

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Swimm v. Swimm*, 2025 NSSC 247

Date: 20250728

Docket: SFH HFD No. 1201-075323

Registry: Halifax

Between:

Lori Dawn Swimm

Petitioner

v.

William Lloyd Clark Swimm

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Samuel Moreau

Heard: February 21, 2025, and March 3, 2025, in Halifax, Nova Scotia

Released to the Parties: July 28, 2025

Written Decision: September 2, 2025

Subject: Bifurcation of issues (Matrimonial Assets); Division of Matrimonial Assets; Inferences; Credibility; Sections 13 and 18 of the *Matrimonial Property Act*.

Summary: The parties agreed to bifurcate the issue of division of matrimonial assets with the disputed item being the business known as Avive Naturals Inc. Ms. Swimm claimed a 50% share of Mr. Swimm's interest in Avive. Mr. Swimm maintained that Ms. Swimm was not entitled to a share of his interest.

Issues: (1) Whether Avive is a matrimonial asset or business asset.

(2) Is Ms. Swimm entitled to a share of Mr. Swimm's interest in Avive under sections 13 and/or 18 of the *Matrimonial Property Act*?

(3) The credibility of the parties.

Result: The Court found that Ms. Swimm is entitled to 40% of Mr. Swimm's interest in Avive.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.
QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.***

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Swimm v. Swimm*, 2025 NSSC 247

Date: 20250728

Docket: SFH HFD No. 1201-075323

Registry: Halifax

Between:

Lori Dawn Swimm

Petitioner

v.

William Lloyd Clark Swimm

Respondent

Judge: The Honourable Justice Samuel Moreau

Heard: February 21, 2025 and March 3, 2025, in Halifax, Nova Scotia

Released to the Parties: July 28, 2025

Written Release: September 2, 2025

Counsel: Kelsey Hudson for the Petitioner
Philip Whitehead for the Respondent

By the Court:

Introduction

[1] In her Petition for Divorce filed November 20, 2023, Ms. Swimm advances a claim under the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, for division of the parties' assets, et al.

[2] The parties agreed to bifurcate the claims concerning division of their assets, with the disputed item being the business known as Avive Naturals Inc. (herein after referred to as Avive).

[3] The trial was heard on February 21 and March 3, 2025. In addition to the parties, Traci Boutilier (called as a witness for Ms. Swimm) also provided viva voce evidence by way of cross examination. Ms. Boutilier is Ms. Swimm's sister.

[4] Counsel for Mr. Swimm identified a number of paragraphs contained in Ms. Swimm and Ms. Boutilier's Affidavit evidence, which he requests be ruled inadmissible and struck from the proceeding. I acknowledged Counsel's request and indicated I would attribute the appropriate weight to the impugned paragraphs in accordance with the relevant legal principles. I have done so. *White v. Stevens-White*, 2013 NSSC 368.

[5] Counsel for Ms. Swimm confirmed her client's agreement to paragraphs 42 and 43 of Traci Boutilier's Affidavit sworn January 31, 2025, being struck from the proceedings.

[6] Also, Counsel for Mr. Swimm brought attention to the recognized but inconsequential feature that Ms. Swimm had not formally pled/sought relief under sections 13 and 18 of the *Matrimonial Property Act* in her filed documents. As noted Ms. Swimm advances a claim for division of the matrimonial assets in her Petition for Divorce filed on November 20, 2023. The dispute over Avive, including the parties' respective positions were well known to both and referenced on several occasions during court appearances prior to February 21, 2025. I am satisfied any considerations in this decision regarding Avive can include sections 13 and 18 of the *Matrimonial Property Act*.

Issues

[7] Is Avive a matrimonial asset or business asset? If found to be a business asset, a successive examination will consider whether Ms. Swimm is entitled to a share of Mr. Swimm's interest in the business under sections 13 and/or 18 of the *Matrimonial Property Act*.

[8] After a thorough review of the evidence, it is apparent the issue of credibility is relevant and ought to be considered.

Background

[9] The parties began living together in 2007 and were married in April, 2010. They separated in early October, 2023. Ms. Swimm filed a Petition for Divorce soon after.

[10] There are two dependent children, L., born in 2008 and X., born in 2011. As per the Second Interim Consent Order (Parenting) issued on August 22, 2024, Ms. Swimm has interim primary care of the children with Mr. Swimm having parenting time via a specified schedule.

[11] Ms. Swimm is a teacher and has been employed in that profession at least since 2007. Mr. Swimm held various jobs prior to his full time involvement with Avive.

Avive

[12] Avive manufactures supplements and is a custom compounder of natural health products and dietary supplements. The parties dispute the origins of the company. Ms. Swimm says it began as a family venture including Ms. Boutilier,

her spouse, Blaise Boutilier and the parties. Ms. Swimm says the Boutiliers approached the Swimms with the business idea for what would eventually become Avive. Ms. Boutilier was designated as the company's General Manager and Mr. Swimm as its Sales Manager. As Mr. Boutilier and Ms. Swimm were otherwise employed, Ms. Boutilier and Mr. Swimm would be the onsite employees, handling day to day operations.

[13] In contrast Mr. Swimm says the initial discussions solely involved Ms. Boutilier and himself. The business plan included Ms. Boutilier as the Chief Executive Officer, Mr. Swimm as the Sales and Account Manager, Mr. Boutilier as Business Advisor and Ms. Swimm's brother, Keith Nicoll as a Networking Specialist. Mr. Swimm says Ms. Swimm "was not involved."

[14] Ms. Boutilier testified that the business plan included in Mr. Swimm's Affidavit evidence as Exhibit "A" was not the business plan which was eventually submitted to secure funding for the company.

[15] Ms. Boutilier says her intention was to have the parties involved as part owners/investors. She states at that time the Swimms were a common law couple and Mr. Swimm's involvement with the business plan was only because of his relationship with Ms. Swimm.

Funding for Avive

[16] Mr. Swimm testified that Avive's three sources of funding during the startup stage were from ACOA-CEED, B.D.C. and the Credit Union Atlantic. Ms. Boutilier says applications for the ACOA loans were submitted in December, 2009 and as part of the application process the personal assets of the Boutiliers and the Swimms were declared and used as collateral. Exhibit A of Ms. Boutilier's Affidavit sworn January 17, 2025, is a copy of the Application form she submitted to the ACOA-CEED Capital Program for funding.

[17] The application form includes information on the Boutilier's assets and liabilities.

[18] Ms. Boutilier says the Swimms submitted an identical application. She states in paragraph 21 that those documents (the Swimms' ACOA-CEED application) "is now suddenly missing from the folder at Avive. I have no idea why this is missing or how it went missing." Unfortunately (owing to the passage of time and apparent policies on the retention of documents by the lenders) the original and/or copies of the loan documents could not be obtained.

[19] Avive was incorporated in January, 2010 and had a rough start. Mr. Swimm says within six months the company was facing closure. A loan was acquired from

the Credit Union Atlantic during the summer months of 2010. It appears Avive continued to experience hardship. Mr. Swimm left Avive for other employment as the parties' financial situation was also dire. Both Mr. and Ms. Swimm declared bankruptcy in the late 2010 to 2012 time period. It further appears Ms. Boutilier kept Avive afloat with the aid of Tracey Landry who was hired on in 2011 and Mr. Swimm. Mr. Swimm returned to Avive in the fall of 2011. He says he secured Avive's "single biggest client for the following 11 years."

[20] Further funding was obtained through loans from ACOA and BDC in 2015 and CIBC in 2018. Ms. Boutilier says the CIBC loan was obtained in order to expand production. She goes on to state that as directors of the company, Mr. Swimm and herself are listed as personal guarantors on the loans. Referenced in paragraph 32 of her January 17, 2025, Affidavit, as Exhibit B are copies of documents with respect to the CIBC loan. She states Mr. Swimm would have been required to complete the same loan documents which includes confirmation of assets and liabilities.

[21] Mr. Swimm says the parties' matrimonial home(s) was not used as collateral in relation to the CIBC loan or any of the loans he sought for Avive. An Order for Production issued on September 12, 2024, compelled the production of files and

records related to the parties and Avive. It appears the documents pertaining to the 2018 loan are no longer available.

[22] To summarize, Mr. Swimm and Ms. Boutilier were the/are the significant administrators in the operations of Avive. I am without any documentary (or otherwise) evidence from an independent source in relation to financing obtained for Avive, during the start up period or after. The evidence substantiates Ms. Swimm was not a guarantor on any of the loans obtained for or on behalf of Avive. My determinations shall be based on the available evidence.

Inferences

[23] Often in contested hearings/trials involving fact based evidence (as with many contested proceedings in the family law sphere) Judges are frequently called upon to make decisions absent the level of evidentiary precision reasonably contemplated. The helpful information may not be available through no fault of the litigants. Regardless decisions must be made. In some instances, Judges may employ varying methods/approaches, pertinent to the subject matter under analysis and consistent with the available evidence. The use of inferences is such an approach. This practice is often helpful in the decision making process.

[24] In *Nova Scotia (Attorney General) v. Jacque Dry Cleaners*, 2013 NSCA 4, Justice Saunders' commentary on inferences and their use in the course of analysis and decision making is very helpful to my task here and provides direction:

[30] Here, it may be useful to provide a brief commentary on inferences, and their application, to the process of decision-making.

[31] An inference may be described as a conclusion that is logical. An inference is not a hunch. A hunch is little more than a guess, a 50/50 chance at best, that may turn out to be right or wrong, once all the facts are brought to light. Whereas an inference is a conclusion reached when the probability of its likelihood is confirmed by surrounding, established facts. When engaged in the process of reasoning we are often called upon to draw an inference which acts as a kind of cognitive tool or buckle used to cinch together two potentially related, but still separated propositions. In the context of judicial decision-making, drawing an inference is the intellectual process by which we assimilate and test the evidence in order to satisfy ourselves that the link between the two propositions is strong enough to establish the probability of the ultimate conclusion. We do that based on our powers of observation, life's experience and common sense. In matters such as this, reasonableness is the gauge by which we evaluate the strength of the conclusion reached through our reasoning.

[32] Two examples will illustrate my point. We anticipate it being more likely than not, that a wild toss of the football towards the sideline by a fleeing, desperate quarterback will land out of bounds. We know where the sidelines are, we see the errant throw sail off in that direction, and we can be sure the pass will be whistled out of bounds without needing to see the proof on instant replay. Similarly, noticing puddles on the street, and then a wet umbrella by the door tells us that it was raining, without having been outside in the rain to witness it.

Analysis

Loans acquired for or on behalf of Avive

[25] The evidence substantiates Ms. Swimm did not play an active role in the day to day operations of Avive. Nonetheless the evidence does establish that

consideration of Ms. Swimm's claim to a share of Mr. Swimm's interest in Avive ought to be contemplated by examining her assumption of risk.

[26] Mr. Swimm maintains that the parties' matrimonial home(s) (and I infer other substantial assets) were never used as collateral for any of the loans obtained by him for Avive. Ms. Boutilier and Ms. Swimm say otherwise. I accept their evidence. I find it highly unlikely Mr. Swimm would have merited consideration as a candidate for a loan during the period of Avive's inception without being required to provide some form of collateral given his financial situation at that time. I accept Ms. Boutilier's evidence that the Swimms would have been required to complete the same application process, including declaration of their assets and liabilities. The inference is reasonable and logical. Likewise I apply the same reasoning to the other loans obtained for or on behalf of Avive.

[27] Under cross examination Mr. Swimm testified that Ms. Boutilier and himself were listed on all the loans associated with Avive. He testified he personally guaranteed all the loans. I am satisfied on a balance of probabilities that in order to qualify for and obtain same loans, Mr. Swimm would have been required to provide some form of collateral, as was the case for Ms. Boutilier, demonstrated by the evidence. When responding to Counsel for Ms. Swimm's questions on whether his/Ms. Swimm's assets would have been at risk in the event of a loan

default, Mr. Swimm testified that same were not used as collateral and would not have been at risk. Buttressed by Ms. Boutilier's and Ms. Swimm's evidence and deductions made, I am satisfied Mr. Swimm's responses to that line of questioning is neither credible nor reliable. Later in this decision, I will comment on the issue of credibility.

[28] As stated Ms. Swimm was neither a signatory nor guarantor on any of the loans. However asset(s) jointly held by Mr. Swimm and herself would have been liable in the event of a default.

Classification of Avive

Section 2(a) of the *Matrimonial Property Act* defines the term "business assets" as:

2. In this Act,

(a) "business assets" means real or personal property primarily used or held for or in connection with a commercial, business, investment or other income-producing or profit-producing purpose, but does not include money in an account with a chartered bank, savings office, loan company, credit union, trust company or similar institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes;

[29] In *Robaczewski v. Larson*, 2019 NSSC 78, Justice Jollimore writes:

[9] All assets are matrimonial and presumptively subject to equal division unless they fall within a specifically excluded category. The person claiming an asset falls within an excluded category bears the burden of proving the exclusion: *Cashin*, [2010 NSCA 51](#) at para 8.

[18] The hallmark of business assets is that they have, as their purpose, the generation of income in an entrepreneurial sense: *Volcko*, [2015 NSCA 11](#) at para 25. The definition of business assets has "been restricted to assets that are

truly of a business character which involves the employment of capital for the purposes of generating income in an entrepreneurial sense”: *Eyking*, [2012 NSSC 409](#) at para [114](#). The “chance of profit or loss” is entrepreneurial: *Tibbetts*, [1992 NSCA 17 \(CanLII\)](#), 1992 CanLII 2541 (NSCA) at para [17](#).

[30] I am satisfied the evidence establishes and supports that Avive can be classified as a business asset.

Sections 13 and 18 of the Matrimonial Property Act

[31] The fundamental query to be examined is whether Ms. Swimm is entitled to a share of Mr. Swimm’s financial interest in Avive, under sections 13 and 18 of the *Matrimonial Property Act*. Those sections read:

Factors considered on division

13 Upon an application pursuant to Section 12, the court may make a division of matrimonial assets that is not equal or may make a division of property that is not a matrimonial asset, where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account the following factors:

- (a) the unreasonable impoverishment by either spouse of the matrimonial assets;
- (b) the amount of the debts and liabilities of each spouse and the circumstances in which they were incurred;
- (c) a marriage contract or separation agreement between the spouses;
- (d) the length of time that the spouses have cohabited with each other during their marriage;
- (e) the date and manner of acquisition of the assets;
- (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
- (g) the contribution by one spouse to the education or career potential of the other spouse;

- (h) the needs of a child who has not attained the age of majority;
- (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
- (j) whether the value of the assets substantially appreciated during the marriage;
- (k) the proceeds of an insurance policy, or an award of damages in tort, intended to represent compensation for physical injuries or the cost of future maintenance of the injured spouse;
- (l) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;
- (m) all taxation consequences of the division of matrimonial assets. R.S., c. 275, s. 13; revision corrected.

Contribution to business asset by spouse

18 Where one spouse has contributed work, money or moneys worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order

- (a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or
- (b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution, and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances. R.S., c. 275, s. 18.

[32] In *Pirie v. Pirie* 2020 NSSC 206, Justice Jesudason (as he then was) was tasked with deciding on issue(s) analogous to those in this case. At paragraphs 47 and 48, he provides clarifying principles on the application of sections 13 and 18 of the *Matrimonial Property Act*:

[47] Section 18 of the *MPA* allows me to award an amount to be paid as compensation or a share of the interest in a business asset where the claiming spouse “has contributed work, money or money worth in respect of the acquisition, management, maintenance operation or improvement of a business asset of the other spouse”.

[48] Section 18 of the *MPA* deals with direct contributions to a business asset. Indirect contributions shouldn't be considered under this section but can be considered under s. 13 of the *MPA*: *Young v. Young*, [2003 NSCA 63](#) and *Ryan v. Ryan*, [2010 NSCA 2](#).

Section 13 Factors

[33] Following, I examine the section 13 factors relevant to the present case:

(e) the date and manner of acquisition of the assets;

[34] It is highly unlikely Mr. Swimm would have had any involvement or interest in Avive absent his association with Ms. Swimm. Earlier I accepted Ms. Boutilier's and Ms. Swimm's evidence on the manner in which Mr. Swimm came to be involved with the company. Ms. Boutilier's primary and I infer sole motivation for including Mr. Swimm in the original planning sessions prior to Avive's inception was because of his relationship with her sister.

(f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;

[35] I accept both parents shared various responsibilities regarding care of the children within the household. I also accept Ms. Swimm was the parent primarily responsible for facilitating child care, extracurricular activities and overseeing the general upkeep of the home itself.

(g) the contribution by one spouse to the education or career potential of the other spouse;

[36] The evidence is clear on the parties' respective contributions during the early stages of the relationship. For a period of time, Ms. Swimm was the main income earner. When Mr. Swimm left Avive to seek other employment (as Avive was failing in its startup stage), it is reasonable to conclude that Ms. Swimm's income was the constant relied upon by the family. Without Ms. Swimm's financial contribution(s) to the family and ergo their assets, I question whether Mr. Swimm would have qualified for the loans he acquired on behalf of Avive.

(h) the needs of a child who has not attained the age of majority;

[37] Currently Ms. Swimm has interim primary care of the children. Given their ages and stages of development, the resources required for their upkeep can be deduced.

(j) whether the value of the assets substantially appreciated during the marriage;

[38] It is undisputed Avive's value appreciated during the marriage.

Application of section 18

[39] At paragraphs 49-52 of *Pirie*, Justice Jesudason's analysis on the application of section 18 illuminates as he later goes on to state the "broad and liberal interpretation" which should be given to the *Matrimonial Property Act*. Paragraphs 49-52 read:

[49] The Husband argues that the Wife didn't make any significant direct contribution to the dental practice and says her involvement with same was minimal. Specifically, he says the Wife acknowledged that:

- She had no direct involvement in the running of the dental practice;
- Except for some minimal painting on one occasion in 2006, she never did any paid or unpaid work for the dental practice; and
- She didn't sign any personal guarantees in relation to the financing of the dental companies.

[50] While I accept these points, I nevertheless conclude that the Wife has established a valid s. 18 claim, primarily for the following two reasons:

1. The matrimonial home, and possibly other matrimonial assets, were used as security for the dental practice

[51] In 2002, the matrimonial home was put solely in the Wife's name. It was subsequently used as security to help finance the dental practice. While the parties dispute the extent to which it was used, at a minimum, they agree that in 2009 the Husband purchased, through N.S. Ltd., Dr. Rutledge's dental practice for approximately \$200,000, using the CIBC personal line of credit. This line of credit was secured against the matrimonial home. The Husband's dental practice repaid the withdrawn funds in about two years, returning the line of credit balance to zero.

[52] The Husband also testified about a number of business loans he obtained to finance his dental practice. While these were corporate loans, he agreed that he had to give personal guarantees in relation to these loans, which included pledging any assets registered in his name. Presumably, this may have included assets in his name in which the Wife may have had a matrimonial interest.

[40] And at paragraph 78:

[78] As noted from *Clarke, supra*, the *MPA* should be given a broad and liberal interpretation. Further, as stated in *Young, supra*, the "predominant concept" under the *MPA* "is the recognition of marriage as a partnership with each party contributing in different ways".

[41] An initial consideration of the facts in this case may reasonably lead to the early conclusion that analysis of Ms. Swimm's entitlement to a share of Mr.

Swimm's interest in Avive ought to be contained to section 13 of the *Matrimonial Property Act*. Further to my earlier commentary, I am satisfied the parties'

matrimonial home(s) and likely other substantial matrimonial assets were used as collateral with respect to the loans obtained by Mr. Swimm for Avive. As enunciated in *Pirie*, assets at risk classified as having a matrimonial interest, shift the examination to inclusion of considerations under section 18.

Ms. Swimm's share

[42] I find Ms. Swimm is entitled to a share of Mr. Swimm's financial interest in Avive. Ms. Swimm maintains she is entitled to 50% of Mr. Swimm's shares in Avive. I am not convinced her entitlement reaches to one half of Mr. Swimm's interest.

[43] A review of the case law referenced in *Pirie v. Pirie, supra*, relating to the percentages/amounts awarded in consideration of a spouses contribution(s) to a business asset (including consideration of the issue of risk to matrimonial assets) range from 7% to 33%:

[53] In many cases where matrimonial assets have been pledged as security to help finance one spouse's business, the other spouse has been awarded a share of the business' value. The amounts awarded for the risk created have generally been under 15% of the value of the business. The following are examples:

- i) *Thomas v. Thomas*, [2012 NSSC 440](#) - The wife made a s. 18 claim against the husband's fishing business. The fishing licenses, boat and gear were purchased using a mortgage placed on the matrimonial home. The wife was awarded a 7% share of the business on account of the risk to the matrimonial asset.
- ii) *Cole v. Luckman*, [2012 NSSC 118](#) - The husband operated a farming and farrier business. The wife was a co-mortgagor of the property on which the farm

was located. She was awarded a 15% share of the farming business and a 10% share of the farrier business. Part of the award appeared to relate to the direct contribution of work she gave to the businesses. Most of the award, however, appeared to relate to the risk incurred by the wife as a co-mortgagor because the trial judge described her work contribution as “minimal.”

iii) *Mood v. Mood*, [1997] N.S.J. No. 531 (S.C.) - The husband owned a fish wholesale business. The matrimonial home and the family cottage were pledged as security for the business. Justice Goodfellow said this risk clearly contributed to the business and assessed the value of the contribution to be 7.5% of the value of the business.

iv) *Campbell v. Campbell*, (1986) [1986 CanLII 7027 \(NS SC\)](#), 74 N.S.R. (2d) 25, [1986] N.S.J. No. 591 (S.C.) - The wife co-signed loans for the husband’s excavating business. Justice Nathanson said “the importance of co-signing the loans should not be underestimated” and determined that, without the loans, likely some or all of the business assets would not have come into existence: para. 23. The wife was found to be entitled to 10% of the value of the business.

[54] In the somewhat outlier case of *Lynk v. Lynk*, [1989] N.S.J. No. 265 (C.A.), the wife was awarded a one-third interest in a business. The husband and wife signed a guarantee on a loan to help their son obtain a Burger King franchise. The son put 48% of the shares of the business into the husband’s name, and the husband helped the son with the business by exercising influence and attending meetings with bankers and the Burger King Company. The Court of Appeal classified the husband’s shares as business assets but awarded the wife a one-third interest, concluding that her contribution was substantial because she signed the guarantee, and the couple’s home was pledged as security.

[55] In the present case, I am satisfied that by allowing the parties’ personal line of credit, secured by the matrimonial home solely in her name, to be used to purchase Dr. Rutledge’s practice, the Wife made a direct contribution to the Husband’s dental practice which gives rise to a valid claim under s. 18 of the *MPA*. Furthermore, to the extent the Husband also gave unlimited personal guarantees for any business loans, and was required to provide updated personal net worth statements in order to obtain the necessary corporate financing to expand the dental practice (e.g. Exhibit 2, Page 221), this arguably created additional risk for personal assets in his name in which the Wife may have had a matrimonial interest. For example, in his Sworn Statement of Property dated February 3, 2018, he indicates that assets solely in his name as of the date of separation included an RRSP, a TSFA and the 2008 Subaru Tribeca. All these items appear to be acknowledged as being matrimonial assets.

[44] In *Lynk v. Lynk* [1989] N.S.J. No. 265 (C.A.) which is referred to as “the somewhat outlier case”, the wife was awarded a one third interest in the husband’s

business shares because of her status as a guarantor and also risk to the matrimonial home.

[45] Contemplation of the award due to Ms. Swimm, (consistent with the jurisprudence), may place the percentage in the 7% to 15% range. Precedent(s) places a trier of fact on the correct route, in turn the unique features of each case leads to the ultimate destination.

[46] The distinguishing feature in this case which is consequential and I find paramount to the analysis within is Mr. Swimm's level of involvement with Avive (in fact if any involvement and consequently his financial interest in the company) if not for his relationship with Ms. Swimm. During the planning stages, Mr. Swimm's involvement came about primarily (if not solely) because of his association with Ms. Swimm. I am satisfied on a balance of probabilities, Mr. Swimm would not hold his current financial interest in Avive (including his position in the company) if not for his relationship with and eventual marriage to Ms. Swimm. In my estimation this fundamental distinction calls for an elevation in Ms. Swimm's share.

[47] After considering the evidence in its totality, the relevant legislation and case authorities, I find it appropriate to award Ms. Swimm a 40% share of Mr. Swimm's financial interest in Avive.

Credibility

[48] After a thorough review of the evidence, I find an assessment of the credibility and reliability of portions of Mr. Swimm's evidence is warranted.

[49] I do not accept Mr. Swimm's evidence on the origins of Avive during the planning stages, initiated by Ms. Boutilier. I accept Ms. Swimm and Ms. Boutilier's evidence on Ms. Swimm's involvement during the planning stages and also of her periodic contributions (albeit sparse) as noted in their Affidavit evidence.

[50] At paragraph 185 of his Affidavit sworn January 24, 2025, Mr. Swimm confirms he completed "a personal net worth statement." He goes on to state, "Lori Dawn did not, and they included no collateral." Paragraph 185 was in response to paragraphs 32 and 35 of Ms. Boutilier's Affidavit sworn January 17, 2025. Paragraphs 32 and 35 of Ms. Boutilier's Affidavit discuss the loan obtained from CIBC in 2018 and requirements to be considered for obtaining same. It is implausible and not credible that Mr. Swimm's "personal net worth statement"

would not have included his most substantial assets which certainly would include the parties' matrimonial home. As mentioned earlier Ms. Boutilier was required to provide confirmation of her assets (which included the home owned by herself and her spouse) and liabilities.

[51] I am satisfied Mr. Swimm's evidence pertaining to the issue of collateral regarding the loans he obtained for or on behalf of Avive is neither credible nor reliable.

[52] At paragraph 42 of his Affidavit sworn January 24, 2025, Mr. Swimm indicates that Ms. Swimm handled the family's personal finances from the beginning of their relationship. To then say she was never involved in any discussions (even in a seemingly minor role) regarding anything associated with Avive is unrealistic and simply not credible.

[53] Here I find it apt to comment on a particular exchange which occurred during Ms. Boutilier's cross examination. Counsel's questions were in relation to collateral provided for a loan. Below is a reproduction of Counsel for Mr.

Swimm's questions and Ms. Boutilier's responses:

Question - Mr. Whitehead: What is it exactly that you say, what documents have you provided to show collateral was placed in relation to this?

Answer – Ms. Boutilier: I haven't provided any because I was asked not to, I was asked by Clark not to discuss anything to do with the business with my sister.

Question- Mr. Whitehead: You filed an Affidavit as part of this proceeding, are you suggesting you do not include things which are relevant?

Answer- Ms. Boutilier: Yes, I did not include the personal net worth statement of Clark.

[54] Ms. Boutilier's evidence above remains undisputed.

[55] In *Baker-Warren v. Denault*, 2009 NSSC 59, Justice Forgeron's seminal test on the assessment of a witnesses credibility is material to my analysis here:

[19] With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

- a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: **Re: Novak Estate**, [2008 NSSC 283](#) (S.C.);
- b) Did the witness have an interest in the outcome or was he/she personally connected to either party;
- c) Did the witness have a motive to deceive;
- d) Did the witness have the ability to observe the factual matters about which he/she testified;
- e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;
- f) Is the testimony in harmony with the preponderance of probabilities which a practical and informed person would find reasonable given the particular place and conditions: **Faryna v. Chorney** [1951 CanLII 252 \(BC CA\)](#), [1952] 2 D.L.R 354;
- g) Was there an internal consistency and logical flow to the evidence;
- h) Was the evidence provided in a candid and straight forward manner, or was the witness evasive, strategic, hesitant, or biased; and
- i) Where appropriate, was the witness capable of making an admission against interest, or was the witness self-serving?

[20] I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: **R v. Norman** (1993) [1993 CanLII 3387 \(ON CA\)](#), 16 O.R. (3d) 295 (C.A.) at para. [55](#). In addition, I have

also adopted the following rule, succinctly paraphrased by Warner J. in **Re: Novak Estate**, *supra*, at para 37:

There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See **R. v. D.R.**, [1966] 2 S.C.R. 291 at 93 and **R. v. J.H.** *supra*).

[56] Mr. Swimm's motive is obvious; his financial gain if able to depart the relationship/marriage with his interest in Avive intact.

Conclusion

[57] Counsel for Ms. Swimm shall draft the order flowing from this decision.

[58] Regarding costs, at the overall conclusion of this matter, the parties shall be afforded an opportunity to file written submissions.

Samuel C.G. Moreau, J.