CITATION: Doudkina v. Doudkine, 2010 ONSC 6221
COURT FILE NO.: FS-09-016164
DATE: 20101116

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
LARISSA DOUDKINA	)	*Natalia Denchik*, for the Applicant
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	)	
- and -	)	
	)	
	)	
VIATCHESLAV DOUDKINE	)	Viatcheslav Doudkine, in person
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	)	**HEARD**: September 14, 2010
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GRACE J.

REASONS FOR DECISION

[1] Only a few years into their marriage and with their young son Nikolai in tow, the parties came to Canada in 1999 filled with cautious optimism. Their son Peter arrived almost exactly nine months later.

[2] Many challenges have been issued. All have been answered. Some have been overcome. Others remain. Less than a decade after their arrival the parties separated and then divorced.[1]

[1] They were granted a divorce in May, 2009.

While they resolved issues of custody of and access to Nikolai and Peter, economic issues continue to be outstanding.[2]

[3] A separation agreement dated February 25, 2008 addressed some of those issues[3] but not others.[4] In any event, the applicant maintains that the separation agreement should be set aside.

[4] The issues are:

(a) What amount is payable by the respondent for child support and when should those payments start?

(b) What amount is due to equalize the net family property?[5]

(c) What is the effect, if any, of the separation agreement?

(d) Should the matrimonial home be sold?

(e) What amount, if any, should be paid by the respondent on account of spousal support?

(f) Should any portion of the order be secured?

A. <u>What amount is payable by the Respondent for child support and when should payments start?</u>

[5] The respondent acknowledges an obligation to pay child support. At issue is quantum.

[6] Making ends meet has not been an easy task. Initially the family received social assistance. In 2001 the respondent obtained a job as a security guard. He held that position for approximately five years. His annual salary ranged from $24,000 to slightly more than $30,000.

[7] Wanting to do something else the respondent began to pursue a career as an immigration consultant. He obtained experience in the industry by working part-time on a pro bono basis. He

[2] Minutes of Settlement were executed February 23, 2010 at the Office of the Children's Lawyer and a final order of Perkins J. was granted April 29, 2010 with respect to custody of and access to the children of the marriage. The applicant was granted custody of the children. Some periods of access by the respondent were specified but on balance access has been left to times requested by the children or agreed to by the parties.

[3] The parties agreed the Respondent would pay child support based on the *Federal Child Support Guidelines* (the "*Guidelines*") and allocated responsibility for paying certain expenses between them.

[4] Issues of spousal support and responsibility for special or extraordinary expenses under s. 7 of the *Guidelines* were left outstanding. In each case the separation agreement says the issue was not resolved because "The Wife refused to settle with the Husband".

[5] In *Greenglass v. Greenglass*, 2010 ONCA 675 at para. 44, we were reminded this question must be answered before moving to the issue of spousal support.

took courses, passed exams and became a member of the Canadian Society of Immigration Consultants in 2005.[6]

[8] The respondent testified that he started working full-time as an immigration consultant in November, 2007.

[9] Until mid-2010 the respondent operated his immigration consulting business as a sole proprietor.

[10] During these proceedings I obtained very limited information about the respondent's income. He reported the following income from his consulting business for 2006-2009:

Date	Gross Income	Income on Line 150 of the Respondent's returns
2006	$7,779.10	$10,389
2007	$18,780.96	$6,658[7]
2008[8]	$27,645.68	$5.764
2009	No information provided	$8,961

[11] The documentary evidence in support of the 2008 figures consisted of a copy of the Statement of Business Activities he prepared for that year and a notice of assessment issued by the Canada Revenue Agency on April 20, 2009.

[12] No supporting documentation for 2009 was provided. The respondent simply provided a copy of the notice of assessment he received from the Canada Revenue Agency dated April 22, 2010.

[13] Earlier this year his business reached the point where he decided to incorporate. According to the respondent's most recent financial statement[9] the business is conducted by an entity called Consimco Immigration Inc. The respondent is the sole shareholder.

[14] The respondent's September 1, 2010 financial statement reports monthly employment income of $1,050 or $12,600 annually. No supporting documentation of any kind was produced or introduced into evidence. If accepted at face value the *Guidelines* would require a monthly payment of $169 for the support of Nikolai and Peter. Does the figure of $12,600 fairly reflect the money available to the respondent for the payment of child support?

[6] The activities of its members are overseen by Citizenship and Immigration Canada.
[7] This number is drawn from the Notice of Assessment of the Canada Revenue Agency dated June 27, 2008. The respondent's statement of professional activities reported net income of $3,510.23 before his claim to business-use-of-home expenses.
[8] The valuation date is February 25, 2008.
[9] It was sworn September 1, 2010

[15] Counsel for the applicant, Ms Denchik, argues that I should not accept the respondent's figures. In part she bases that submission on information she found on a website maintained by Statistics Canada.[10] Ms Denchik submits it demonstrates that the income reported by the respondent is far less than the industry norm.[11]

[16] I was unable to obtain any assistance from the information extracted from the Statistics Canada website. It was produced for the first time in closing argument. No evidentiary or legal foundation for its introduction was identified. Leaving all other issues aside the document was, in part, unreadable. It was stated to relate to Social Policy Researchers, Consultants and Program Officers. I am unable to determine if a person acting as an immigration consultant fits within that description. If the website provides an explanation for the average and high hourly wage rates, it was not shared with me. In short, the information was not properly introduced nor was any foundation for reliance upon it laid.

[17] However, Ms Denchik advanced a more formidable argument. Despite being obligated to do[12] so the Respondent did not produce any financial statements for his business whether pre or post-incorporation.[13] He did not produce his income tax return for 2009. She submits that I am in a position to impute income to the Respondent by reason of his non-disclosure. I agree. While the Respondent attributed his failure to a lack of request, the requirements of the *Guidelines* are mandatory and not dependent upon a request being made.

[18] I am left without any information concerning the gross revenue generated by or expenses charged to the business in 2009 or 2010.

[19] For that reason I reviewed the information which was provided for 2007 and 2008 with care. Did other evidence support the respondent's statement that his business generated only modest revenue and income in each of those years? In my view, it did not.

[20] I reviewed copies of statements for the respondent's personal bank account at the Royal Bank of Canada for the period from December 7, 2007 to January 5, 2009.[14] Monies were routinely transferred to and from other accounts. Those transfers accounted for most of the transactions recorded. Yet records relating to those other accounts were not provided nor were copies of account statements for the Royal Bank of Canada account for the period from January 5, 2009 onward.

[10] The submission is based on information compiled by Human Resources and Social Development Canada.
[11] It reports that the average hourly wage for "Social Policy Researchers, Consultants and Program Officers is $24.85 and that the high is $41.05.
[12] See ss. 21 (1) (d), (f) and 22 (2) of the *Guidelines*.
[13] While the corporation is in its first fiscal year, no opening financial statement was prepared.
[14] The statement for the period from April 8 to May 8, 2008 was missing.

[21] On October 15, 2008 the respondent purchased three ounces of gold for $3,071.41. He paid cash. The source of the money is unclear.[15] Various records relating to transactions conducted at the Royal Bank of Canada between October 6 and December 4, 2008 were entered into evidence. Two transactions aggregating almost $5,000 did not appear on the account statements entered into evidence despite the fact the same client card was utilized.

[22] That suggests a second Royal Bank of Canada account was utilized. Yet I have not seen any disclosure of or relating to such an account. Suffice to say that I am not confident that the respondent's figures should be accepted at face value: *Davids v. Davids*, [1998] O.J. No. 2859 (Gen. Div.).

[23] I have similar concerns for 2009 and 2010 year-to-date. Required disclosure has not been made. Under the heading Bank Accounts, Savings, Securities and Pensions, the Respondent's September 1, 2010 financial statement reported six items having, in the aggregate, a nominal balance.[16] No supporting documents were provided.

[24] The financial statement alleges that exclusive of the mortgage on the matrimonial home, the respondent's debts totalled approximately $24,500 on September 1, 2010 representing an increase of approximately $5 k since the date of separation. At first blush that seems to be consistent with the respondent's evidence that his income has been low since separation.

[25] However, the allegation bears closer scrutiny. The current small monthly excess of income over expenses may not be enough in amount or duration to reverse earlier erosions in net worth. However, the respondent's financial statement is not consistent with the figures he inserted in the separation agreement. In that document he claimed debts aggregating approximately $29 k. Those amounts had been updated from an earlier November 1, 2007 draft. If the liabilities listed in the separation agreement are used, the aggregate of the respondent's debts actually *fell* by almost $4,500.[17] A reduction of that magnitude simply is not possible based on the income figures reported by the respondent.

[26] Again I am not confident the respondent has provided accurate income information. I cannot tell what expenses the respondent claimed in 2009 or year-to-date in 2010 let alone their reasonableness. I cannot hide my surprise that the respondent would incorporate his business in

[15] The respondent testified that he had accumulated savings over the years and had supplemented those savings with the proceeds of the sale of a condominium in Russia. No documentation relating to the sale was referred to or entered into evidence.

[16] The balance was said to be $36.22. The accounts were stated to be with ING Direct (an RRSP account and an investment savings account), PC Financial (2 accounts), RBC and Buduchnist Credit Union.

[17] The amount may actually be higher. In the separation agreement the reference was to the respondent's RBC Visa card and to a balance of $6 k. The financial statement makes no mention of that card. It mentions, instead, the applicant's RBC card which was *not* referred to in the executed separation agreement though it had been mentioned in the earlier draft. The respondent alleges the balance due in respect of the applicant's RBC Visa card was $8,960 as of September 1, 2010. The applicant says the balance was only $500 on August 26, 2010. I was not shown any source documents to assist me in reconciling the conflicting statements.

2010 given the lack of financial success he claims his foray into the immigration consulting business has yielded to date.

[27] Furthermore, if the respondent's figures are in the range reported why has the respondent persisted in an activity which is generating far less income than his job as a security guard where he earned a steady salary?

[28] In my view I am at liberty to impute income to the Respondent for two reasons: first, the Respondent failed to provide financial information when under a legal obligation to do so. That failure justifies the drawing of an adverse inference. Second, if the respondent's figures are accepted, his income is below what he is capable of earning. That fact is not attributable to reasonable educational needs, the needs of the children of the marriage or reasonable health needs of the respondent: *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 (C.A.). His career aspirations have not, based on his evidence, been achieved: *Hanson v. Hanson,* [1999] B.C.J. No. 2532 (S.C.). Consequently, the court may impute such amount of income to him as the court considers appropriate.[18] The court's discretion must, of course, be exercised on a principled basis.[19]

[29] In my view it is reasonable to impute income to the respondent based on his earnings as a security guard. As indicated previously his earnings ranged from $24k to approximately $30 k per annum over a five year period. I impute to the respondent income in the amount of $27,000 for 2008, $28,500 for 2009 and $30,000 for 2010. Based on those amounts the *Guidelines* amount is $403 per month in 2008, $424 in 2009 and $444 in 2010.

[30] The parties agree that the obligation to pay support should commence on or very near to the date of separation.[20] The real issue is whether the Respondent has already paid $20k on account of child support as he alleges comprising:

a) A payment of $3,000 in February, 2008;

b) A payment of $15,000 cash to the Applicant in January, 2009. He testified that he had accumulated cash in part from pre-separation savings and in part from the sale of a condominium in Russia some years earlier; and

c) A payment of $2,000 cash to the Applicant in July, 2009.

[31] The Applicant does not deny receiving those amounts but denies that they were paid on account of child support. She says:

[18] *Guidelines*, s. 19 (1) (f)
[19] *Bak v. Dobell*, 2007 ONCA 304.
[20] The separation agreement contemplated a March 1, 2008 starting date.

a) The $3,000 payment was made to satisfy an amount due by the respondent because he obtained credit for his business using her Royal Bank of Canada Visa account;

b) The $15,000 "payment" was, in fact, cash she found hidden in the matrimonial home. The applicant testified she believes the money represented the balance of the proceeds of a student loan she had obtained through the Ontario Student Assistance Program to assist her with her studies at Humber College. According to the applicant the respondent had controlled the family finances including the proceeds of the student loan; and

c) The $2,000 payment was intended to reimburse the applicant for payments she had made on account of the mortgage on the matrimonial home when the respondent breached his promise to make them.[21]

[32] Though diametrically opposed, two of the payments are quickly resolved in favour of the applicant. In cross-examination, the respondent conceded that the cash payment in July, 2009 was made in the circumstances the applicant had outlined. Similarly I accept her version with respect to the $3,000 payment. The November 1, 2007 draft separation agreement had shown a balance of $2,450 owing in respect of the applicant's RBC Visa card. The respondent proposed that he would bear responsibility for that liability. The executed separation agreement did not refer to that liability at all. It had been satisfied. That fact is, in my view, consistent with the applicant's version of events and I accept it.

[33] I also accept the applicant's testimony concerning the payment of $15,000. If the respondent had, in fact, received and retained proceeds from the sale of a condominium in Russia some documentary evidence relating to the sale should have been available. Yet none was produced.

[34] Furthermore, in an extremely detailed answer dated July 22, 2009, the respondent said this:

> 15. Child and spousal support were discussed and agreed upon in the Separation Agreement dated February 25, 2008. The Applicant received 15,000 CAD in cash of *borrowed money* from the Respondent and to the best of my knowledge the money was deposited into RBC bank account. (My italics)

[35] An inaccuracy in the paragraph is immediately apparent. The parties did not resolve the issue of spousal support in the separation agreement. In fact, it specifically provided that the "Wife refused to settle with the Husband any payments for her own support."

[21] The promise is set forth in paragraph 14 (b) of the separation agreement.

[36] More importantly, why would the respondent describe the $15,000 as "borrowed money" if, as he now says, it represented a lump sum payment on account of child support from money he had accumulated from his employment and the disposition of a capital asset? I can think of no alternative but this: the money was paid to the applicant because it was already hers. It had been "borrowed" by her because of her enrolment at Humber College.

[37] The respondent has sought to reinvent history. I do not accept his explanation. I accept the applicant's evidence. The payment of child support should have commenced on March 1, 2008. The parties did agree that, on rare occasions, the respondent gave to the applicant $100 cash.[22] I will credit the respondent with $500 on account of those payments but not with any portion of the $20,000 described in paragraphs 30 and 31 of these reasons.

[38] By my calculation the respondent owes child support totalling:

a) For 2008 the principal sum of $4,030;

b) For 2009 the principal sum of $5,088;

c) For 2010 the principal sum of $4,884 inclusive of the payment due November 1, 2010.

[39] Those amounts total $14,002 leaving a balance owing of $13,502 after deduction of the $500 credit referred to above. The respondent is ordered to pay the sum of $13,502 to the applicant forthwith. If not paid interest shall accrue at the rate of 2 per cent per year shall accrue commencing January 1, 2011. He shall also pay ongoing child support to the applicant at the rate of $444 per month for the support of the two children, Nikolai Doudkine born November 12, 1997 and Peter Doudkine born June 22, 2000 commencing December 1, 2010 and on the first day of each month thereafter for as long as they are a child of the marriage as defined by the *Divorce Act.* That sum is based on the respondent having annual income in the imputed amount of $30,000.

[40] While no special or extraordinary expenses were specifically identified, each child has Type 2 Diabetes and Nikolai suffers from migraines. At the time of trial the applicant was receiving income in the amount of $22,341 per year.[23] The respondent shall pay his proportional share of section 7 expenses as they arise within fifteen days after he receives evidence that the expense has been or is about to be incurred. Those expenses include any medical and dental insurance premiums attributable to the children, health-related expenses that exceed any insurance reimbursement by more than $100 annually including orthodontic treatments and prescription drugs. They shall also include any extraordinary expenses for extracurricular activities up to a maximum of $500 per child. The applicant shall pay 42.68 per cent and the respondent 57.32 per cent of such expenditures.

[22] The applicant testified this occurred on 3 or 4 occasions. The respondent didn't know how many times it occurred.

[23] The income is received from a combination of employment insurance and child tax benefits.

B. What amount is due to equalize the net family property?

[41] After divorce the spouse whose net family property is the lesser is entitled to one-half the difference.[24]

[42] According to the applicant's last financial statement her net family property on the date of separation was $28,666.33.[25] The respondent's last financial statement indicated the value of his net family property was $29,450.39.

[43] I make three observations: first, the applicant indicated the value of certain bank accounts was to be determined. Second, the parties attributed different values to the matrimonial home. Third, the husband attributed a value of $1,941.94 to his consulting business. I will deal with those items in turn.

[44] With respect to the bank accounts, both financial statements are missing so much information that I would be guessing whether the respondent's discloses the missing balances. While names of institutions are mentioned, the location and account numbers are not. Doing the best I can I attribute a value of $1 k to the applicant in respect of this category.

[45] With respect to the matrimonial home, the applicant based her economic interest on a value of $144,000. The respondent based his on a value of $120,000.[26] For the purposes of comparison the value should be the same. Since I have no objective evidence of value, I will split the difference and use $132,000. The result is in an adjustment to each party's figure of $6,000: in the case of the applicant by way of a reduction and in the case of the respondent by way of an increase.

[46] I turn to the consulting business. The basis for its valuation is entirely unclear. No evidence, let alone credible evidence, has been lead by the respondent to support that figure despite his obligation to do so: *Homsi v. Zaya*, [2009] O.J. No. 1552, 2009 ONCA 322. In those circumstances what number should be used? The trial judge in *Homsi* was faced with a similar dilemma without proper evidence of the value of the matrimonial home and contents. In upholding the trial judge's estimate, Epstein J.A. said at paragraph 38:

> While it is true that there is a paucity of evidence in this regard, the onus is on the party asserting the value of an asset that he or she controls to provide credible evidence as to its value: *Conway v. Conway*, [2005] O.J. No. 1698 (S.C.J.) at para.14. Homsi had control of the items in question since he took possession of the matrimonial home and proceeded to sell it without Zaya's consent. It was open to the trial judge to draw an adverse inference from Homsi's failure to

[24] *FLA*, s. 5 (1).
[25] The amount specified in the financial statement sworn August 26, 2010 was actually$29,733.19 but I do not believe it was mathematically correct. The value of all property owned on the valuation date was shown as $74,000 and the value of deductions as $45,333.67. Part 9 of the Applicant's financial statement did not correctly reflect any of those numbers.
[26] The parties seem to agree that the current value is in the range of $144,000.

> produce an updated financial statement or an assessment of the property in support of his position. While the factual foundation for the trial judge's numerical calculations, as well as his ultimate assessment of value of the net family property, are rather opaque, I appreciate that he was not provided with much assistance in this regard. The trial judge's determination that Zaya was entitled to an equalization payment of $12,000 was supported by the limited evidence available to him.

[47] Aside from that raw data I have nothing to guide me with respect to valuation. On the valuation date the business was modest but growing. While the figure used by the respondent seems low, it is difficult to say by how much. Doing the best I can, I ascribe an additional value of $5,000 to the business as of the date of separation.

[48] In light of the above, the adjusted net family property values are as follows.

	Applicant	Respondent
Claimed Amount	$28,666.33	$29,450.39
Adjustment – Matrimonial home	($6,000)	$6,000
Adjustment – Bank Accounts	$1,000	
Adjustment - Business		$5,000
Adjusted Total	$23,666.33	$40,450.39

[49] The difference is $16,784.06 and therefore the amount due by the respondent to the applicant under s. 5 (1) of the *FLA* is $8,392.03.

[50] The applicant takes the position that she is entitled to an unequal division of the net family property.

[51] In limited circumstances the court has jurisdiction to make such an order. Section 5 (6) of the *FLA* provides:

> The court may award a spouse an amount that is more or less than half the difference between the net family properties if the court is of the opinion that equalizing the net family properties would be unconscionable, having regard to,
>
> (a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the date of the marriage;
>
> (b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;
>
> (c) the part of a spouse's net family property that consists of gifts made by the other spouse;

(d) a spouse's intentional or reckless depletion of his or her net family property;

(e) the fact that the amount a spouse would otherwise receive under subsection (1), (2), or (3) is disproportionately large in relation to a period of cohabitation that is less than five years;

(f) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities than the other spouse for the support of the family;

(g) a written agreement between the spouses that is not a domestic contract; or

(h) any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

[52] The process to be undertaken is summarized in *Serra* v. *Serra*, 2009 ONCA 105:

> The steps to be taken when s. 5(6) is engaged are well-established. The court must first ascertain the net family property of each spouse, by determining and valuing the property each owned on the valuation date (subject to the deductions and exemptions set out in s. 4). Next, the court applies s. 5(1) and determines the equalization payment. Finally – and before making an order under s. 5(1) – the court must decide whether the equalization of net family properties would be unconscionable under s. 5(6), having regard to the factors listed in paragraphs 5(6)(a) through (h). See *Rawluk v. Rawluk* 1990 CanLII 152 (S.C.C.), [1990] 1 S.C.R. 70 at pp. 93-94; *Berdette v. Berdette* (1991), 3 O.R. (3d) 513 (C.A.), at pp. 525-526; *Stone v. Stone* 2001 CanLII 24110 (ON C.A.), (2001), 55 O.R. (3d) 491, at para. 39; *LeVan v. LeVan* 2006 CanLII 31020 (ON S.C.), (2006), 82 O.R. (3d) 1 (S.C.J.).

[53] Is the result unconscionable given the factors set forth in s. 56 (4) *FLA?* A very high threshold must be met. An equal division must "shock the conscience of the court": *Merklinger v. Merklinger*, (1992), 11 O.R. (3d) 233 (Ont. Gen. Div.), aff'd 1996 CanLII 642 (ON C.A.), (1996), 30 O.R. (3d) 575 (C.A.); *Serra*, supra, at para. 47.

[54] In this case equalizing the net family properties does not have that effect. None of the subparagraphs set forth in s. 5(6) have been engaged. Adjustments to the value of the respondent's net family property have already been made. Income has been imputed to the respondent. There is no reason to deviate from the general rule.

C. What is the effect, if any, of the separation agreement?

[55] From a financial perspective the separation agreement has a very limited effect. It divided certain items of personal property. It gave the applicant "a licence" to occupy the

matrimonial home exclusively for an indefinite period.[27] For approximately the first four months[28] the respondent was to make all required payments in respect of the mortgage, condominium payments[29] and utilities for the matrimonial home. He was also to pay the cost of insuring the matrimonial home and the family's automobile. Thereafter, his obligations were to be limited to the mortgage and the cost of automobile insurance. The applicant agreed to bear the other costs relating to the matrimonial home.

[56] The parties also agreed that child support would be paid by the respondent to the applicant in accordance with the *Guidelines* and that the net proceeds of sale of the matrimonial home would be divided equally.

[57] It then provided:

> This Agreement adequate (sic) and completely provides for the present and future needs of the Husband and the Wife, and each covenants and agrees that the arrangement herein described constitutes a full, complete and final settlement of all rights, causes, claims and demands with respect to support and property.

[58] As mentioned earlier the separation agreement does not deal with spousal support. It did not address the issue of equalization of the parties' net family property. It made no representation concerning the respondent's income. In short, it is a contract which never purported to address, let alone resolve, all of the financial issues. As a matter of interpretation, the separation agreement does not, in my view, preclude consideration of any of the issues addressed in these reasons.

[59] I am fortified in my view by the fact no lawyer was involved in the drafting, negotiation or execution of the separation agreement. It was initially drafted by the respondent in November, 2007 and presented to the applicant. She declined to sign it. While the parties have agreed in this proceeding that their date of separation was February 25, 2008,[30] marital discord clearly arose much earlier.[31]

[60] The separation agreement that was executed February 25, 2008 follows the same template as the original draft. Many of the financial provisions were, however, amended. As executed the respondent was to bear responsibility for some of the expenses but for a shorter term. It is impossible to tell whether the changes were advantageous to the applicant or not.

[61] If I am wrong in my interpretation of the scope of the separation agreement and the release provision contained within it, should the separation agreement be set aside?

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[27] Until the parties either agreed or the court ordered that the matrimonial home be sold.
[28] The period ran from February 25 until July 1, 2008.
[29] His responsibility was to include special assessments.
[30] Which is the date appearing on the separation agreement.
[31] They resided in the same home but occupied separate bedrooms for some time.

[62] The applicant relies on section 56 (4) of the *Family Law Act*, R.S.O. 1990, c. F.3 (*"FLA"*). It provides:

> A court may, on application, set aside a domestic contract or a provision in it,
>
> (a) if a party failed to disclose to the other significant assets, or significant debts or other liabilities, existing when the domestic contract was made;
>
> (b) if a party did not understand the nature or consequences of the domestic contract; or
>
> (c) otherwise in accordance with the law of contract.

[63] The analysis undertaken under s. 56(4) comprises two-parts: *Demchuk v. Demchuk* (1986), 1 R.F.L. (3d) 176 (Ont. H.C.J.). The court must first determine whether the applicant has demonstrated the operation of one or more of the delineated circumstances. If proven, the court must then consider whether it is appropriate to exercise discretion in favour of setting aside the agreement: *Levan v. Levan,* 2008 ONCA 388 at para. 51.

[64] In this case a lengthy analysis is not required. There is a glaring – and in my view significant – omission from the list of assets which appears as part of a schedule to the agreement. That omission is the respondent's immigration consulting business. I should elaborate on his involvement in that endeavour.

[65] The respondent began practising as an immigration consultant in 2003. He alleged that he originally worked on a pro bono basis and began earning income from that activity in 2004. While serving as a security guard[32] he wrote his professional exams in 2005 and 2006. He began paying membership dues to the Canadian Society of Immigration Consultants in 2005 The respondent says he started working as a full-time immigration consultant in November, 2007[33].

[66] The applicant received no disclosure of the assets, liabilities, revenue or expenses of the business. Even if the respondent's venture was in its early stages, disclosure was required.[34] By the time the separation agreement was executed it was the respondent's sole source of income and it has continued to provide him with a source of income which has met its needs. I find that the applicant has met the onus she bears.

[67] The respondent also failed to disclose that he had a safety deposit box. Even today the applicant does not know what was contained within it.[35] Given the fact that the respondent

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[32] According to the respondent he earned between $24 k and $30 k annually in that position.
[33] The Respondent is a member of the Canadian Society of Immigration Consultants. Activities are overseen by Citizenship and Immigration Canada.
[34] The business was conducted from a bank account which was not accessible to the Applicant.
[35] The contents were removed in the presence of the police but no report from that source is in hand.

completed various transactions in cash, her submission that it contained items of value is, in my view, more than mere suspicion. She has proven that s. 56 (4) (a) of the *FLA* has been engaged.

[68] Should any portion of the separation agreement be set aside for non-disclosure? In my view the release provision should be set aside if it would otherwise affect the applicant's equalization claim. I say that for two reasons:

> a) First, it was the respondent's idea that the parties enter into a separation agreement. He drafted and revised the agreement and requested that the applicant execute it a number of times between November, 2007 and February, 2008 without either party seeking professional advice concerning their rights and obligations. In those circumstances it was incumbent on the respondent to make full financial disclosure. His failure is sufficient to warrant the exercise of the court's discretion to set aside the agreement: *Dubin v. Dubin* (2002), 34 R.F.L. (5th) 227 (Ont. S.C.J.);
>
> b) Second, even if that fact is not sufficient, the circumstances surrounding execution lead to the same result. The applicant testified that discussions occurred over a number of months and during a period the respondent was sometimes supportive of the continuation of the marriage and sometimes against it. That caused understandable tension. The situation was exacerbated by the demands of the applicant's program at Humber College, her own limited financial means and the pressures of raising two young children in an increasingly uncomfortable environment. According to the applicant she was verbally abused by the respondent following periods of heavy drinking. As an act of resignation the separation agreement was signed. This evidence was not seriously challenged in cross-examination and I found the applicant entirely credible.

[69] I am of the opinion that the separation agreement was not entered into by the applicant freely or fairly. The release provision cannot stand. In *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295 the Supreme Court of Canada upheld the trial judge's decision to set aside a separation agreement. Writing for the court, Abella J. said at para. 6:

> The husband's exploitative conduct, both in failing to make full and honest disclosure and in taking advantage of what he knew to be his wife's mental instability, resulted in a finding of unconscionability

[70] The applicant in this case was not suffering from "mental instability". Not all of the provisions of the separation agreement are "unconscionable". However, a global release provision was overreaching and is grossly unfair. The applicant was vulnerable: emotionally, physically and financially. In my view the respondent took advantage of that unfortunate imbalance: *Miglin v. Miglin*, 2003 SCC 24 (CanLII), 2003 SCC 24, [2003] 1 S.C.R. 303. I acknowledge a difficulty in assessing the economic consequences that flowed but that is because the respondent did not – and still has not – made adequate financial disclosure. Nor, such as they are, has he fulfilled his contractual obligations. I am of the view that paragraph 16 of the separation agreement (the release provision) should be set aside. Had I read any of the other

provisions of the separation agreement as being inconsistent with the claims made for relief in this proceeding I would have also set them aside.

D. Should the matrimonial home be sold?

[71] The matrimonial home is jointly owned. The separation agreement provided:

> 14. (a) The Wife shall have a licence to exclusive occupation and possession of the matrimonial home…at 509-3621 Lakeshore Blvd W Toronto…until such time as the Husband and the Wife mutually agree to sell the home. If the parties cannot agree when the home is to be sold, either of them may apply to Court for further determination of same. When the home is sold, the loss (sic) resulting therefrom…shall be divided equally…

[72] Ordinarily a joint tenant has a right to require sale.[36] However, as envisioned by the separation agreement the applicant has continued to live in the matrimonial home with Nikolai and Peter. The separation agreement contemplated court intervention if the parties failed to agree that the property should be sold.

[73] Both Nikolai and Peter attend James S. Bell Public School. They are in grade 8 and 5 respectively. The school is a short walk away.[37]

[74] The applicant does not wish to sell the matrimonial home. She testified that the children are happy there and at their school. They have forged relationships and do not want to move. They have endured their share of drama. They need stability and security. Her evidence was unchallenged.

[75] The respondent seeks the sale of the matrimonial home although seemingly he has no objection to the applicant being allowed to purchase his interest. He seemed to be motivated by one thing: avoiding an obligation to pay child support. With her share of the equity in the matrimonial home, the applicant and the children could live, the respondent suggested, for some time without much, if any, economic contribution from him. Perhaps so. But should they? In my view the matrimonial home should not be sold at the present time.

[76] Given the limited financial position of the parties, complete uncertainty whether other suitable and affordable accommodation would be available in the present and desired area, the likelihood of a move having a disruptive effect on the children and the views and preferences expressed on their behalf by the applicant, it is appropriate that the applicant be given exclusive possession of the matrimonial home until Peter completes grade 8: *Ward v. Ward* (1990), 26 R.F.L. (3d) 149 (Ont. C.A.).

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[36] *Ali v. Ansar*, 2010 CarswellOnt 2537 at para. 90 (S.C.J.)
[37] The Applicant estimated the walk took five minutes.

[77] At that point and absent the earlier consent of the parties or a motion to vary the order based on a material change in circumstances, the matrimonial home should be sold and, *subject* to what follows the net proceeds should be divided equally.

E. What amount, if any, should be paid by the Respondent on account of spousal support?

[78] The parties were married for over fourteen years. Since her arrival in Canada the applicant has had several short-term jobs. Initially she worked in a bakery. She worked long days: ten to twelve hours. I believe her when she says that she also performed the bulk of the household chores and shouldered her share of caring for first one and then two small children.

[79] Later she worked at what she described as a "sewing factory" and at a No Frills store. To earn extra income she baked cakes and sold them. She testified that her money was turned over to the respondent who managed the family's finances. Money was tight – particularly for the applicant. Clothes were often supplied by the family's church. Again, this testimony was not challenged.

[80] In an effort to improve her employability, the applicant enrolled in an English class at Humber College. She did well. She then enrolled in its Human Resources Management program. She said that the respondent was unsupportive and surprised when she successfully completed the first academic year.

[81] Her efforts to contribute economically continue. When this proceeding started she was working for Katz Group Canada which owns and operates Pharma Plus. An initial one-month placement was extended but in May, 2010 she lost her job. Her search for new employment was ongoing. At the time of trial she was taking an on-line payroll course.

[82] Taking into account the factors set forth in section 15.2 (4) and (6) of the *Divorce Act,* S.C. 1985, c. 3 (2nd Supp.) I am of the view the Applicant is entitled to spousal support: *Moge v. Moge,* [1992] S.C.R. 813; *Bracklow v. Bracklow,* [1999] 1 S.C.R. 420.

[83] Based on the primary obligation of the respondent to pay child support, the income of the applicant and, as far as I can determine it, the respondent, there is limited ability for the respondent to pay spousal support. In those circumstances I order the respondent to pay spousal support to the applicant in the amount of $50 per month commencing January 1, 2011 and on the first day of each month thereafter.

F. Should any portion of the order be served?

[84] The *Guidelines* permit the court to require that the amount payable under a child support order be secured.[38] A similar power is given with respect to an equalization payment under the *Family Law Act.*[39]

[85] Given the respondent's inadequate disclosure, his failure to accept or fulfill his responsibility to his children and his former spouse and his attempt to mischaracterize the limited money the applicant obtained from him, it is imperative that the respondent's obligations for child support and for the equalization payment be secured.

[86] In the circumstances I order that the respondent's one-half interest in the matrimonial home shall stand as security for payment of:

> a) the amount due by the respondent to the applicant under s. 5 (1) of the *FLA* being $8,392.03;
>
> b) the sum of $13,502 being the amount owing on account of arrears of child support;
>
> c) all subsequent amounts due in accordance with these reasons for child support and the respondent's proportional (57.32 per cent) share of special or extraordinary expenses due under section 7 of the *Guidelines.*

[87] The respondent is also directed to provide a copy of the information set forth in section 21 of the *Guidelines* to the applicant annually commencing July 1, 2011 and on July 1 of each succeeding year. Specifically the respondent must provide a complete copy of his personal income tax returns, all notices of assessment and reassessment, a complete and accurate copy of the financial statements and related information concerning Consimco Immigration Inc. which should be prepared in accordance with generally accepted accounting principles.

DISPOSITION

[88] In summary, I order that:

> a) The respondent pay the sum of $13,502 to the applicant forthwith on account of arrears of child support. If not fully paid, interest will accrue on the unpaid portion at the rate of 2.0 per cent per year commencing January 1, 2011;
>
> b) The respondent pay ongoing child support to the applicant in the monthly amount of $444 for the support of the two children, Nikolai Doudkine born November 12, 1997 and Peter Doudkine born June 22, 2000 commencing December 1, 2010 and on the first day of each month thereafter for as long as they are a child of the marriage as defined by

[38] That permission is set forth in section 12 of the *Guidelines.*
[39] The power is set forth in section 9 (1) (b). Section 9 refers to applications under section 7 which, in turn, refers to section 5. Section 5 deals with the equalization of net family properties.

the *Divorce Act.* That sum is based on the Respondent having annual income in the imputed amount of $30,000;

c) The respondent pay a proportional share of section 7 expenses as they arise within fifteen days after he receives evidence that the expense has been or is about to be incurred. Those expenses include any medical and dental insurance premiums attributable to the children, health-related expenses that exceed any insurance reimbursement by more than $100 annually including orthodontic treatments and prescription drugs. They shall also include any extraordinary expenses for extracurricular activities up to a maximum of $500 per child. The applicant shall pay 42.68 per cent and the respondent 57.32 per cent of such expenditures.

d) the respondent pay the sum of $8,392.03 to the applicant to equalize the parties' net family property. That payment shall be made by March 31, 2011. If not fully paid, interest shall accrue on the unpaid portion at the rate of 2.0 per cent per year commencing April 1, 2011;

e) the applicant be given exclusive possession of the matrimonial home until Peter Doudkine completes grade 8;

f) the respondent pay spousal support to the applicant in the amount of $50 per month commencing January 1, 2011 and on the first day of each month thereafter;

g) the respondent's one-half interest in the matrimonial home shall stand as security for payment of his obligations set forth in subparagraphs (a), (b), (c) and (d) above;

h) as set forth in greater detail above, the respondent provide to the applicant a copy of the information set forth in section 21 (1) of the *Guidelines* annually commencing July 1, 2011 and on July 1 of each succeeding year.

[89] Given the applicant's success she is presumptively entitled to costs.[40] Although Ms Denchik provided me with a bill of costs it had not been shared with the respondent and I did not hear submissions on costs. I would ask that written submissions be made to me through Judges' Administration, Main Floor, 361 University Avenue, Toronto, by December 17, 2010 which should include, in the case of Ms Denchik. dockets to support the claims made on her client's behalf. The written submissions shall include details of any offers to settle which were exchanged.

[40] Rule 24 (1) of the *Family Law Rules.*

GRACE J.

Released: November 16, 2010

CITATION: Doudkina v. Doudkine, 2010 ONSC 6221
COURT FILE NO.: FS-09-016164
DATE: 20101116

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

LARISSA DOUDKINA

Applicant

- and -

VIATCHESLAV DOUDKINE

Defendant

REASONS FOR DECISION

GRACE J.

Released: November 16, 2010