] Mr. Tauber concedes that he wants the best for his son. He deserves good accommodation, and it is important for him to have every opportunity to develop as a person. He says he is willing to pay child support "within reason". The issue of reasonableness is what divides the parties. Mr. Tauber questions Ms. Tauber's values when it comes to Sam. He sees her choice of day camp for Sam as "overpriced". He views her giving Sam the opportunity to eat foods like sushi, octopus and lobster as excessive and unnecessary. He complains she spends far too much on Sam's clothing and shoes. He disagrees with Ms. Tauber's choice of vacation locales for holidays with Sam, and does not think it reasonable for her to take the nanny on the holiday, to give her some respite in Sam's care. Mr. Tauber puts it all down to a question of values. He says it is not a matter of money, and if Sam were living with him, he would not spend money on the same things as Ms. Tauber does. He sees no reason to "throw money" at Sam, and vigorously resists paying any more than $4,000 per month, plus Sam's reasonable s. 7 expenses.

[29] There is no question that Ms. Tauber's spending over the last few years has been at the highest end of consumer spending. She has spent every penny of what she has received in child support, and from her own modest earnings, as well as the lump sum she received under the marriage contract. She spent $34,000 on clothing for herself last year. She spent thousands of dollars on clothes for Sam, including more than a dozen pairs of shoes and other footwear for him. She spends a great deal on groceries, choosing to purchase organic meats and produce, at high-end specialty stores. She eats out often and regularly takes Sam to restaurants for pizza, Chinese food, Japanese food, and Thai food. The nanny accompanies them. They generally go out for food she does not prepare at home, although she is an accomplished cook, and provides home cooked meals for her household as well. She maintains a personal trainer, generously buys

extravagant gifts, and lives a fairly lavish life, albeit in smaller and less luxurious surroundings than her former husband. Each party is extravagant in a different way. Mr. Tauber's extravagance relates primarily to his home and art collection, while Ms. Tauber's is in the area of significant consumer spending. Ms. Tauber points out that Mr. Tauber has never bought anything at all for Sam. He counters with the comment there is no need for him to do so, since she overindulges the boy to such a degree. It is no wonder that these two people with such disparate views of appropriate spending cannot agree on what Sam's reasonable expenses are.

[30] On the issue of spousal support, as a factual matter, I must consider, as directed by the Court of Appeal, whether "the wife's responsibilities for the child prevent her from continuing her career at the same level as prior to the marriage and the birth of the child. Because of those responsibilities she may be no longer free to take every job offered on short notice nor work the kinds of hours that some of the engagements require" [para. 45]. I accept Ms. Tauber's description about the demands of the type of work she did prior to Sam's birth. I recognize, as well, the fact that she has been out of the workforce since prior to Sam's birth. Hers is a competitive business, and there is no doubt she may have lost some of her competitive edge. Since the first trial judgment, in which her claim for spousal support was dismissed, Ms. Tauber has attempted to restart her career.

[31] Ms. Tauber testified that ever since she moved out of Dunvegan, she has had a full-time nanny to help her both with Sam's care, and the running of her household. Shortly after she moved into her own home, she began to do a little work. She had been out of the market for a while, and found it difficult with a child. She continued to nurse Sam until he was fourteen months old, and quite naturally found it hard to find work that would fit within his schedule. However, if she did, she took the job. In 1998, her gross revenues from her work were just under $16,500. This must be compared with the $94,000 in fees she earned in 1996, the year of the marriage. Even in that year, she reduced her workload somewhat, due to the demands of the renovations of the home, as well as the time off to prepare for the wedding, and the honeymoon afterward. Ms. Tauber testified that in 1996 she did not work at all in the months of May and July, worked only part of August, and reduced her workload in the fall, when she and her husband were trying to conceive. As I have already noted, when Ms. Tauber became pregnant in the fall of 1996, the nausea and fatigue associated with her pregnancy also interfered with her ability to work. Had she worked at a constant rate during the entire year, I find it likely she would have grossed perhaps 15% to 20% more, bringing her gross to over $120,000. By comparison, in 2000, her gross sales came to just over $69,000. Together with December billings paid in the new year, her total gross income for 2000 was just under $78,000. According to her tax return, this resulted in net income of $25,000. There is no question Ms. Tauber is able to write off a great many expenses for which she enjoys certain personal benefits. Whatever these may be, I find it more

helpful to compare her gross revenues over the years, in order to assess more reasonably the impact Sam's birth has had on her ability to earn.

[32] Ms. Tauber described a job she felt compelled to reject, because of her responsibilities for Sam. It was a job to shoot a catalogue in Chicago, involving six weeks of shooting, two weeks of "prepping", and one week return. While it would no doubt have been lucrative, it was not unreasonable for her to turn down a job that would have taken her away from Sam for about eight weeks. Ms. Tauber is now the senior prop stylist for *Food and Drink* magazine, a publication of the Liquor Control Board of Ontario. It is a contract position, and she is unsure of its being renewed. It has been a part-time position, and Ms. Tauber finds that with this workload, and responsibilities at home, her plate is quite full. She has, however, pursued other additional opportunities, one of which she did not obtain. Ms. Tauber feels she cannot accept big advertising campaign jobs, or jobs that take her on location, because of the hours. She also has not pursued television work, or ad campaigns, because of the hours. As a result, the calibre of her work has changed.

[33] However, Ms. Tauber now intends to cut back even further from her current diminished workload, to be more of a full-time stay-at-home mother. She has no intention of giving up the services of the nanny. In my view, her plan to work less is not reasonable. She has full-time help in the house. Her nanny cleans, does laundry, helps with meals and does the dishes. On occasion she walks the dog, picks up Sam from school or activities, and does other miscellaneous tasks around the house. Sam is at nursery school for half the day. Although this does not give Ms. Tauber a large space of uninterrupted time to pursue her career, given the assistance of her nanny, she can continue to work at least as much as she did in 2000, without unduly impairing her relationship with Sam, and his need to have his mother reasonably available to him.

[34] No doubt Sam is unhappy when his mother is not immediately available when he wants her. Ms. Tauber says he sometimes cries when she goes to work, and resists going to bed when he senses she is exhausted and stressed. With some of the work she does, things are unpredictable, in terms of the hours she will be at work. It is always stressful to come home from work, make dinner, take care of a child, and prepare for the next day. Ms. Tauber finds it exhausting and stressful. That, however, does not excuse her from her obligation to make reasonable efforts to contribute to her own support. I find it probable that Ms. Tauber can continue to earn at the level she did in 2000, namely gross sales of about $78,000. This represents a drop of about 35% from what she was able to generate prior to the marriage and Sam's birth. The nature of her business, and the demands of the type of television and advertising work she did before are contraindicated because of Sam's young age, and the demands of being a single parent. The assistance the nanny provides alleviates some of these demands to some degree. The nanny, however, is not a replacement for Ms. Tauber as Sam's mother. It is still

she who must plan, organize, and orchestrate Sam's days, the needs of her household, and all that it entails. Sam's birth has had a significant impact on Ms. Tauber's ability to work.

[35] The impact of Ms. Tauber's being out of the workforce during Sam's infancy, in a highly competitive business, has probably also had an impact on her overall career path and ability to earn. It is not an impact that can be readily calculated. However, I note that from 1994 to 1996 her gross business revenues were steadily increasing. Ms. Tauber's 1994 income tax return reflected her earnings to January 31 of that year. The gross billings for that period were $54,000. In 1995, due to changes in tax law, she included two years of income. For the earlier period, her billings were $56,000, and for the second period had risen to $73,000. By 1996, her gross revenues were $96,000. Over these years, at least, her gross revenues were rising at the rate of about 30% per year. Had she continued at this rate of growth, unimpaired by Sam's birth, she might well have now been generating $270,000 per year. It is impossible to determine, however, if the business would have continued at the same rate of growth. It is reasonable, however, on the basis of the past history of her business, to conclude that her revenues would have increased to some degree, year over year, had she been able to continue in her full-time work. This is borne out by the steady increase in her revenues since she returned to part-time work in 1998. Again, between 1999 and 2000 her gross revenues increased by about 30%. Ms. Tauber has clearly suffered a significant impact to her earning trajectory as a result of Sam's birth, and her care of him. On an ongoing basis, I find that Ms. Tauber's current responsibilities for Sam prevent her from continuing her career at the same level as prior to the marriage and Sam's birth. Because of these responsibilities she is no longer free to take every job offered on short notice, nor work the kinds of hours that some of the engagements require. Her income earning capacity has been significantly reduced.

[36] It is against this factual backdrop that I turn to the issues of child and spousal support.

THE LEGAL ISSUES

[37] I must determine the quantum of child support, and Ms. Tauber's entitlement, if any, to spousal support. In considering the issue of child support, I must determine Mr. Tauber's income for child support purposes under the *Child Support Guidelines,* and must also consider the interplay of the "table amount", and s. 7 expenses, in the context of the overall child support award. On the issue of spousal support, I must consider all of the objectives of spousal support under the *Divorce Act.* Mr. Tauber takes the position that I am bound by some of the trial judge's findings of fact in the first trial. I must therefore also determine the extent to which, if any, the principle of *res judicata* applies in the circumstances of this case.

Res judicata

[38] Mr. Tauber suggests I am bound by the following findings of fact in the first trial:

> (a) that Ms. Tauber is young, in good health, and has a proven ability to earn income; (para. 27)
>
> (b) that Ms. Tauber's original budget was a "wish list", (para. 25), and if that budget was a wish list, her even greater budget at this trial must be, too;
>
> (c) since Jennings J. dismissed the claim for retroactive support, there can be no merit in the claim for retroactive spousal support.

I disagree. All three of these "facts" are absolutely germane to the issues of spousal and child support. The Court of Appeal has ordered a new trial on these issues. The appeal court pointed out that because he was bound by the Court of Appeal decision in *Francis v. Baker,* the trial judge made few findings of fact about the means, needs and other circumstances of the child. The court stated: "In effect, we are being asked to make a *de novo* assessment without having seen the parties testify nor *having up-to-date financial information*" (para. 42; emphasis added). It is clear the Court intended the issues to be decided on the basis of the evidence adduced at this trial, having regard to both Sam's and the parties' current circumstances, and not those found over two years ago by the first trial judge. I must assess the facts as presented in this trial *de novo,* and thus find I am not bound by any of the findings in the first trial. This is particularly so when the Court of Appeal, because it ordered a new trial, held it did not need to determine whether the trial judge had erred in his appreciation of the evidence. Without the Court's clear acceptance of the trial judge's findings of fact, I cannot hold myself bound by them.

Calculating child support under the Child Support Guidelines

[39] The process of calculating child support under the *Guidelines* involves the following steps, once the custodial arrangement is known:

> (a) determine the non-custodial parent's income (ss. 16-20)
>
> (b) presumptively apply the table amount, and any s. 7 amount for extraordinary expenses (ss. 3(1)(*a*) and (*b*), and 7)
>
> (c) if the non-custodial parent's income is over $150,000

(i) apply the amount determined under s. 3 (the table amount and s. 7 amounts); or

(ii) if the court considers that amount to be inappropriate,

(i) in respect of the first $150,000 of income, the table amount, and

(ii) in respect of the balance of income "the amount the court considers appropriate, having regard to the conditions, 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 s. 7 (s. 4(*b*)).

[40] The Supreme Court of Canada, in *Francis v. Baker,* set out the principles for the court to consider with payors earning more than $150,000 per year. The British Columbia Court of Appeal, in *Metzner v. Metzner,*[7] has set out a useful nine-point summary of the Supreme Court's reasons in *Francis v. Baker.* At para. 30 of the *Metzner* judgment, the court says the following:

> As I understand the reasons for judgment of the court… these principles were applied:
>
> 1) It was Parliament's intention that there be a presumption in favour of the Table amounts in all cases (para. 42).
>
> 2) The *Guidelines* figures can only be increased or reduced under s. 4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate (para. 42).
>
> 3) There must be clear and compelling evidence for departing from the *Guidelines* figures (para. 43).
>
> 4) Parliament expressly listed in s. 4(*b*)(ii) the factors relevant to determining both appropriateness and inappropriateness of the Table amounts or any deviation therefrom (para. 44).
>
> 5) Courts should determine Table amounts to be inappropriate and so create more suitable awards only after examining ail circumstances including the factors expressly set out in s. 4(*b*)(ii) (para. 44).

6) Section 4(*b*)(ii) emphasizes the "centrality" of the actual situation of the children. The actual circumstances of the children are at least as important as any single element of the legislative purpose underlying the section (para. 39). A proper construction of s. 4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of the actual "condition, means, needs and other circumstances of the children" on the other (para. 40).

7) While child support payments unquestionably result in some kind of wealth transfer to the children which results in an indirect benefit to the non-paying parent, the objectives of child support payments must be kept in mind. The *Guidelines* have not displaced the *Divorce Act* which has as its objective the maintenance of children rather than household equalization or spousal support (para. 41).

8) The court must have all necessary information before it in order to determine inappropriateness under s. 4. If the evidence provided is a child expense budget, then "the unique economic situation of high income earners" must be considered.

9) The test for reasonableness of expenses will be a demonstration by the paying parent that the budgeted expense is so high "as to exceed the generous ambit within which reasonable disagreement is possible": *Bellenden v. Satterthwaire,* [1948] 1 All E.R. 343 at 345.

The analysis must therefore begin with a determination of the table amount. To do that, I must first determine Mr. Tauber's current income, using the guide of ss. 16 to 20 of the *Child Support Guidelines*

What is Mr. Tauber's income for child support purposes?

[41] Mr. Tauber's income is made up primarily of his salary, a bonus, and interest and dividend income. The most significant issue dividing the parties is how, and when, the bonus should be included in Mr. Tauber's income. The bonuses have been significant. To understand the issue, it is important to understand how the company operates. The company's auditors have remained the same for some thirty years. The company's year-end is the calendar year-end. During the year, Mr. Tauber is paid a modest salary of about $60,000 a year. When the auditors complete the financial statements at year-end, they make a determination of how large a bonus will be declared in favour of Mr. Tauber. The determination is driven by the amount of money that will keep the corporation's taxable income within the small business limit authorized under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). The bonus for any particular year is not

determined until well into the first quarter of the next fiscal year, and is actually paid to Mr. Tauber in about June of that year. Thus, for example, in its 1998 fiscal year, the company declared a bonus of $2.4 million in favour of Mr. Tauber. It did not pay it to him until June of 1999, and he did not include it in his income for tax purposes until 1999.

[42] Again, each party submitted expert testimony on the issue of determining Mr. Tauber's income under the *Guidelines.* Andrew Freedman, an experienced business valuator and expert in litigation support, testified for Mr. Tauber. Wayne Rudson, similarly experienced and expert, testified for Ms. Tauber. Each expert tendered a report. The fundamental difference between them lies in how each treats the bonus.

Should the bonus be considered in the year it is declared or earned

[43] Mr. Rudson takes the position that the bonus should be included in Mr. Tauber's income in the year it is paid and received. Mr. Freedman suggests that the bonus should be notionally included in Mr. Tauber's income in the year it is declared, thus having Mr. Tauber's personal income track the income of the company more closely. All of this would be of little significance, had Mr. Tauber's bonus not dropped precipitously in Ever-Reddy's year ended December 31, 2000. The company accrued a bonus of $1.331 million for that fiscal year, but Mr. Tauber did not receive it until June of 2001, and will report it as part of his 2001 income on his 2001 tax return. Mr. Freedman suggests that the bonuses should be reflected in the year they are declared, and would readjust Mr. Tauber's 2000 income from the $2,959,168 he reported, to $1,514.268. He suggests this "adjusted" 2000 income is Mr. Tauber's income for child support. With the greatest of respect to Mr. Freedman's knowledge and expertise, I disagree. The fundamental basis of determining income under the *Child Support Guidelines* is set out in ss. 16 through 20 of the *Guidelines.* Section 16 provides:

> 16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.

[44] Section 2(3) of the *Guidelines* says:

> 2(3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.

The interplay of the two sections therefore requires me to begin with the income sources set out in the T1 General, but to use the most current information. The trial concluded

exactly half-way through 2001. Child support is prospective, and is to be paid out of current, or prospective income. The law is clear that using historical income is inappropriate. The court is to determine what the payor will earn, not what the payor has earned.[8] If I were to accept Mr. Freedman's analysis, I would not be able to determine Mr. Tauber's current 2001 income until the end of December, when the company determines the 2001 bonus, to be paid in 2002. Mr. Freedman would have the bonus declared in the company's 2001 financial statement included in Mr. Tauber's 2001 income for tax purposes. This flies in the face of both the *Guidelines,* and the tax treatment of the bonus. I find that using Mr. Tauber's income tax returns, with the bonus as declared, is the appropriate starting point for determining his income. I decline to make the adjustment suggested by Mr. Freedman. His rationale for making the adjustment he seeks is to correct the "mismatch" of the profit of Ever-Reddy and Mr. Tauber's personal income. There is no requirement under the *Child Support Guidelines* that there be any "match" between the profit of a company controlled by the payor spouse, and his or her personal income. The *Guidelines* do not mandate any specific adjustment that permits this type of reallocation of bonus.

[45] Leaving the bonus in the year it is received results in Mr. Tauber's income being as follows for the past three taxation years:

2000	$2,959,168
1999	$2,953,099
1998	$2,546,297

In determining Mr. Tauber's income for child support purposes, however, I must use the most current information. Although Ms. David's opening statement suggested that "it is impossible to ascertain his income for 2001", I disagree. The *Guidelines* require me to do so. It is clear that for 2001, Mr. Tauber's bonus was only $1,331,000, and was paid to him in June of this year. His current employment income is apparently $57,200, according to a *pro forma* 2001 income tax return prepared by his accountants. It is conceded that nothing would prevent Mr. Tauber from increasing his base salary, or indeed declaring a further bonus to himself, before the year-end, thus increasing his 2001 income beyond what is stated in the *pro forma* return. However, given the historical pattern shown in the corporation's financial statements, I am not persuaded that there is any reasonable probability of either of those events occurring. The estimates in the *pro forma* statement for dividend and investment income accord with Mr. Tauber's historical pattern of income, and thus appear reasonable. I accept the 2001 *pro forma* tax return as representing Mr. Tauber's income, calculated in accordance with ss. 16 and 2(3) of the Guidelines, and thus begin the with premise that his current income is $1,472,200.

Should there be adjustments to Mr. Tauber's income under ss. 17 and 19 of the Child Support Guidelines?

[46] Having determined Mr. Tauber's current income under s. 16, I must then turn to the issue of whether this is the "fairest determination" of his income. Having considered the provisions of ss. 17 to 19 of the *Guidelines,* as required by s. 16, I am of the view it is not.

[47] Section 17(1) of the *Guidelines* provides:

> 17(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

Mr. Tauber's income showed a steady increase in the years 1998 to 2000, but he projects a significant drop in 2001. He attributes this to both the company's recent acquisition of significant new equipment, which created a cash drain on the business, as well as a decline of over $1 million in the company's revenues between 1999 and 2000. Mr. Tauber attributes this decline in revenues to the erosion of the CD market by the impact of the Internet, and downloading of music from that source. I have no way of knowing whether Mr. Tauber's predictions of future declines will be accurate. Ms. Tauber pointed out that in the context of these proceedings, both at the first trial and at this one, Mr. Tauber has consistently underestimated his income. For the first trial, he also significantly underestimated the 1998 gross profit of the company by about $1.2 million, and overestimated its cost of sales by $300,000. Ms. Tauber raises these issues to throw doubt on the reliability of the 2001 *pro forma* tax return, and suggests I should instead look at Mr. Tauber's historical income over the last three years to come to a fairer determination of his income. The fact remains, however, that Mr. Tauber's 2001 income is likely to be significantly less than it was in prior years, and thus I decline to average his recent income in order to arrive at a higher annual figure, as Ms. Tauber requests.

[48] That, however, is not the end of the matter. I must also consider the provisions of ss. 18 to 20 of the *Guidelines*, since Mr. Tauber is a shareholder, officer and director of his companies. Section 18 of the *Guidelines* states:

> 18(1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the

spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

(*a*) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(*b*) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[49] Since I am of the view that the income analysis under s. 16 does not provide the fairest determination of Mr. Tauber's income, I am obliged to consider the provisions of s. 18. Until the end of 2000, Mr. Tauber's parents were both on the payroll of Ever-Reddy. It is conceded that Mr. Tauber's mother did no work at all for the corporation. She was paid a modest salary of $15,000 per year, and had all the expenses for her Jaguar vehicle paid by the company. Mr. Tauber's father came into the office regularly, at least in the months he was not vacationing in Florida or elsewhere. He spent at least two months a year away from Toronto. In each of 1998 and 1999 he was paid a salary of $120,600, and in 2000 was paid $356,285. In addition, all the expenses for his Jaguar were paid by the company as well. Thus, as required by s. 17(2) I must add the sum of $361,285 to the pre-tax income of the corporation for 2000, unless Mr. Tauber can establish that the payments were reasonable in the circumstances. The onus is on Mr. Tauber to do so. He testified that he was relieved when his father finally agreed to retire, and admits that he has not had to replace his father with any new employee. There is no question the payments to Mrs. Tauber, Sr. were not reasonable at all. Mr. Freedman, for Mr. Tauber, was retained to provide an opinion concerning Mr. Tauber's income for child support purposes. He did not provide any analysis of the reasonableness, or otherwise, of these non-arm's length payments. I must conclude that Mr. Tauber has not met the onus imposed by the section, and will therefore add the figure of $361,285 to the company's pre-tax income of $547,252 in 2000, bringing it to $908,537.

[50] In considering whether any of the company's pre-tax income is available to Mr. Tauber, it is helpful to look at the historical levels of pre-tax income in the company for prior years. In order to make the comparison properly, it is necessary to make the

same adjustments to pre-tax income for prior years as well. Thus, the salaries of $135,600 paid to the Taubers, Sr. must be added back for 1998 and 1999. The adjusted pre-tax income for those years becomes $549,256 and $516,280 respectively. It is clear that the current level of pre-tax income in the corporation is significantly higher than it has been in prior years. This itself, in conjunction with Mr. Tauber's historical pattern of income may suggest that some of the company's current pre-tax income may be money available to Mr. Tauber for the payment of child support. In 1998, the gross revenues of the company were only about $300,000 higher than in 2000, and yet the adjusted pre-tax income was significantly lower. In looking at whether any additional corporate pre-tax income is available to Mr. Tauber, I am also mindful of a significant non-recurring expense of the corporation, namely the $90,000 paid to a consultant in 2000. This is money would now be available to Mr. Tauber.

[51] Ms. Tauber also points to the fact that Mr. Tauber's business is housed in a building owned by his father. Mr. Tauber rents the premises from his father. Ms. Tauber suggests this brings the rental into the operation of s. 18(2) of the *Guidelines* as an amount "paid by the corporation as … other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length" and thus the annual rent of $342,470 must be added back into the pre-tax income of the corporation. There was no evidence on the issue of the reasonableness of the rent paid, one way or the other. Ms. Tauber concedes that rent should be paid, but suggests an arbitrary figure of half of the rental to be added back to the company's pre-tax income. The rental figure remained relatively constant at about $250,000 per year from 1993 to 1997. It rose to just over $300,000 in 1998, the year this lawsuit was commenced, and rose again to over $340,000 in each of 1999 and 2000. Whether this increase reflects an unreasonable payment to Mr. Tauber, Sr., or a reasonable rental, reflecting market conditions, I cannot say. Mr. Tauber had the onus of showing the payment was reasonable. He has not. It is therefore my view that an additional sum of $40,000 should be added back into the pre-tax income of the corporation in each of 1999 and 2000. The adjusted pre-tax income of the company for the year ended December 31, 2000 is therefore $948,537.

[52] Ms. Tauber also suggests that since Mr. Tauber has reduced his workforce, there should be an adjustment to the pre-tax income of the company, or to the money available to Mr. Tauber on this account. There was no cogent evidence of the actual reduction in this cost, nor is this a defined adjustment to pre-tax income mandated by the *Guidelines.* Although the court is given a broad discretion to find the fairest determination of income, I decline to make this adjustment. The reduction in workforce was a direct response to the current market conditions the company is facing. It does not, in my view, create any extra money available to Mr. Tauber to pay child support.

[53] Even though the pre-tax income of the company may be higher than stated on the financial statements, I must still consider the extent to which this money is actually

available to Mr. Tauber for paying child support. When he analyzed this issue, Mr. Freedman used only the stated pre-tax income of the company of $547,252 to support his view that if all the pre-tax income of the company were drawn out by Mr. Tauber, the company would be required to borrow over $1.9 million in order to fund its obligations. Mr. Freedman based his conclusion on the following assumptions:

> In fiscal 2000, Ever-Reddy had a reported pre-tax income of $547,252 (before deducting imputed interest noted above). We do not consider attribution of this amount to Mr. Tauber… In arriving at this conclusion we considered the following:
>
> > • *future planned expenditures* … over the next six months the company will be required to:
> >
> > > • make capital purchases (one large purchase in particular); and
> > >
> > > • pay out the bonus accrued for Mr. Tauber in the 2000 financial statements within 180 days of the company's year end (*i.e.* by June 30, 2001) and remit the income taxes withheld shortly thereafter pursuant to the *Income Tax Act*. Failure to do so will cause Ever-Reddy to be denied the deduction for the expense.
>
> The sum of these outlays totals $2.3 million. As the cash on hand at December 31 was only $1,740,000 a shortfall of approximately $560,000 results. Financing will be required in order to meet the company's cash needs. Further, if we assume that the company was to repay Mr. Tauber's shareholder's loan, additional financing of approximately $1,430,000 will be required. Based on assumed total borrowings of approximately $1,990,000 it would be imprudent for Ever-Reddy to incur further debt and interest expense in order that its pre-tax income be made available to Mr. Tauber.

[54] Mr. Freedman goes on to consider the potential decline in revenues for Ever-Reddy, based on both the decline in revenue for 2000, compared with 1999, and the small decline in revenue in the first quarter of 2001, when compared with the same period in 2000. Mr. Freedman concludes that no part of the company's pre-tax income is reasonably available to Mr. Tauber. Mr. Freedman fails to consider first the adjustments to pre-tax income I have been required to make. The adjusted pre-tax income figure under the *Guidelines* is $948,537, or roughly $400,000 more than the figure used by Mr. Freedman. Also, it is true that at December 31, 2000 the company was considering some major equipment purchases. It had not, however, ordered the equipment. It made the purchases during the currency of the trial. As Mr. Rudson pointed out, however, between December 31, 2000, and the trial balance prepared for

the company for the period ended March 31, 2001, the company's cash on hand had risen from the sum of $1,740,000 referred to by Mr. Freedman, to $2,552,000 at March 31, 2001, an increase of over $800,000 in available cash. If the company experienced similar increases in cash reserves in the next quarter, prior to the purchase of the equipment, an additional $800,000 would be available. Mr. Tauber did not provide current figures concerning the company's cash on hand since March 31.

[55] While it is true that the company must pay out the bonus to Mr. Tauber, and historically has repaid his shareholder's loan, Mr. Freedman's analysis does not take into account the other historical reality of the corporation, namely that Mr. Tauber lends all or part of his current bonus back to the company. Thus, while receiving a repayment of his shareholder's loan, and receiving his bonus on the one hand, Mr. Tauber re-lends a significant portion of these sums back to the company. In my view, Mr. Freedman's analysis contains an element of double counting. This is not to say, however, that Mr. Tauber could withdraw all the pre-tax income of the company out without adversely affecting the company's operations. In considering an adjustment to income under s. 18 of the Guidelines, the court must strike a balance between maintaining the ongoing operations of the company and determining an amount of income that fairly reflects the money available to a spouse for the payment of child support.

[56] When I consider all these factors, including the potential decline in the overall revenues of the company, I find it reasonable to include the further sum of $100,000 in Mr. Tauber 's income on account of the adjusted pre-tax income of the company that is available to him. While this might be considered too modest a figure, I am mindful of the fiscally conservative fashion in which Mr. Tauber has managed his business, and the very real concerns he has about a significant decline in revenues. Since Mr. Tauber will be required under the *Guidelines* to provide annual income information, it will soon be readily apparent whether his fears are founded or not.

[57] I turn now to the question of whether there are any reasons to impute income to Mr. Tauber under s. 19 of the *Guidelines.* Mr. Freedman pointed out that the company owes significant money to Mr. Tauber by way of shareholder's loans, but does not pay him interest on the outstanding balance. Both Mr. Freedman and Mr. Rudson agree that a reasonable rate of return should be attributed to Mr. Tauber, under s. 19(1)(*e*) of the *Guidelines,* which permits the court to attribute income where a spouse's property is not reasonably utilized to generate income. At December 31, 2000 the company owed Mr. Tauber $1,429,670. The experts agree that there should be imputed interest on the loan balance as at December 31 of each year, based on the 6 month Treasury bill rates as per Bank of Canada Review as at the end of each year. At the end of December, 2000 the rate according to Mr. Rudson was 5.6%. I accept this as the appropriate rate to apply. Accordingly, the sum of $80,061.52 (rounded to $80,000) must be added to Mr. Tauber's current income.

What is the table amount?

[58] Mr. Tauber's income for *Guideline* purposes, and thus the table amount, are as follows:

Income determined under s. 16	$1,472,200
Part of pre-tax income of company (s. 18(1)(*a*))	$100 000
Imputed interest income (s. 19(*e*))	$80,000
TOTAL INCOME	*$1,652,200*
TABLE AMOUNT UNDER GUIDELINES	$11,173

Is the table amount "inappropriate"?

[59] As stated by the Supreme Court in *Francis v. Baker,* and reiterated by the courts in *Metzner* and other cases,[9] there is a presumption in favour of the table amount. I must therefore presume that the figure of $11,171 per month is the correct figure. Here, the table amount can only be reduced under s. 4 if Mr. Tauber has rebutted the presumption that the applicable table amount is appropriate. He must do so on clear and compelling evidence, having regard to the factors enumerated in s. 4(*b*)(ii). Mr. Tauber suggests that he has already rebutted the presumption, due to the findings of the Court of Appeal. As I read the reasons of the Court, I can conclude nothing more than Mr. Tauber had rebutted the presumption, based on a table amount of $17,000 per month, which in turn was based on his income of $2.5 million per year. The court conceded, at para. 40, that "this does not mean that something approaching the Table amount may not in the end be awarded". This suggests to me that as far as a figure of $17,000 per month was concerned, the presumption in favour of the table amount had been rebutted. I cannot, conclude however, that this extends to a finding that Mr. Tauber has rebutted the presumption of the table amount, regardless of what that table amount might be. To come to that conclusion would lead to the result that Mr. Tauber would be deemed to have rebutted the presumption, regardless of whether his income was found to be $150,001, or any figure in excess of that sum. Given the admonition of the Court of Appeal at para. 2 that its reasons "will have limited application to cases where the income of the payor spouse is closer to the $150,000 mark" this cannot be the result intended. I therefore find on the facts presented at this trial, that given Mr. Tauber's significantly reduced income, and the concomitant reduction in the table amount, he still has the onus of rebutting the presumption in favour of the table amount.

[60] Both parties prepared "child care budgets", setting out what each sees as Sam's reasonable monthly expenses. Given their respective views, it is not surprising that Mr. Tauber posits a monthly budget of $5,748.42, including s. 7 expenses for school, activities and the nanny, while Ms. Tauber's budget comes to $11,195.99 per month,

also inclusive of these s. 7 expenses. The table amount would meet the child care budget as Ms. Tauber presents it. The issue is whether Mr. Tauber can discharge the onus of providing clear and compelling evidence that the table amount is inappropriate. In considering this issue, I am mindful of the comments of Bastarache J. in *Francis v. Baker* that "custodial parents need not justify each and every budgeted expense. Courts should be wary of discarding the figures included in their budgets too quickly" [para. 48].

[61] What are the factors to consider in this task? The Court of Appeal has directed that this court will have to make the determination based on the factors set out in s. 4(*b*)(ii) of the *Guidelines.* Therefor, I first turn to those factors. The court is required, if the table amount is inappropriate, to determine the "appropriate" amount, "having regard to the conditions, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child". These are questions of fact. Looking first at the "condition, means, needs and other circumstances of the child", it is clear that Sam is a young child, born to a wealthy father, who has never had the opportunity of living with his parents together, and enjoying the joint lifestyle they would have created for him. As long ago as 1970, the Ontario Court of Appeal stated in *Paras v. Paras,*[10] that the objective of child support should be "as far as possible, to continue the availability to the children of the same standard of living as that which they would have enjoyed had the family break-up not occurred" [p. 550 D.L.R.]. The statement is as true today as it was more than thirty years ago. It is echoed in the purpose of the *Guidelines,* as described by Bastarache J. in *Francis v. Baker* as ensuring "that a divorce will affect the children as little as possible". As he went on to say, "s. 4(*b*)(ii) itself emphasizes the centrality of the actual situation of the children by expressly requiring that the 'condition, means, needs and other circumstances of the children' be considered in the assessment of an appropriate amount of support payable in respect of income over $150,000" [para. 39]. I consider, then, that any child support order must continue to make available for Sam the same standard of living he would have enjoyed had the family breakup not occurred. Put another way, any support order must try to ensure that Sam will be affected as little as possible by his parents' divorce. This means that his needs and circumstances will have to be viewed through the lens of the particular financial milieu in which his parents, and particularly his father live. That is the "centrality of his actual situation". It will provide the context in which to assess each parent's views of his needs.

[62] There are certain "guiding principles" to be considered when assessing the child care budgets the parties presented. From the Supreme Court in *Francis v. Baker* at para. 41 it is clear the following must be kept in mind:

> (a) The *Guidelines* have not displaced the *Divorce Act*. The objective of child support is still the maintenance of children, not household equalization or spousal support;
>
> (b) Standard of living may be a consideration in assessing need. However, at some point, support payments will meet even a wealthy child's reasonable needs;
>
> (c) At some point, the *Guidelines* figure may be so in excess of a child's reasonable needs that it must be considered a functional wealth transfer, or *de facto* spousal support; however,
>
> (d) Courts should not be too quick to conclude that the *Guidelines* figure enters the realm of wealth transfer or spousal support.

[63] There is no question Ms. Tauber has spent considerable sums on Sam in the last year. Her "actual budget" for the 2000 calendar year reflects her expenditures for her and Sam. She has receipts or proof of payment for virtually all the items. The budget totals just over $20,000 per month, including the $31,000 she paid in legal fees during the year. Without that expense (which is capital in nature), the actual living expenses for her and Sam came to $17,500 per month. Her "proposed budget" totals over $21,000 per month, without any expenditure for capital expenses, such as legal fees. The budget anticipates some decreases in some items (for example a reduction from $34,000 a year to $25,000 a year for clothing for herself), but increases in others. For example, she anticipates an increase in her vehicle operating costs, since Mr. Tauber no longer pays some of these costs directly. Sam's nursery school tuition is going up slightly. The most significant increases are in the area of vacations (increasing by $10,000 a year), and housing (increasing by over $22,600 per year), with other items reflecting inflationary increases. Ms. Tauber's "actual" budget for Sam for the 2000 calendar year was just over $8,800 per month, and her "proposed" budget is just over $11,000 per month for Sam. As with the total budget for the family, the expenses for Sam increase most significantly in the area of housing, and vacations, with other increases for gifts, clothing, groceries, and transportation costs. School fees have gone up modestly. Sam is only in school half days at present; it must be remembered that his school fees will no doubt increase significantly when he is in school full-time.

[64] Mr. Tauber's budget for Sam approaches the issue in two ways. First, he has reduced many of Ms. Tauber's stated expenses for Sam to what he feels are more appropriate levels, and second has reduced Sam's proportionate share of them. For example, he suggests that the figure of $1,000 per month Ms. Tauber proposed for groceries in her first budget in 1998 is the appropriate one to use. He apparently concedes the reasonableness of the figure at that time. He neglects, however, to consider that in January of 1998, Sam was an infant, still being nursed. Then there was virtually

no component of the grocery budget for him. He is now a growing boy, with a sophisticated palate. The current grocery budget of $1,667 per month for Ms. Tauber's household cannot be viewed as unreasonable in the context of the earlier budget. It is luxurious. But why should Sam not have the best food? His mother chooses to provide him with organic meats, milk, fruits and vegetables. She purchases only kosher chickens. All these food items are costly, but she feels provide a healthier diet for Sam. She should have the discretion to do so. Since she must also feed the nanny, who is in her household solely because of Sam, Ms. Tauber allocates 55% of her total grocery budget to Sam. This is appropriate.

[65] Mr. Tauber reduces the housing cost for Sam and Ms. Tauber to $1,500 per month less than Ms. Tauber currently pays for rent and utilities. He allocates only half of the expense to Sam, while Ms. Tauber suggests that 66% of her housing cost relates to Sam, since she must house his nanny as well. There is no question that Ms. Tauber's housing needs would be quite different without Sam. Because of him, and the nanny, she is restricted to living in a central part of the city, in a safe neighbourhood, with place for him to play. She needs to be close to schools, and must have reasonable accommodation for her nanny. In my view, her allocation of the cost is reasonable in the circumstances. Mr. Tauber takes no objection to Ms. Tauber's current home as being too luxurious, or large for her needs. He simply thinks she should find something cheaper. I see no compelling reason for her to do so. Mr. Tauber's position on housing seems to have much more to do with trying to reduce Sam's overall costs than with the actual reality his son is in, and the actual cost of his current accommodation, Similarly, Mr. Tauber has arbitrarily reduced the amounts budgeted for Sam's activities, his nanny, and additional babysitting. I accept Ms. Tauber's evidence that she has to pay overtime to the nanny for her help in the evening, or has to hire evening sitters at a cost of $10 to $15 per hour, if she wishes to go out, or must work late in the evening. Mr. Tauber's budget for Sam does not even include any item for gifts, notwithstanding he is now at the age when he is beginning to attend birthday parties, and of course celebrates his own birthday, and I presume Christmas or Hanukkah with his mother and her family. Ms. Tauber's general budget includes synagogue dues. She did not allocate any portion of this cost to Sam. In my view, she should have. She converted to Judaism to join Mr. Tauber in his faith. She is a member of a synagogue, and takes Sam to High Holiday services. It is a necessary part of his upbringing, and a reasonable aspect of his needs.

[66] Mr. Tauber takes significant issue with the proposed cost of vacations for Sam. Ms. Tauber took Sam on a holiday to Hawaii last year. She would like to take a similar holiday with him each year, as well as have a holiday on her own. When she goes away with Sam, she would like to take her nanny with her, in order to provide Sam with a familiar caregiver when she is out in the evening, or wishes a break during the day. Mr. Tauber thinks this is ridiculous. He himself took Sam to his parents' condominium

in Florida. He suggests that a holiday like that, or perhaps a week at a resort in northern Ontario is more appropriate for Sam. As the British Columbia Court of Appeal stated in *Hollenbach v. Hollenbach:*[11] "children should not receive treatment different than other children of wealthy parents just because the father has always been close to his money. One of the objectives of the Guidelines is: '(*d*) to ensure consistent treatment of spouses and children who are in similar circumstances'" [para. 41]. I heard no evidence of how other wealthy families vacation with their children, where they go, or whether they take their nannies with them. I cannot conclude that Ms. Tauber's vacation plans, even including the nanny, are so high as to "exceed the generous ambit within which reasonable disagreement is possible".

[67] *Hollenbach* also states "the unique economic situation of high income earners must be acknowledged at the *threshold* stage and that the level of expenses which would support the table amount must be unarguably excessive …The burden on the father, as I see it, was to show that the table amount could not have been useful to the children having regard to the standard of living of other children of very wealthy parents" [paras. 37, 38]. Mr. Tauber urged me to find that no one spends this kind of money on a child this age. Even though he says it is absurd for his son to eat octopus and sushi, and going to expensive stores to buy for a child is not sensible, this alone is not sufficient for me to reach the conclusion that "no one" spends this kind of money on a child this age. I have no doubt if Sam lived with his father alone, Mr. Tauber would spend money differently for Sam. That is not to say he would spend less. In Mr. Tauber's home, Sam's share of the housing costs, even at 50% would be nearly $3,200 per month. Mr. Tauber currently spends more on gardening and snow removal alone than he suggests it should cost for Ms. Tauber to house Sam. Until recently, he retained a full-time housekeeper for himself alone. This is not to suggest that Mr. Tauber's expenses are excessive; it is simply to put in some kind of perspective the lifestyle Mr. Tauber enjoys, and which Sam would likely have enjoyed had his parents not separated. It is in this context I must assess the appropriateness of the table amount for Sam.

[68] Mr. Tauber chooses to spend large sums of money on things that are extremely important to him. He does not see the value in spending the kind of money on Sam that Ms. Tauber does. Sam never had the opportunity to share his parents' home, and enjoy the lifestyle they would have built together. He would have lived in a far larger and more luxurious home, surrounded by the valuable art and artifacts his father collects. He would have enjoyed fine meals prepared by his mother, as he does now, as well as meals out. He would have vacationed with his parents. No doubt he would have attended private school, day camp and activities, as he does now. He would have continued to have a nanny, and would be exposed to other domestic help, like his father's cleaning woman, and gardening help. His parents would have bought him clothes, shoes, toys, and games. They would be faced with the common expenses of

childhood like bicycles, skates, sporting equipment and the like. Perhaps his mother might have spent slightly less on him, and his father might have spent more, perhaps not. I am not persuaded, however, that had his parents remained together, the overall monthly costs for Sam would be appreciably different that what his mother currently proposes. Mr. Tauber has the means to provide a luxurious lifestyle for his son. He himself enjoys such a life, although he allocates his spending in different ways than does his former wife. Sam is entitled to no less.

[69] Ms. Tauber's budget for Sam is extremely high. It contains, as anticipated by the Court of Appeal a significant element for discretionary expenses. Whether Ms. Tauber's budget for Sam increases to $11,000 per month because of increased housing expenses, or other costs like bicycles, increased tuition, equipment or other costs, I have no doubt that it will be in that range. While it is a luxurious budget, I do not consider it so excessive however as to be a functional wealth transfer to Sam, nor *de facto* spousal support. It must be remembered that Mr. Tauber earned in excess of $2.5 million per year for most of Sam's life; it is only this year that his income has dropped to just over $1.6 million. Indeed, although Ms. Tauber's child care budget for Sam is just over $11,000 per month, her position at trial was that Mr. Tauber earned closer to $2.9 million per year, which would have resulted in a table amount for child support of $19,433. She did not claim this amount in child support. After the conclusion of the trial, Mr. Tauber's counsel brought to my attention two cases[12] released after the end of the trial. In each case, the court ordered significantly less than the table amount, and indeed, ordered significantly less than the $11,000 Ms. Tauber claims in her child care budget. In each case, however, the court declined to order the table amount because the child care budgets were significantly less than the table amount. In *De Zen,* the court notes that although the table amount ranged from $18,493 to $25,525 for the three children, without s. 7 expenses, Mrs. De Zen was not claiming that amount. She asked for an amount related to her child care budget. Similarly, in *MacDonald,* the court declined to order the table amount of over $59,000 a month, since Mrs. MacDonald's total budget for herself and the children came to about $200,000 a year, and the family had historically always lived on that amount. The court ordered a child support payment of $20,000 a month. It is clear the courts give significant weight to a custodial parent's child care budget, considering it in the context of the child's condition, means, needs and other circumstances. Unlike the cases of hockey players, such as *Simon v. Simon* and *M. (O.) v. K. (A.)*,[13] this is not a situation of a payor spouse who began to earn large sums after the separation, or whose earning power for the future is uncertain, due to the vagaries of the sport. Mr. Tauber has always earned in the millions each year, and is likely to continue to do so. That fact creates part of the context in which I assess the appropriateness of the table amount.

[70] Ms. Tauber has an obligation to contribute to Sam as well. She has only limited means to do so. I will discuss her financial circumstances, and her obligation in this regard more fully below. Regardless of Ms. Tauber's ability to earn, her means are minuscule in comparison to Mr. Tauber's. Her financial contribution to Sam will be tiny in comparison to his, just as his contribution to the day-to-day chores of raising Sam are significantly less than hers. I find that Ms. Tauber is contributing to Sam's maintenance in accordance with her own limited financial ability.

What is the "appropriate" amount of child support?

[71] Having considered the factors in s. 4(*b*)(ii) I am of the view that the table amount of $11,171 per month is appropriate. I decline to exercise my discretion, and order an amount that is different than the table amount.

[72] As s. 4(*b*)(iii) provides, I must now consider whether there should be any amount ordered under s. 7 of the *Guidelines.* Section 7 provides:

> 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:
>
> > (*a*) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
> >
> > (*b*) that portion of the medical and dental insurance premiums attributable to the child;
> >
> > (*c*) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
> >
> > (*d*) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
> >
> > (*e*) expenses for post-secondary education; and
> >
> > (*f*) extraordinary expenses for extracurricular activities.

The section is discretionary. The table amount as I have found it is sufficient to cover all of Sam's current s. 7 expenses, namely the cost of his nanny, his private school tuition, summer camp and activities. In this family, these costs cannot be viewed as "extraordinary". I recognize that Sam's private school fees currently are for a nursery/kindergarten program, which runs only half the day. No doubt the cost will increase when Sam is in school full days. In September, Ms. Tauber will begin to consider the choice of Sam's school after he completes senior kindergarten in a year and a half, since his current school does not go beyond senior kindergarten. However, depending on Ms. Tauber's housing choices in the future, I expect the current table amount will provide her with sufficient discretionary funds for Sam to meet even this increased need. Also, when Sam is in school full-time, Ms. Tauber will no doubt have further time to devote to her career, and thus will be in a position to make a greater financial contribution to any of Sam's increased needs. I therefore decline to order any further amount to cover these s. 7 expenses.

[73] Ms. Tauber also requests child support by way of a lump sum for Sam. Although lump sums for child support are authorized by s. 11 of the *Guidelines,* there are no guiding criteria given for when a lump sum might be appropriate. Prior to the *Guidelines,* lump sums for child support were rare, and used primarily in situations where there was some risk of future non-payment. There is no such risk here. Of more importance, however, is the fact that the table amount of support is clearly sufficient to maintain Sam. This is the fundamental goal of child support. Any further lump sum award would be in the nature of wealth transfer to him, and would be inappropriate. I therefore decline to order any lump sum support for Sam.

[74] The parties agree that the child support I order should be prospective only. Therefore, commencing September 1, 2001, Mr. Tauber will pay the sum of $11,173 per month in support for Sam Tauber, born August 5, 1997. This amount is based on Mr. Tauber's current annual income of $1,652,200.

What, if any, is Ms. Tauber's entitlement to spousal support?

[75] Spousal support is determined under the provisions of s. 15.2 of the *Divorce Act.* In s-s. (4) the *Act* sets out the factors for the court to consider in determining spousal support, and in s-s. (6) enumerates the purposes of an order for spousal support. Subsection (1) permits the court to make both periodic and lump sum spousal support orders, or to order a combination of the two.

Factors to consider regarding spousal support

[76] Since the Supreme Court of Canada's decisions in *Moge*[14] and *Bracklow*[15] it has been clear that the court must consider all the factors in s-s. (4), as well as all of the

objectives in s-s. (6) in coming to a decision about spousal support. Section 15.2(4) sets out the factors for the court to consider:

> 15.2(4) In making an order under subsection (1) … 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.

[77] The court is required to take into consideration the condition, means, needs and other circumstances of the parties, including the specific factors set out in paras. (*a*) through (*c*). Mr. Tauber's "condition, means, needs and other circumstances" in a general sense have been unchanged. He is still a wealthy businessman, whose financial means allow him to meet whatever needs he has, and more. He continues in the same business, and remains in the same home as he had prior to the marriage. Ms. Tauber's current "condition, means, needs and other circumstances" have changed. She is now a single parent, whose means of providing her own support have been impaired because of the marriage and the birth of the child. Her needs are greater than they were before the marriage, due in large part to Sam's arrival, and the lifestyle he is entitled to as the son of a wealthy father. She and Sam must live in an integrated household, which itself has an impact on her needs. His standard of living cannot be separated from hers. While Mr. Tauber's circumstances have been fairly stable, Ms. Tauber's have been marked by the uncertainty of her future housing, and her ongoing responsibilities for Sam, and their impact on her ability to contribute to her own support.

[78] Turning to the specific factors enumerated in s. 15.2, s. 15.2(4)(*a*) requires the court to consider the length of time the parties cohabited. Here it was only 18 months. At first glance, that might suggest that with such a short marriage, it would be unlikely for a party to have suffered any economic disadvantage as a result of the marriage or its breakdown. Here, however, the arrival of a child so soon after the marriage has had a significant financial impact on Ms. Tauber. As a result, I find the length of cohabitation a neutral factor.

[79] Section 15.2(4)(*b*) requires the court to consider the functions performed by each spouse during cohabitation. Here, the parties agree that this is a neutral factor in assessing the issue of spousal support.

[80] Section 15.2(4)(*c*) requires the court to consider "any order, agreement or arrangement relating to support of either spouse". The marriage contract and the interim agreement are such "agreements or arrangements". The marriage contract itself contemplated spousal support for Ms. Tauber if there were a child born in the first three years of the marriage. If there were no child, and the marriage broke down in that time frame, she released any claim to spousal support. It was clearly within the contemplation of the parties that having a child could alter the financial landscape. Mr. Tauber urged me to find that the lump sum under the marriage contract was intended to satisfy both his property and support obligations. It is true that the agreement provided a significantly greater lump sum if there were children, which Mr. Tauber suggests is an indication that the lump sum was designed to compensate any financial consequences associated with having a child. With the greatest of respect, I disagree. The overall purpose of the agreement is to avoid the property provisions of the *Family Law Act.*[16] The lump sum must be seen as the consideration for the release of any property claims. Indeed, in the interim agreement, the lump sum paid to Ms. Tauber is specifically characterized as being "in full satisfaction of all her property claims, and in particular under Section 10 of the said marriage contract." It is a property right, and not in satisfaction of any support obligation. The lump sum is relevant, however, as part of Ms. Tauber's "condition, means, or other circumstances".

[81] Mr. Tauber considered the lump sum as an amount of money that would allow his wife to get on her feet, find accommodation, or spend as she wished. However, as the Court of Appeal found, the effect of the trial judge's costs order was to wipe out Ms. Tauber's lump sum. The appeal court found that Ms. Tauber was required to pursue litigation for the parties' son, so that "she would be able to offer him a reasonable standard of living". The court stated at para. 59, "It was surely not contemplated by the parties that the $100,000 from the marriage contract was to serve as a fund for litigation for the wife". The Court of Appeal awarded Ms. Tauber 80% of her party-and-party costs of the trial, and her costs of the appeal and cross-appeal. As a result she received $55,000 from Mr. Tauber on that account. However, her legal and professional fees to the commencement of this trial total more than $200,000. Even with the contribution from Mr. Tauber, it is fair to say that she has been required to expend her lump sum and more on funding this litigation. Her lump sum is gone. It has been spent expressly because of the breakdown of the marriage, and the protracted litigation which has followed it.

[82] Mr. Tauber faults his former wife for having no capital, and failing to save any money on the generous support he was paying. Since the parties physically separated over three years ago, he has been paying exactly the same amount, namely $11,000 per month, net of tax. It was initially characterized as spousal support in the interim agreement, while the Court of Appeal characterized it as child support. In either case,

however, it was clearly earmarked as ongoing support. Ms. Tauber submits she was entitled to spend the support, and she did. I agree. I cannot find that Ms. Tauber had any requirement to save significant sums from the support she received first on consent under the interim agreement, and then pursuant to the order of the Court of Appeal. I do not fault her for having no capital to invest in the purchase of a home. I consider her loss of her lump sum, and additional capital, as a relevant factor on the issue of spousal support.

[83] Mr. Tauber also suggests that by paying $11,000 per month since May of 1998, under the provisions of the interim agreement, he must have satisfied his obligations for spousal support. Although the interim agreement characterized the payments as spousal support, the agreement did not provide for child support specifically. Since both the Court of Appeal and I ordered the payment of $11,000 per month for child support, I view these payments as being for Sam's benefit. I cannot see how Mr. Tauber can have satisfied his spousal support obligation by paying that sum.

[84] Having considered the factors enumerated in s. 15.2(4), I turn now to the objectives of spousal support, as set out in s. 15.2(6):

> 15.2(6) An order made under subsection (1)… 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] First I must recognize the economic advantages or disadvantages arising from the marriage or its breakdown. Mr. Tauber's economic circumstances are essentially unchanged. He has not experienced any economic advantages or disadvantages arising from the marriage or its breakdown. Mr. Tauber suggests however, that Ms. Tauber came out of the marriage with more than she had when she went in. Therefore, he says, she has received significant economic advantages, and thus there is no economic disadvantage to compensate. Ms. Tauber went into the marriage with a net worth of

$115,000 and the ability to earn about $50,000 per year. Although she received an additional $100,000 on separation, the marriage breakdown has required her to spend that sum and more on this litigation. Her net worth has been diminished because of the aftermath of the separation. As I have already found, her ability to earn income has also been impaired because of the marriage, namely Sam's arrival. The objective of para. (*a*) remains unmet, unless there is an order for spousal support.

[86] Next I must apportion any financial consequences arising from Sam's care, over and above any obligation for his support. Ms. Tauber is solely responsible for Sam's care, although she does have her nanny to assist her. Had the parties remained together, Ms. Tauber would have had both the nanny and her husband available in the house to help with Sam. I have found that her responsibilities for Sam have had a direct impact on Ms. Tauber's ongoing ability to earn income, as well as creating a past loss, due to her being out of the workforce, and losing both ongoing income and her competitive advantage. Ms. Tauber has suffered financially as a result of her obligations to Sam. Mr. Tauber has suffered no similar impairment, due to caring for Sam. The financial consequences of caring for Sam have only affected Ms. Tauber, and have not been apportioned between the parties. Thus, the objective of para. (*b*) remains unmet, unless there is an order for spousal support.

[87] Paragraph (*c*) focuses on relieving economic hardship arising from the breakdown of the marriage. Mr. Tauber has suffered no economic hardship arising from the breakdown of the marriage. In contrast, there is no doubt Ms. Tauber has been economically disadvantaged by the breakdown of the marriage. She has lost both her competitive advantage in her field, the ability to earn income at the level she did before, and has also lost the benefit of income earning during the time she has been caring for Sam. In addition, the breakdown of the marriage and the cost of its subsequent litigation have resulted in her losing not only her lump sum property settlement under the marriage contract, but also significant portions of her other capital. Her economic hardship has not yet been relieved. Thus, the objective of para. (*c*) remains unmet, unless there is an order for spousal support.

[88] It is clear from the analysis of paras. (*a*) through (*c*) that an order for spousal support is necessary. However, para. (*d*) requires that any order for support must also promote economic self-sufficiency within a reasonable period of time. Ms. Tauber is young, healthy, bright and capable. She has a history of being self-supporting. That, however, was prior to Sam's birth. She must be motivated to return to the workforce, and aim for future self-sufficiency. I must craft a support order that will meet all the support objectives in s. 15.2(6), giving none precedence over the others. The *Divorce Act* contemplates both periodic support, lump sum support, or a combination of the two.

Is a lump sum appropriate?

[89] Ms. Tauber has the obligation and the ability to earn income and contribute to her own support. Her ability to support herself has been affected by both the impact on her career of giving birth to Sam and also the change in her lifestyle occasioned by both her marriage and Sam's birth. Her needs and Sam's are inextricably intertwined. Her financial needs are greater than they were prior to marrying Mr. Tauber. That is the result of the marriage, Sam's birth, and the need to provide a certain lifestyle for Sam. I share Ms. Tauber's concerns about Sam remaining in rental accommodation. There is nothing inherently objectionable about Ms. Tauber and Sam living in a rented house. The difficulty is with the nature of that rental market itself, and the lack of long-term stable housing. If Ms. Tauber continues to rent a home, it is likely she and Sam will move frequently, as their rental homes are sold. This is what necessitated their move from Cluny to Alcorn. This type of instability is not in Sam's interests. In my view, a lump sum support order is the most appropriate way to meet the support objectives under the *Divorce Act.* It also has the benefit of providing a "clean break".

[90] A lump sum of $500,000 will compensate Ms. Tauber for the direct financial consequences of the breakdown of the marriage, as I have already described them. It will also provide some additional ongoing support for her as she re-establishes herself in her career, and begins to work toward more full-time work, as Sam becomes older. As in *M. (O). v K. (A.),* it is without question a sum commensurate with her former husband's means. There, the court ordered a lump sum of $300,000 where the husband earned $2 million per year, but had a net worth of only $150,000. Here, Mr. Tauber's net worth is about $19 to $20 million, if his company is valued not at book value, but rather at what he hopes to sell it for. Even valuing the company at book value, his net worth is in excess of $11 million. I note from Mr. Tauber's most recent financial statement that he had enough cash in his personal bank account at the end of February to write a cheque for a $500,000 lump sum, and still have over $600,000 left. There was no evidence this account has been depleted in any significant way since then. The lump sum will, as in *M. (O.) v. K. (A.),* provide Ms. Tauber with some security for her future, and provide for her own needs in the period she is not able to work as she did before. I decline, however, to provide ongoing periodic support for Ms. Tauber as well. To do so would, in my view, discourage her future economic self-sufficiency, and would thus fail to meet the objective in s. 15.2(6)(*d*), which is equally important as all the others. A lump sum, although unusual in these circumstances, will strike the necessary balance among all the support objectives, and best meet them.

[91] Ms. Tauber has requested retroactive spousal support, and indeed the parties agreed to retroactivity to at least December 1, 1998. Since I have ordered a lump sum, there is no need to address the issue of retroactivity specifically, since prejudgment interest will run on the lump sum. In my view, given Mr. Tauber has had exclusive use of this capital from the commencement of these proceedings, it is appropriate that

prejudgment interest run from that date. Prejudgment interest will adequately satisfy any retroactive requirement.

CONCLUSION

[92] Commencing September 1, 2001, Mr. Tauber will pay child support for Sam Tauber, born August 5, 1997 in the table amount of $11,173 per month, based on Mr. Tauber's 2001 income of $1,652,200. Mr. Tauber will pay Ms. Tauber a lump sum of $500,000 for spousal support. Prejudgment interest on this sum will run from the commencement of the proceedings, namely January 16, 1998 at the rate of 4%. If the parties are unable to agree on the issue of costs, or if there are any mathematical errors in these reasons, they may make an appointment to address these issues.

Table amount of child support and lump sum spousal support ordered.

ENDNOTES

1 Reported at (1999), 1999 CanLII 14774 (ON SC), 43 O.R. (3d) 42.

2 Reported at (2000), 2000 CanLII 5747 (ON CA), 6 R.F.L (5th) 442, 187 D.L.R. (4th) 1.

3 *Francis v. Baker* (1998), 1998 CanLII 4725 (ON CA), 34 R.F.L. (4th) 317, 157 D.L.R. (4th) 1.

4 Federal Child Support Guidelines, SOR/97-175, as amended SOR/97-563; SOR/99-136; SOR/2000-337.

5 *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250, 177 D.L.R. (4th) 1.

6 *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) as amended.

7 *Metzner v. Metzner* (2000), 2000 BCCA 474 (CanLII), 9 R.F.L. (5th) 162, 190 D.L.R. (4th) 366.

8 *Hollenbach v. Hollenbach*, (2000), 2000 BCCA 620 (CanLII), 10 R.F.L. (5th) 280, 194 D.L.R. (4th) 151 (B.C.C.A.); *Holtby v. Holtby*, (1997), 1997 CanLII 24470 (ON CJ), 30 R.F.L. (4th) 70 (Ont. Fam. Ct.); *Halley v. Hannon* (1998), 1998 CanLII 18651 (NL SC), 40 R.F.L. (4th) 60 (Nfld. U.F. Ct.).

9 For example, *Simon v. Simon* (1999), 1999 CanLII 3818 (ON CA), 1 R.F.L. (5th) 119, 182 D.L.R. (4th) 670 (Ont. CA.).

10 *Paras v. Paras*, 1970 CanLII 370 (ON CA), [1971] 1 O.R. 130, 14 D.L.R. (3d) 546.

11 *Hollenbach v. Hollenbach*, *supra*, footnote 8.

12 *De Zen v. De Zen*, Ont. S.C.J., July 27, 2001 [summarized 107 A.C.W.S. (3d) 92], and *MacDonald v. MacDonald*, B.C.S.C., July 18, 2001 [summarized 106 A.C.W.S. (3d) 888].

13 (2000), 2000 CanLII 49257 (QC CS), 9 R.F.L. (5th) 111 (Que. S.C.).

14 *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456.

15 *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420, 169 D.L.R. (4th) 577.

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

[1] Notice of Appeal filed in the Ontario Court of Appeal September 5, 2001 (Court File No. C36925).