

I Dalglish v. Dalglish

Between
John Hugh Dalglish, applicant, and
Cheryl Maureen Dalglish, respondent

[\[2003\] O.J. No. 2918](#)
Newmarket Court File No. 10843/01

**Ontario Superior Court of Justice
Family Court
Magda J.**

Heard: April 1-4, 7-11, 2003; with written submissions
completed May 3, 2003.
Judgment: July 14, 2003.
(47 paras.)

Family law — Maintenance of wives and children — Support guidelines — Calculation or attribution of income — Special or extraordinary expenses — Enforcement, orders — Transfer of assets — Payment into court — Husband and wife — Marital property — Matrimonial home, occupation by one spouse, claim for occupation rent — Marital property, distribution orders — Equalization payments — Exempt acquisitions, gift, trust, bequest or award.

Action by the husband for a division of family property and occupation rent. The wife applied for child and spousal support. The parties married in 1985 and separated in 2001. They had one son who was born in 1989. The child was a gifted athlete who was involved in extensive extracurricular activities at school. The parties had resolved custody and access issues prior to trial. The wife had been in temporary exclusive possession of the matrimonial home since separation. The husband worked for a family business during the marriage. The family business was sold in January 2000. The husband's total income in 2000 was \$1 million. He was employed by the purchaser for several months but his employment was terminated in June 2000. He had not worked since then. He received shares from his father's estate freeze, which he claimed were a gift. He sought to exclude them from his net family property. His current annual income was \$25,000. The wife worked for a school. Her annual income for 2003 was \$32,000. The husband had not paid any support since the separation.

HELD: Action allowed in part. The husband was unemployed or underemployed by his own choice. Based on his qualifications, an annual income of \$75,000 was imputed to him. He was required to pay child support of \$605 per month. He was also ordered to pay spousal support of \$1,200 per month. The support obligations would be secured by his interest of \$175,000 in the matrimonial home. The wife would pay the funds to purchase

his interest into court, and they would serve as a fund from which the wife could draw her support payments. The court refused to establish a fund to secure the child's future post-secondary education. The allowable extraordinary expenses were \$376 per month. The husband was ordered to pay 70 per cent of this amount, or \$263. The husband's shares from the estate freeze were not a gift and were not excluded from net family property. The husband was not entitled to occupation rent. Such a claim was not equitable based on the facts of this case. The wife owed an equalization payment of \$25,000 to the husband.

Statutes, Regulations and Rules Cited:

Divorce Act, s. 15.2(4).

Federal Child Support Guidelines, s. 7, 7(1).

Counsel:

W. Ross Milliken, for the applicant.

James D. Singer, for the respondent.

¶ 1 **MAGDA J.**— The applicant John Hugh Dagleish ("the husband") was born March 25, 1957 and the respondent Cheryl Maureen Dagleish ("the wife") was born on March 29, 1953. The husband and the wife were married on June 22, 1985 and separated on January 2, 2001.

¶ 2 There is one child of the marriage, namely Andrew James Dagleish, who was born June 8, 1989. To the credit of the husband and the wife all issues of custody and access were resolved prior to the commencement of the trial in a "Custody and Access Agreement", which is found at Tab 7 of the applicant's Opening Trial Statement. An order will therefore go in accordance with paragraphs 3, 4, 5, 6, 7, 9 and 10 of that Agreement.

¶ 3 Certain other issues between the parties were resolved before the trial as set out on pages 9 to 12 in Tab 1 of the applicant's submissions brief, and certain facts have been agreed upon as set out in the Agreed statement of Facts found at Tab 3 of the applicant's Opening Trial Statement.

¶ 4 Issues Resolved before the Trial:

1. The parties are agreed that the valuation date is January 2, 2001.
2. Ownership of assets on the valuation date was as follows:
 - (a) The matrimonial home at 47 Wilkie Ave., Nobleton, Ontario is jointly owned by the parties. The wife has been in temporary

exclusive possession thereof, on consent, since January 24, 2001.

- (b) The parties purchased the investment asset Tal Private Management Limited ("TAL") for \$600,000 in April 2000. The parties agreed that the asset was transferred from the husband's name to the wife's name and that tax considerations motivated the transfer. The husband said it was the wife's idea and the wife said it was the husband's idea. It was agreed from the outset that the asset was owned beneficially by the parties equally as of the date of separation and that its value was \$566,766.
 - (c) TAL was sold February 17, 2003, and the proceeds in excess of \$302,000 were deposited in a bank account in the parties' names jointly at the Bank of Nova Scotia.
 - (d) The husband's Bank of Montreal (BMO) Investorline cash account #XXX-XXXXX contained \$103,542.
 - (e) The wife's BMO Investorline spousal RRSP #XXX-XXXXX-XX contained \$63,283.
 - (f) The wife's BMO Investorline RRSP account #XXX-XXXXX-XX contained \$28,638.
 - (g) The wife had a bank draft of \$24,000.
 - (h) The husband's BMO Investorline cash account #XXX-XXXXX contained \$83,781.
 - (i) The husband's BMO Investorline RRSP account #XXX-XXXXX-XX contained \$70,833.
 - (j) The husband's Merrill Lynch investment account #XX-XXXX-X was valued at \$5,364.
 - (k) The husband owned shares of AGF Master Limited Partnership with a value of \$1,947.
 - (l) The husband owned a London Life insurance policy #XXX XXXX-X with a value of \$6,800.
3. The parties agree with the following debts owed at the valuation date:
- (a) The husband's income tax liability of \$96,951.

- (b) The husband's MasterCard debt of \$3,189.
 - (c) Approximately \$100,000 on a joint line of credit.
 - (d) It is agreed that the husband's credited share of the amount by which the joint line of credit was paid since separation, based on payments made by him since separation, is the sum of \$27,393.
 - (e) It is agreed that the wife's credited share of the amount by which the joint line of credit was paid since separation, based on payments made by her since separation, is the sum of \$22,206.
4. The parties agree on the value of assets owned at the date of marriage as follows:
- (a) The husband's life insurance - \$1,357
 - (b) The wife's equity in real property - \$45,909
 - (c) The wife's cash - \$9,675
5. The parties agree that the wife's annual income as at the date of trial is \$31,886.
6. The only S. 7 expense agreed upon is for the child's Kumon tutoring expense of \$75 per month for 7 months, for a total of \$525 annually or \$43.75 per month, for which the husband agrees to pay for his proportionate share.
7. The parties agree with the following credits in the case::
- (a) The wife owes the husband for his payment of a joint TD Canada Trust account overdraft, having paid that debt incurred by the wife post-separation, in the sum of \$2,639.87.
 - (b) The wife owes the husband for costs in the sum of \$800 awarded in his favour in respect of the January 31, 2002 settlement conference.
 - (c) Since the separation the husband has drawn on the TAL account in the sum of \$122,713.

[Numbers replaced by X's by LexisNexis Canada.]

¶ 5 According to the Agreed Statement of Facts, the parties further agree as follows:

- (a) Just before the marriage the husband joined the family business, Aloro Foods Inc. ("Aloro"). His position in the company was in sales and marketing.
- (b) Aloro's business was the preparing and marketing of frozen foods, namely pizza.
- (c) Aloro was owned by a holding company Dalglo Ltd. ("Dalglo"), controlled by the husband's father.
- (d) The husband's taxable income from 1984 to 1999 was as follows:

1984 -	\$19,703
1985 -	\$19,535
1986 -	\$22,907
1987 -	\$26,902
1988 -	\$25,997
1989 -	\$30,759
1990 -	\$37,225
1991 -	\$39,494
1992 -	\$42,100
1993 -	\$45,304
1994 -	\$37,976
1995 -	\$41,504
1996 -	\$41,129
1997 -	\$76,518
1998 -	\$230,792
1999 -	\$110,523

- (e) Prior to the marriage, the wife was employed by The Workers' Compensation Board as a senior claims adjuster. Prior to the marriage, she left that employment. Approximately four months after the marriage, the wife obtained employment with Seneca College. In 1998, she left that employment. In 2002 she has resumed her employment with Seneca College. The wife's earnings from 1984 to 1998 and for 2002 and anticipated for 2003 are as follows:

1984 -	\$17,631
1985 -	0
1986 -	\$2,695
1987 -	\$14,261
1988 -	\$15,686
1989 -	\$8,817
1990 -	0

1991 -	\$8,920
1992 -	\$10,544
1993 -	\$16,651
1995 -	\$16,628
1996 -	\$23,066
1997 -	\$27,288
1998 -	\$20,575
2002 -	\$14,006
2003 -	\$31,886

- (f) On January 6, 2000, Dalglo was sold to McCain Foods Limited ("McCain"). Inclusive of the payments that the husband received in respect of the sale of his interest in Dalglo, the husband's total income in 2000 was \$1,016,144.

¶ 6 After the sale of Dalglo, the husband continued as a contract employee of McCain at a rate of \$70,000 per year, until June 2000, at which time his contract was terminated. He was paid to the end of the contract in October 2000. The husband was not otherwise employed from June of 2000 to the date of separation.

¶ 7 It is agreed that in early 2000 the parties spent approximately \$100,000 in retiring the first mortgage on the matrimonial home. On the date of separation there was no mortgage on the home. The wife remains in the exclusive possession of the home pursuant to the order of Justice Nelson made January 24, 2001.

¶ 8 With respect to the "TAL" account with the CIBC, the parties agree as follows:

- (a) In April 2000 an investment in the nature of a privately managed mutual fund portfolio was purchased and at all material times it has been owned, beneficially, jointly by the parties.
- (b) The amount invested in TAL was the sum of \$600,000.
- (c) In May 2000, the wife was made the legal owner of TAL.
- (d) On January 24, 2001 Justice Nelson made an order freezing TAL.
- (e) On September 29, 2001, \$10,000 was ordered to be paid from TAL to the wife and the characterization of the payment was deferred.
- (f) A total of \$30,000 has been paid from TAL to the wife or will have been paid by trial as temporary spousal support, commencing April 1, 2001 through April 1, 2003, at the rate of \$1,200 per month as ordered by Justice Nelson on December 22, 2001.
- (g) A total of \$12,675 has been paid from TAL or will have been paid by trial as temporary child support, commencing April 1, 2001

through April 1, 2003 at the rate of \$507 per month as ordered by Justice Nelson on December 22, 2001.

- (h) A total of \$7,200 has been paid from TAL to the wife or will have been paid by trial on account of the child's special and extraordinary expenses, commencing April 1, 2001 through April 1, 2003, less one month, at the rate of \$300 per month as ordered by Justice Stong on April 19, 2002.
- (i) A total of \$8,250 has been paid from TAL to the wife on account of cost orders in her favour made within the proceeding.
- (j) \$37,000 was paid from TAL to the husband's lawyer on account of fees, as ordered by Justice Stong on April 19, 2002.
- (k) \$8,000 was paid from TAL to the husband's lawyer on account of expert's fees, as ordered by Justice Stong on April 19, 2002.
- (l) The husband owes the wife \$300, an amount that TAL failed to pay to her on his behalf for s. 7 expenses.
- (m) TAL was collapsed on February 17, 2003 and is now invested in the parties' joint names at Scotiabank in the amount of \$302,167, plus interest.

¶ 9 In this judgment I shall not be referring to what was said to the parties or their counsel by Justice Nelson or Justice Stong or what may have been said by any other justice, even if the parties may agree on what was said. Similarly, I shall not consider any oral or written reasons given by any justice at a motion, case conference or settlement conference. As I indicated to counsel at the outset of the trial, I will only refer to prior endorsements to verify what temporary orders have been made prior to trial and will base my decision on the evidence provided at trial only. To do otherwise, in my view, would be most improper.

¶ 10 Continuing with the Agreed Statement of Facts, the parties agree that the market value of the TAL account decreased as follows:

January 2, 2001 -	\$566,768
January 30, 2001 -	\$574,258
February 28, 2001 -	\$532,594
March 31, 2001 -	\$513,953
April 30, 2001 -	\$532,755
May 31, 2001 -	\$532,694
June 30, 2001 -	\$506,068
July 31, 2001 -	\$502,279
August 31, 2001 -	\$483,107
September 30, 2001 -	\$454,767

¶ 11 The parties also agree that the husband sold his common shares of Titan Trading Analytics Inc. on or about September 11, 2002 for \$1,400.

¶ 12 The husband requests the following orders from the court:

- (a) Order in accordance with paragraphs 3, 4, 5, 6, 7, 9 and 10 of the custody and access agreement, which is granted on consent.
- (b) Fixing child support in the sum of \$310 per month, including the table amount of \$223 and s. 7 expenses in the amount of \$83 per month, based upon the husband's current annual income of \$25,116 and the wife's current annual income of \$31,886.
- (c) Dismissing the wife's claim for spousal support, with leave to seek spousal support in the future based upon a material change in circumstances.
- (d) Ordering that temporary spousal support paid to the wife from May 1, 2002 through April 1, 2003 be repaid to the husband in the amount of \$14,400.
- (e) Ordering occupational rent payable by the wife to the husband for the months of May 2001 through May 2002 (sic), a total of 25 months, in the amount of \$850 per month for a total of \$21,250.
- (f) Ordering that occupational rent shall continue to be payable for each month the wife continues in occupation of the matrimonial home prior to its being sold, in the amount of \$850 per month.
- (g) Ordering that the husband is entitled to retrieve his personal property from the matrimonial home forthwith.
- (h) Ordering that the wife shall pay to the husband the sum of \$10,000 in respect of the jointly owned contents of the matrimonial home.
- (i) Partition and sale of the matrimonial home at 47 Wilkie Ave., Nobleton.
- (j) An order that all arrears of property taxes be paid from the proceeds of the sale of the matrimonial home.
- (k) Declaring the income tax debt a joint debt.
- (l) An order that all income taxes owing by the husband be paid from the proceeds of the sale of the matrimonial home, including interest and penalty charges.
- (m) Provided (l) above (my lettering) is granted, ordering that the wife shall pay to the husband an equalization payment of \$82,331.24.

- (n) If (l) (my lettering) is not granted, ordering that the wife shall pay to the husband an equalization payment in the amount of \$138,225.24.
- (o) An order that the net proceeds of the sale of the matrimonial home be divided equally between the parties.
- (p) An order that the husband owes the wife \$61,356.50 in respect of his prior withdrawals from the TAL account.
- (q) An order that the wife owes the husband \$8,439.87 in respect of the agreed amounts of \$2,639.87 and \$800, as well as \$5,000 being one-half of the advance from TAL in September 2001.
- (r) An order that the net amount owing by the wife to the husband is as follows:

To husband from wife:

Equalization	\$82,331.24
Occupational rent	\$21,250.00
Support repayment	\$14,400.00
Contents	\$10,000.00
Credits	\$8,439.87

	\$136,421.11

To wife from husband:

TAL withdrawals	\$61,356.50

Difference to husband	\$75,064.61

- (s) An order that the parties' joint line of credit at the bank of Montreal be paid from the monies invested in the parties' joint names at the Bank of Nova Scotia.
- (t) An order that the amount of \$75,064.61 shall be paid by the wife to the husband from her one-half share of the monies invested in the parties' joint names at the Bank of Nova Scotia, and that the balance of the wife's one-half share be paid to her, subject to the security interest of Tilda Roll, Barrister and Solicitor.
- (u) An order that the husband's one-half share of the monies invested in the parties' joint names at the Bank of Nova Scotia be paid to him

forthwith.

- (v) Dismissing the wife's claims as follows:
 - (i) for unequal division of net family property,
 - (ii) that the matrimonial home be transferred to her,
 - (iii) for exclusive possession of the matrimonial home,
 - (iv) for security for support

and

- (v) dismissing the wife's motion for relief in regard to an order alleged to have been breached,
- (vi) dismissing the motion for costs of the December 5, 2001 motion.

¶ 13 The wife requests the following orders from the court:

- (a) Order imputing the husband's income at a minimum of \$80,000 to a maximum of \$163,000, leaving the matter of retroactivity of support based on a finding in such a range up to the court.
- (b) Order that the husband pay lump sum child and spousal support, and his proportionate share of the child's extraordinary expenses (exclusive of his contribution to the child's post-secondary school education), implemented by way of a vesting order conveying the husband's interest in the matrimonial home over to the wife; to the extent that the present value of total support found owing is in excess of \$175,000, an order that the difference be paid to the wife out of the husband's share of the monies formerly invested in TAL, now invested at the Bank of Nova Scotia.
- (c) Order that an estimate of the husband's proportionate share of the child's post-secondary school education be paid by way of a special fund, obtained from the husband's share of the TAL monies. This fund shall be paid into court and shall be returned to the husband should the child not enroll in post-secondary school education 2 years after he is eligible for same. The court shall set out the anticipated proportion of the post-secondary school expenses to be borne by the husband. Should that estimate turn out to be high by reason that the child is able to contribute to his post-secondary

school expenses beyond any projected contribution, an order permitting the husband to access the funds to recover any over-payment.

- (d) If the court is not prepared to order lump sum support as set out in (b) and (c) (my lettering) above, an order that the husband's interest in the matrimonial home be vested in the wife by way of the wife purchasing the husband's interest therein, said purchase funds to be paid into court and to be the source from which the wife draws periodic child support (base and extraordinary) until the child is no longer a child of the marriage within the meaning of the Divorce Act.
- (e) In the event this court is not prepared to order lump sum spousal support, an order that the husband pay spousal support indefinitely, calculated with regard to the husband's imputed income, to be paid in the same manner as (d) (my lettering) above.
- (f) Order directing the Bank of Nova Scotia, Centrepoint Mall, Toronto, Ontario to pay \$102,999 to the wife, calculated as follows;

\$122,713 -	credit wife from husband accessing TAL
\$5,000 -	credit wife for costs of the motion for failure (of the husband) to pay the line of credit as ordered (if the court rules on that matter)
\$11,650 -	credit wife for costs on the December 5, 2001 motion (from October 2, 2001 - December 5, 2001 per Bill of Costs of Tilda Roll, if allowed by this court).
\$636 -	credit wife for husband's failure to pay line of credit, net 13 months of interest on such arrears.

TOTAL \$102,999

- (g) Order that with respect to the remaining \$160,061 on deposit at the Bank of Nova Scotia (\$302,167 - \$2,107 May 1, 2003 support

cheque - \$102,999 to the wife and - \$37,000 hold-back for Roll = \$160,061) the wife to receive \$59,984 calculated as follows:

- (i) \$ 300 - on consent due to TAL error
- (ii) \$ (800) - costs not paid by wife
- (iii) \$ (2,639) - husband's post-separation payment on the wife's behalf for the overdraft in the parties' prior TD Canada Trust joint account

- (iv) \$80,030 - 50% of said proceeds

- (v) \$(16,906) - equalization of NFP (as per wife's NFP statement Trial Record Tab 17, page 6)

\$59,984

- (h) Order directing the Bank of Nova Scotia to pay out the remaining balance of \$96,637 as follows:
 - (i) To the Bank of Montreal, Allen Road Branch, Nobleton, Ontario, an amount sufficient to retire the husband's share of the parties' joint indebtedness in respect to their line of credit, counsel to take steps to ascertain that amount, estimated to be about 50% of \$66,000.
 - (ii) If this court orders lump sum support and the total present value of same is in excess of \$175,000, the excess to the wife.
 - (iii) To the Accountant of the Superior Court of Justice, or as this court may otherwise direct, in the amount estimated to be the husband's contribution to the child's post-secondary school expenses, as more particularly set out in paragraph (c) above (my lettering).

- (i) Interim order from December 5, 2001 be made a final order with respect to the husband maintaining the wife as the irrevocable beneficiary of his London Life Insurance Policy that he owned on the date of separation, for so long as the husband is required to pay support under this judgment.

- (j) An order that either party has the right to bring a motion, with

further and better evidence, in respect to the distribution of contents, or, if the court is more inclined, that the wife forthwith pay to the husband \$2,000 for his share of the contents remaining in the home.

¶ 14 The trial of this matter took nine days to complete. Except for the most patently clear facts that were agreed upon, virtually every other relevant fact is in dispute. This litigation has continued for over two years at great cost to the parties. The animosity between the parties is palpable. Sadly, their case falls into that class of domestic litigation cases that is the antithesis of the expressed principles that family law litigation should be fairly and economically conducted. On the basis of the evidence presented at trial, it is now up to the court to determine:

1. The husband's income for the purpose of establishing his child and spousal support obligations;
2. Whether child and spousal support should be lump sum or periodic and whether such payments should be secured;
3. If a fund should be established to secure the future post-secondary school expenses of the child;
4. S. 7 extraordinary expenses.
5. Whether part of the traceable proceeds from the husband's sale of his Dalglo shares should be excluded from his NFP on the basis that such shares were acquired by way of a gift from his father during the marriage;
6. If occupational rent should be paid by the wife;
7. What disposition is to be made of the matrimonial home;
8. What distribution or compensation is appropriate respecting contents of the matrimonial home;
9. Miscellaneous matters, including:
 - (1) Who is to pay realty tax arrears on the matrimonial home and the source of the funds;
 - (2) Disposition of the husband's income tax debt and accrued interest and penalties thereon.
 - (3) How much does the husband owe the wife regarding his post-separation access to the TAL funds, of which he drew \$122,713;
 - (4) The characterization of the \$10,000 allowed to be

withdrawn by the wife by the court on her motion in September 2001;

- (5) Costs of a motion December 5, 2001 and a prior motion regarding the husband's failure to pay his share of the parties' joint line of credit;
 - (6) Value and ownership of vehicles prior to marriage and/or separation;
 - (7) Certain interest on the line of credit;
 - (8) Dividend to husband in January 2001.
10. The appropriate recalculation of the parties' NFP statements and the appropriate equalization payment;
 11. The appropriate application and distribution of monies of the parties after determining the issues in 1 to 10 above and payment of costs as asked for.

¶ 15 Once the above determinations have been made, the finding will be applied to the relevant orders sought by the husband and the wife. An assessment of credibility plays a pivotal part in this exercise.

The Parties:

¶ 16 The wife was born March 29, 1954 and spent her childhood in Kleinburg, Ontario. She has a brother and a sister. Her parents passed away when she was in her teens and she looked after her sister and brother. In 1977, she obtained employment at the Workers Compensation Board (WCB). At that time, she resided in Woodbridge, Ontario at 48 Rainbow Drive. She purchased this home with \$10,000 as a down payment.

¶ 17 At the WCB she attained the position of a senior claims adjuster, but left that employment in 1984 after she had met her husband-to-be in 1982. They began to cohabit at her home in 1983 or 1984. She testified that the applicant did not want her to continue to work at the WCB after they began cohabitation. The parties were in love and wanted to spend more time with each other. He encouraged her to find part-time work closer to their home. He had secured employment in 1984 with Aloro Foods Inc., a company owned by his father. She acceded to his requests and the parties were married June 22, 1985. Their son Andrew was born June 8, 1989.

¶ 18 The husband was born March 25, 1957. He completed grade 12 and two years of college. He worked at various occupations, including photography, until he joined Aloro Foods Inc. in 1984. As stated, his father owned the company, but his mother, a brother and sister also worked there. In the later years, prior to the sale of the company to McCain Foods on January 6, 2000, his position with the company was described as a key

account manager. For a number of months after that sale he worked for McCain Foods in that capacity at a salary of \$70,000 per year, plus a car allowance. Since October of 2000 he has had no further employment in the consumer package goods food industry.

¶ 19 The husband and the wife began to experience marriage difficulties at least from 1997. They had hoped that the funds the husband received from his shares in the sale to McCain Foods (in excess of one million dollars in capital and dividends) would provide an element of financial security for the family and help their failing marriage. Their expectations did not materialize. After assaulting his wife in the kitchen of their matrimonial residence, the husband left the home on January 2, 2001.

¶ 20 The wife has had exclusive possession of the home where she has resided with the child since the separation. The home is mortgage-free as a result of repayment of the mortgage utilizing some of the proceeds of the sale of the husband's shares in the McCain Foods transaction. Realty taxes on the property are in arrears and there is a lien on the property placed by Canada Customs and Revenue Agency for the husband's arrears of income taxes owing as a result of the sale to McCain.

¶ 21 After the sale to McCain Foods to the date of separation, both the husband and the wife traded in the stock market regularly and, as it turned out, quite improvidently. A considerable portion of their newly acquired wealth was lost. A good portion of funds set aside to pay the husband's income taxes due (\$45,000) were used by him to acquire very speculative equities and were lost before the wife discovered what the husband had done. The full amount of the husband's income tax obligation of \$96,951 at separation remains unpaid and considerable interest has accrued. He now owes almost \$120,000.

¶ 22 Both the husband and the wife testified at trial and were ably cross-examined by counsel. On balance, although the wife's answers tended to be lengthy and detailed, I did not find her to be untruthful or attempting to deceive the court in any way. I did not find that she presented herself poorly by her demeanour, as was suggested by the husband's counsel. I agree that she failed to disclose her inheritance monies from her grandfather on her early financial statement, which she received just prior to the separation. In my view, this error in judgment occurred more from her desire to have a fund for her and the child on which to live, rather than an attempt to hide these funds. Given the husband's refusal to pay any child or spousal support after the separation, in my view this verified her motivation in this regard.

¶ 23 As well, I do not feel that her failure to disclose a trip to Las Vegas (in conjunction with the child's Scout trip to the Grand Canyon) materially affects her credibility. During this time period the husband took numerous expensive trips and vacations and spent in excess of \$114,000 from the separation date to December 2001 and, until he was ordered to do so by Justice Nelson, steadfastly refused to pay child or spousal support. This was so even when he was working for a time at the National Golf Club as a greens keeper.

¶ 24 From the husband's testimony I find that the following negatively affected his credibility:

- (a) He attempted to minimize the assault on his wife on the separation date. I accept the wife's testimony that she was frightened and upset by the assault.
- (b) His efforts to find employment in the area of his expertise fall far short of reasonable. Given his age and experience, I am of the view that, had he made reasonable efforts to find suitable employment shortly after the separation, he could have done so.
- (c) I accept the testimony of David Street, an expert on the state of the job market for key account managers in the food industry, who testified that the husband exercised bad judgment by applying for a lesser position than that of a key account manager, for which he was fully qualified.
- (d) His demeanour at trial did not convince me that he really appreciated his responsibilities in his circumstances. He spent a good deal of his time since separation pursuing his own interests, rather than focussing on his obligations.

¶ 25 On balance, therefore, whenever the evidence of the wife and the husband conflict on any material point, I accept the evidence of the wife. I reject out of hand the husband's suggestion that the wife's motivation in this matter is to acquire all of the husband's assets for herself. Her motivation is to make certain that her son's needs and her own are met for now and for a reasonable time in the future. In that regard, I now turn to the issues to be determined.

1. The Husband's Income:

¶ 26 I find that the husband has been unemployed or underemployed by his own choice, notwithstanding the thickness of Exhibit 14, the "Applicant's Book of Documents - Job Search (Vol. 3). I am not satisfied that the husband has made a bona fide, reasonable attempt to obtain employment for which he is qualified.

¶ 27 I accept the evidence given by David Street, a professional recruiter specializing in placements for the consumer package goods food industry, in this regard. He was qualified as an expert in the area of salary ranges and job prospects in that industry for key account managers and sales representatives. He was not impressed by the husband's job search in Exhibit 14. His view was that, with a strong résumé as compiled by the husband and with reasonable effort, he should have found a position as a key account manager within six months. In Mr. Street's view, looking for this type of employment is a full-time job. He described the husband's job search as 'laughable'.

¶ 28 Mr. Street testified that the salary ranges for key account managers were from \$55,000 to \$65,000 at the low end, to \$75,000 to \$90,000 per year at the high end. Both ranges also included a car allowance (worth approximately \$10,000 per year), plus benefits packages and bonuses ranging from 10% to 25% of salary.

¶ 29 Keeping in mind all of the other considerations testified to by Mr. Street, I am of the view that the husband should have imputed to him an annual income of \$75,000. On that sum the husband's child support obligation shall be \$605 per month.

¶ 30 Taking into account the factors in s. 15.2(4) of the Divorce Act and the facts of this case, I am of the view that the husband shall pay spousal support in the sum of \$1,200 per month. Both amounts for child and spousal support are to commence April 1, 2003.

2. The Form of Child and Spousal Support

¶ 31 I am not convinced on the facts of this case that child and/or spousal support should be by way of a lump sum award. I appreciate the factors for a lump sum consideration, including a "clean break" for the parties. However, that having been said and given the husband's refusal to pay support until ordered to do so, the support payments ordered herein must be secured.

¶ 32 I accept that the appropriate way to secure the support obligations is that an order go vesting the husband's interest in the matrimonial home by way of the wife purchasing same for \$175,000. The purchase funds are to be paid into court (or as the parties may otherwise agree) and remain there as the fund from which the respondent draws her child and spousal support.

3. Separate Fund to Secure the Child's Future Post-Secondary Education Expenses

¶ 33 Although there is some logical appeal for such a consideration, in this case I am not convinced that there is sufficient evidence before the court respecting the numerous factors needed to establish such a fund. The child is just beginning his secondary education. There is no actuarial evidence to establish the present value of a yet-to-be-determined future cost. There are simply too many uncertainties to accede to this request and I must reject it.

4. S. 7 Extraordinary Expenses

¶ 34 The wife has very carefully prepared a detailed compendium of expenses for the child, which was submitted as Exhibit 85 at trial. The child has always been involved in extensive extracurricular activities at school. He is a gifted athlete and participates in numerous sports. In considering the claim for extraordinary expenses, I have taken into account the necessity of the expenses in relation to the child's best interests and the reasonableness of the expenses, having regard to the means of the parents and those of the child and to the spending pattern of the parents in respect of the child during

cohabitation as set out in s. 7(1). I have considered each claim and provided an amount which I feel is fair in the circumstances and allow the following as extraordinary expenses:

- | | | |
|-----|------------------------------|-----------------|
| (a) | School | \$100 per month |
| (b) | Scouts | \$ 50 per month |
| (c) | Golf and summer camp | \$100 per month |
| (d) | Orthodontics | \$ 29 per month |
| (e) | Drug/dental | \$ 27 per month |
| (f) | Tutoring (Kumon and private) | \$ 70 per month |

¶ 35 The above allowed extraordinary expenses total \$376 per month. I have disallowed the remaining claims as either uncertain (e.g. the child may not play "rep" hockey in future) or expenses which are not extraordinary and are therefore part of child support. The husband shall pay 70% of the allowed extraordinary expenses in the sum of \$263 per month, to be paid out of the secured sum for child and spousal support.

6. The Husband's Claim for an Exclusion as a Gift for Part of the Proceeds of His Sale of the Dalglo Shares

¶ 36 It is clear from the evidence that the husband acquired the shares in question from his father as a result of his father's estate freeze. As set out in *Karakatsanis v. Georgious* [1991] O.J. No. 1298 (Gen. Div.), Greer, J. explained the business purpose of an estate freeze:

The whole business purpose of an estate freeze, whether partial or whole, is to pass the future growth of the newly incorporated company to the common shareholders, some of whom may be the children of the controlling shareholder. The subscribing common shareholders pay consideration for the shares, albeit nominal, but it is fair market value at the time of purchase. Estate freezes are commonly structured this way for tax reasons. At the inception of the tax freeze, the common shares have a nominal value and thus the purchaser pays \$1.00 each for such shares. As the years go by, the growth of the company is attracted to the common shares.

Continuing, Greer, J. states:

In *Black v. Black* 18 R.F.L. (3d) 303, Walsh, J. at p. 321 in analyzing the principles of an estate freeze stated, "Clearly, this `growth' was what the estate freeze procedure was designed to isolate and protect from gift and estate taxes." Although taxpayers are no longer burdened with gift and

estate taxes, those taxpayers intending to enter into estate freezes usually obtain proper legal and accounting advice regarding the income tax consequences of such a step, keeping in mind the income tax attribution rules and the general anti-avoidance rules.

The wife sought to exclude the value of her share of Exaca under s. 4(2) of the F.L.A. as a gift acquired from a third person after the date of marriage. The onus was on the wife to prove the gift and I am not satisfied that the onus had been met. In making such a finding, I concur with the reasoning of Craig, J. in *Leslie v. Leslie and Clyde* (1987), [9 R.F.L. \(3d\) 82](#) (Ont. H.C.) and McMahon, L.J.S.C. in *Rosenthal v. Rosenthal* (1986), [3 R.F.L. \(3d\) 126](#) (Ont. H.C.) that you cannot assert for tax purposes that transfers are not a gift, but for division of family property purposes that they are. The structuring of the estate freeze with respect to Exaca had all the elements of sophisticated tax planning.

¶ 37 In this case, the husband's father testified that it was he who paid the subscription price for the husband's shares and accordingly there was no consideration paid by the husband, thus creating the gift. I disagree with this position and concur in the reasoning of McMahon, L.J.S.C. in *Rosenthal*, supra when he states:

A further question obviously comes to mind. If in 1969 Mr. Sumner or Mr. Rosenthal was asked if the shares transferred on the 15th of April were a gift, the answer would have been promptly in the negative, since this would have destroyed the legal device used to avoid the payment of gift tax. In other words, it is being argued that for the purpose of the Income Tax Act in 1969, the transfer of shares was not a gift, but for the purpose of the Family Law Act in 1986, the transfer of shares was a gift. Such a result should not be condoned by the court on the grounds of public policy alone.

¶ 38 In my view, there is nothing in the estate freeze by the husband's father that would distinguish it from the estate freezes in the cited cases. The husband has not met the onus for exclusion in this case and no portion of the proceeds in this regard may be excluded from calculation of the N.F.P.

6. Occupational Rent

¶ 39 The wife and child continue to reside in the matrimonial home since separation. For many months after separation they continued to reside there without any financial support from the husband. He left the home after committing an assault on the wife. The wife has had exclusive possession of the home by order of the court. Although this court has jurisdiction to consider and order occupational rent, I do not feel that in the circumstances such an order would be reasonable or equitable. I agree with the statement of Steinberg, J. in *Foffano v. Foffano* (1996), [24 R.F.L. \(4th\) 398](#) at p. 401 that:

I conclude that where the property in question is a matrimonial home, a claim for occupation rent by one spouse, spousal co-tenant, against the other will be granted only in exceptional cases.

¶ 40 Although it may be argued that the husband has been denied access to his equity in the matrimonial home, since I have decided that his interest be vested and the proceeds be held in a fund to secure further child and spousal support that argument fails.

7. Matrimonial Home

¶ 41 The husband's interest in the matrimonial home is to be vested in the wife in consideration of the sum of \$175,000. The proceeds are to be held as security for future child and spousal support as previously ordered herein.

8. Contents of Matrimonial Home

¶ 42 The wife has had possession of the majority of the household contents of the matrimonial residence since separation. The husband seeks an order that the wife pay him \$10,000 for his share thereof. The wife is prepared to pay the sum of \$2,000 or seeks leave to determine this issue at a later date. There is little merit in granting such leave and continuing the litigation. I am of the view that placing a reasonable and fair estimate on the contents now is far more pragmatic. I am of the view that the value of household contents should be \$12,000 and shall use that figure on the N.F.P. As well, the husband should be allowed to remove any of his personal belongings from the matrimonial home within 14 days of the release of this judgment.

9. Miscellaneous Matters

(1) Realty Tax Arrears on Matrimonial Home

I am of the view that the wife should be responsible for the realty tax arrears on the matrimonial home. Although she has not been found to owe occupational rent, it would not be fair to allow continued exclusive possession without some cost to her. The home is mortgage free and her costs of occupation, including realty taxes, insurance, utilities and maintenance should accrue to her.

(2) The Husband's Income Tax Debt and Penalties

In my view, the husband should have retired his income tax debt long ago. He made his own poor choices to speculate on the market with a substantial portion of the monies set aside for payment of that debt. Only the amount due by him for income taxes on separation will be allowed in the sum of \$96,951. It would be manifestly unfair to have the wife share in a post-separation penalty due to the husband's improvident choices.

(3) Consequences of the Husband's Access to the TAL Account of \$122,713

Since separation, the husband has accessed the TAL account to the extent of \$122,713. Counsel for the husband states that since this is shown as an asset on the husband's N.F.P., the net result will be a credit to her from him of \$61,356.50, being one-half of the sum he has drawn. Counsel for the wife correctly asserts that the wife should also be able to draw the sum of \$122,713 from the TAL funds. This full sum will be appropriately applied after calculation of the equalization payment.

(4) Characterization of the \$10,000 ordered by Justice Nelson to be Paid Out of the TAL in September 2001

I agree with counsel for the wife that this sum is on account of child and spousal support and not to treat that sum as a matter of property. It is clear that the sum was ordered to be paid on a motion that sought temporary child and spousal support and did not deal with property issues.

(5) Costs for December 5, 2001 motion and Costs for Failure of the Husband to Pay His Share of the Line of Credit at the BMO

On review of the submissions on this issue, I fix costs of the December 5, 2001 motion before Justice Nelson at \$7,500, inclusive of disbursements and G.S.T. Costs of the motion to sanction the husband for his failure to pay his share of the line of credit as ordered, I fix at \$2,500, inclusive.

(6) Value of Vehicles at Marriage and on Separation

I find that the 1983 Villager automobile was owned by the husband on the separation date and was probably unfit to drive as early as October, 2001. I accept the wife's testimony that although she used the vehicle for some time, it has simply been parked and is now in the husband's possession. I am unable to ascribe a value to this vehicle and I accept the submission that it was probably as much a liability as an asset on separation.

The husband's 1997 Villager was purchased at less than fair market value for \$9,500 less than 5 months prior to separation. There is some documented evidence that this vehicle may have been worth \$13,000 at separation date. I am not satisfied that I can ascribe a greater value than what was paid by the husband. Vehicles vary in cost due to options and

condition and so on, and to change that number here would be speculation on my part.

The wife values her 3 vehicles (a Carmen Ghia, a Corvette and a Firebird) at \$6,000. This appears as a reasonable and modest sum and has some documentary support, albeit quite dated.

(7) Interest on Line of Credit

I agree with the wife that primarily due to the husband's failure to pay his share of the line of credit, interest accrued of \$636.09 and this is the husband's responsibility.

(8) Dividend of the Husband Received January 2001

I agree with the wife that the sum of \$748.33 is to be included in the assets side of the husband on the N.F.P. statement. This appears to have been merely an oversight.

¶ 43 With the above findings I have prepared the parties' N.F.P. statement at the date of separation. I have used the N.F.P. of the wife, prepared March 20, 2003 found at Tab 17 of the respondent's Trial Record as a format for the calculations.

TABLE 1. VALUE OF ASSETS OWNED ON THE VALUATION DATE

	HUSBAND	WIFE
Part 11(a) Land		
Matrimonial home	\$175,000.00	
\$175,000.00		
Part 11(b) General Household Items and Vehicles		
Household contents		
\$12,000.00		
Vehicle - 1997 Villager	\$9,500.00	
Part 11(c) Bank Accounts and Savings		
No changes	\$445,308.00	
\$502,304.00		
Part 11(d) Securities		
Husband's Canacord Shares	\$13,973.44	

Part 11(e) Life and Disability Insurance	
Husband's London Life	\$6,800.00

Part 11(g) Money owed to you	
Dividend for 2000	\$748.33

TOTAL 1. VALUE OF ALL PROPERTY ON \$689,304.00	\$651,329.77
VALUATION DATE	

TABLE 2. VALUE OF DEBTS AND LIABILITIES ON VALUATION DATE

Part 12 No changes	\$149,640.58
\$53,425.39	

TABLE 3. NET VALUE OF PROPERTY (OTHER THAN A MATRIMONIAL HOME) and DEBTS ON DATE OF MARRIAGE

Part 13 No changes	\$1,357.00
\$61,584.00	

TABLE 4. PART 14 VALUE OF PROPERTY EXCLUDED SUBS. 4(2) OF F.L.A.

Wife's inheritance	
\$24,000.00	

CALCULATION OF EQUALIZATION PAYMENT

TOTAL 2. Debts and Other Liabilities	\$149,640.58
\$53,425.39	

TOTAL 3. Value of Property on date	\$1,357.00
\$61,584.00	
of marriage	

TOTAL 4. Value of Excluded Property	0
\$24,000.00	

TOTAL 5.	\$150,997.58

\$139,009.39

TOTAL 1. Value of Property Owned on
Valuation Date

\$651,329.77

\$689,304.00

Less Total 5.
\$139,009.39

\$150,997.58

TOTAL 6. Net Family Property
\$550,294.61

\$500,332.19

EQUALIZATION PAYMENT -
WIFE PAYS HUSBAND

\$24,981.21

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10. DISTRIBUTION OF FUNDS AT THE BANK OF NOVA SCOTIA,
CENTREPOINT
MALL, TORONTO, ONTARIO

At the conclusion of the trial, the balance in the above
account
was \$302,167. Child and spousal support payments for May, June
and
July 2003 have come out of that account for a total of \$6,021.
The
balance for the subsequent calculations is \$296,146.

Out of that balance, the wife shall be credited as follows:

(a) \$122,713.00	to equal husband's draws from the TAL account
\$2,500.00	costs for motion for husband's failure to
\$7,500.00	pay credit line
\$636.00	costs of December 5th, 2001 motion
husband's	interest on line of credit due to
	failure to pay

\$133,349.00	
- \$19,000.00	Paid out for Tilda Roll

TOTAL \$114,349.00

(b) Of the balance then remaining of \$162,797.00 the wife shall receive the sum of \$53,278.29, calculated as follows:

\$ 300.00	shortage of 1 month s. 7 expenses owed to wife
\$ (800.00)	costs owed by wife
\$ (2,639.00)	husband's debt payment on wife's behalf
\$ 81,398.50	1/2 of above balance of \$162,797.00
\$ (24,981.21)	equalization of N.F.P. wife to husband

TOTAL \$
53,278.29

¶ 44 The wife shall, therefore, receive \$114,349.00 plus \$53,278.29 for a total of \$167,627.29.

¶ 45 The balance due to the husband is \$109,518.71, of which \$3,000 has been paid towards his share of the line of credit since trial. Of the \$106,518.71 remaining to his credit, the Bank of Nova Scotia is directed to pay to the Bank of Montreal, Allan Road Branch, Nobleton, Ontario, an amount sufficient to retire the husband's share of the parties' joint indebtedness on their line of credit and counsel are to take steps to ascertain that amount. The balance then remaining of the \$106,518.71 shall be paid to the husband.

¶ 46 I note that there is a claim for divorce by the applicant, which was not addressed at trial or in submissions. Such claim is severed and may proceed uncontested or as counsel may advise after the preparation of the appropriate forms by the clerk.

¶ 47 Submissions as to costs may be made, in writing, within 30 days of the release of this judgment, no longer than 7 pages each.

MAGDA J.