IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Croft v. Foote*, 2023 NLCA 36
Date: November 28, 2023
Docket Number: 202201H0053

BETWEEN:

TROY RICHARD CROFT — APPELLANT/RESPONDENT BY CROSS-APPEAL

AND:

SUSAN JEANETTE FOOTE — RESPONDENT/APPELLANT BY CROSS-APPEAL

Coram: F.P. O'Brien, W.H. Goodridge and K.J. O'Brien JJ.A.

Court Appealed From:	Supreme Court of Newfoundland and Labrador, Family Division 201602F0232 (2022 NLSC 122)
Appeal Heard:	October 23, 2023
Judgment Rendered:	November 28, 2023
Reasons for Judgment by:	K.J. O'Brien J.A.
Concurred in by:	F.P. O'Brien and W.H. Goodridge JJ.A.
Counsel for the Appellant:	Shane R. Belbin and Sonya Vey
Counsel for the Respondent:	Self-Represented

Authorities Cited:

CASES CITED: *White et al. v. True North Springs Ltd. et al.* (2001), 209 Nfld. & P.E.I.R. 1 (Nfld. SC (TD)); *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *Barendregt v. Grebliunas*, 2022 SCC 22; *Temple v. Peddle*, 2019 NLCA 2, 4 C.A.N.L.R. 14; *Taylor v. Mallany*, 2019 NLCA 25, 4 C.A.N.L.R. 361; *R. v. Bennett*, 2017 NLCA 59, 2 C.A.N.L.R. 230; *Slawter v. Bellefontaine*, 2012 NSCA 48; *Thomas v. Thomas*, 2019 NLCA 32, 4 C.A.N.L.R. 432; *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *H.L. v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Dillon v. Dillon*, 2005 NSCA 166; *Gosse v. Sorensen-Gosse*, 2011 NLCA 58, 311 Nfld. & P.E.I.R. 76; *McInness v. Hamilton*, 2013 NWTSC 58.

REGULATIONS CONSIDERED: *Child Support Guidelines Regulations*, NLR 40/98, sections 13-18, 7.

RULES CONSIDERED: *Court of Appeal Rules*, NLR 38/16, rules 11(3), 15, 37(3).

K.J. O'Brien J.A.:

OVERVIEW

[1] This is an appeal of a family law decision. Mr. Croft and Ms. Foote were in a common law relationship and had three children together. They separated in 2016. Mr. Croft started a proceeding in the Supreme Court of Newfoundland and Labrador, Family Division, to address legal issues arising from their separation. Both parties were self-represented before the Family Division.

[2] The parties settled some of the property issues between them by consent. Mr. Croft agreed to pay Ms. Foote $90,000.00 as reimbursement for expenses he had incurred. The parties filed a consent order which incorporated that agreement. I will refer to this consent order, as amended, as the "Final Consent Order".

[3] The $90,000.00 debt was not at issue during the trial. Following the trial, the judge issued a written decision (*Croft v. Foote*, 2022 NLSC 122, the "Decision").

[4] Mr. Croft appeals two discrete issues arising from the Decision. He alleges:

1. The judge denied the parties procedural fairness when he incorporated terms of the Final Consent Order into his property order following trial without giving the parties notice that the issue would be addressed or hearing submissions from the parties on the issue.

2. The judge erred in determining Mr. Croft's 2021 income for child support purposes by double counting a contribution that Mr. Croft's employer made to his RRSP, contrary to the judge's intention as evidenced by the decision.

[5] Ms. Foote did not file a formal notice of cross-appeal but raised issues for cross-appeal in her factum. The failure to file a notice of cross-appeal does not preclude Ms. Foote from making submissions (*Court of Appeal Rules*, NLR 38/16, at rule 11(3)). The Court has discretion to excuse irregularities in procedure particularly for self-represented litigants where to do so would not materially affect the other party's ability to understand and respond to the claim or otherwise to receive a fair hearing (*White et al. v. True North Springs Ltd. et al.* (2001), 209 Nfld. & P.E.I.R. 1 (Nfld. SC (TD)), at para. 8; and *Court of Appeal Rules*, at rule 15). Mr. Croft had the opportunity to fully respond to the issues both in a reply factum and at the oral hearing. As such, at the hearing, the Court exercised its discretion to consider Ms. Foote's grounds of cross-appeal. They are:

1. The judge erred in determining Ms. Foote's 2019 income for child support purposes by deducting the incorrect amount for her RRSP contribution that year.

2. The judge erred in finding her liable for occupation rent during a period when she and Mr. Croft continued to have sexual relations.

3. The judge erred in not ordering that Mr. Croft contribute to the cost of their child's braces.

4. The judge erred by failing to order that Mr. Croft pay her $5,000.00 for a jeep that Mr. Croft kept post-separation.

[6] The Court does not have to consider the last issue because Mr. Croft agrees that the judge erred by not making an equalization payment for the jeep and he concedes that he should pay Ms. Foote $5,000.00 as a result.

[7] As to the remaining issues, for the reasons that follow, I would allow the appeal with respect to both issues raised by Mr. Croft. I would also allow Ms. Foote's cross-appeal with respect to her 2019 income. I would dismiss her cross-appeal with respect to the occupation rent and the contribution to the braces.

[8] Before explaining this result, I will first consider requests from each party to have the Court consider additional evidence.

ADDITIONAL EVDENCE

[9] When a party seeks to introduce additional evidence on appeal, the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, applies. The test ensures that the admission of additional evidence on appeal will be rare (*Barendregt v. Grebliunas*, 2022 SCC 22, at para. 31; and *Temple v. Peddle*, 2019 NLCA 2, 4 C.A.N.L.R. 14).

[10] The test is set out in rule 37(3) of the *Court of Appeal Rules*:

> 37. (3) In determining the application, the Court shall consider
>
> (a) whether, by due diligence, the evidence could have been brought in the court appealed from;
>
> (b) the relevance of the evidence in the sense that it bears upon a decisive or potentially decisive issue in the appeal;
>
> (c) the credibility of the evidence;
>
> (d) whether the evidence, if believed, could reasonably have affected the result; and
>
> (e) any other relevant factor.

[11] Mr. Croft applied to admit an affidavit of Michelle Walsh, an employee of BDO Canada Limited, which provided details of a consumer proposal that Mr. Croft made on November 28, 2019.

[12] Mr. Croft acknowledges that the additional evidence is not necessary for the Court to decide the appeal because the denial of procedural fairness he alleges is apparent from the existing court record. Rather, he submits that it would be beneficial for the Court to have additional information about Mr. Croft's consumer proposal to give context to the error and to establish that it is not merely an academic concern.

[13] Given that the Court does not require the Walsh affidavit to decide the appeal, it is of low to no relevance. Additional evidence should not be introduced merely to

give context. There was no issue of mootness raised or suggestion that this appeal was solely of academic concern. Consequently, I would find that the *Palmer* test is not met. This is not one of the rare cases when additional evidence should be allowed on appeal. I would dismiss Mr. Croft's application to introduce additional evidence.

[14] Although she did not file a formal application, Ms. Foote sought to introduce additional evidence to the Court by appending it to her factum. The material included communications between Ms. Foote and Mr. Croft, photographs of Mr. Croft's home, invoices for legal fees, and documents related to special expenses. The only material relevant to the appeal issues, an insurance claim form which noted a dentist's referral for braces, was an exhibit at trial and thus already part of the court record. The other material was not legally relevant to the issues on appeal. Further, the material likely could have been introduced at trial by due diligence, although it would not have reasonably affected the result because it was of low probative value to the issues before the judge.

[15] Consequently, I would also find that the *Palmer* test is not satisfied in relation to Ms. Foote's proposed additional evidence and would thus decline to admit it on appeal.

ISSUE 1: DID THE JUDGE DENY THE PARTIES' PROCEDURAL FAIRNESS IN RELATION TO THE FINAL CONSENT ORDER?

[16] At a pre-trial case management hearing, the judge made a procedural order that listed the issues for trial. The issues did not include any reference to the Final Consent Order or the $90,000.00 payment.

[17] There was little reference to the Final Consent Order or the $90,000.00 payment at trial. One reference was during Mr. Croft's testimony about wanting to retrieve his belongings from the former couple's home post-separation (Trial Transcript, at 66):

> Mr. Croft: […] I wanted all my things at one time but she was withholding things because of the $90,000 that I had put in a consumer proposal on, she was withholding anything that had value, she was not giving it to me, so I wanted all of my items.

[18] Another was during Ms. Foote's testimony about a severance payment she received. Ms. Foote told the judge that she was still paying off a large portion of Mr.

Croft's gambling debts. Mr. Croft interjected that that issue had "been dealt with" and the judge agreed (Trial Transcript, at 183).

[19] Finally, Ms. Foote indirectly referred to the Final Consent Order near the end of the trial. She asked the judge: "There was a court order that had been, a number of years ago Mr. Croft owed me money. Is that order still in place?" (Trial Transcript, at 374). In response, the judge confirmed that previous final orders "bring that issue to a close and it's done" (Trial Transcript, at 375). He also added (Trial Transcript, at 375-376):

> So I think in your case you have certain property orders, they … I will refer to them in my decision but they are not nullified in any way by this court decision […] They remain in full force and effect. I think one of them was amended by consent of the parties, if I recall correctly, […] you can amend orders by consent but failing consent you can't […] **And I won't be in any way dealing with other past matters that were resolved**…
>
> (Emphasis added.)

[20] Despite this statement, the judge did deal with the Final Consent Order in the order that he issued following trial by accounting for the $90,000.00 in the final balancing payment that Mr. Croft had to pay Ms. Foote. The judge explained his reasons for doing so in his decision:

> [56] Pursuant to Consent Orders dated August 11, 2017 and January 19, 2018, Mr. Croft is to pay Ms. Foote $90,000.00 as a reimbursement for expenses incurred from day trading within 36 months of his name being removed from the mortgage for the family home.
>
> [57] Mr. Croft conveyed his interest in the family home to Ms. Foote on or about July 18, 2018. As a result, the $90,000.00 amount became due and payable on July 19, 2021. Pursuant to the Consent Orders dealing with this issue, the debt is enforceable as a money judgment in accordance with the provisions of the *Judgment Enforcement Act*, S.N.L. 1996, c. J-1.1 (the "*Judgment Enforcement Act*"). **For purposes of finality, I shall consolidate this money judgment into the summary of property related payments to be made by both parties pursuant to this decision.**
>
> (Emphasis added.)

The law of procedural fairness, and the right to notice and to be heard

[21] Where a party alleges a breach of procedural fairness, the reviewing court need not engage in a detailed assessment of the appropriate standard of review. Failure to

provide procedural fairness will result in the decision being set aside (*Taylor v. Mallany*, 2019 NLCA 25, 4 C.A.N.L.R. 361, at para. 20).

[22] The right of all parties to a dispute to be heard is a well-established tenet of procedural fairness (*Taylor*, at para. 21; and *R. v. Bennett*, 2017 NLCA 59, 2 C.A.N.L.R. 230, at para. 16). A fundamental element of the right to be heard is the right of a party to present their case to the decision-maker. The right to notice is related to this right because a party can only be meaningfully heard if they are aware of the issues the decision-maker is considering (*Taylor*, at paras. 26, 46).

Analysis of the issue of procedural fairness

[23] Effectively, the judge ordered that Mr. Croft had to pay Ms. Foote $90,000.00 on the date of his final order. He did this without giving notice to the parties that he would be dealing with the $90,000.00 debt. Any notice that he had given them was to the contrary, that he would *not* be dealing with the Final Consent Order.

[24] Flowing from this, the parties did not have the opportunity to be heard on this issue. Without notice that the judge would be dealing with the matter, they reasonably did not address it in their evidence or submissions. As a result, they did not have the opportunity to present their positions on matters such as the appropriateness of consolidating the Final Consent Order with the judge's final order, payments already made under the Final Consent Order, or any further relevant context. Further context might have been particularly important in light of Mr. Croft's statement about having filed a consumer proposal.

[25] Although a consolidated final order may be an effective way of providing parties with a summary of their financial obligations to each other, in this case it may have led to unintended consequences. Procedural fairness required the parties to have had an opportunity to be heard on the matter before the consolidation was ordered. There are two ways to remedy this error.

[26] The first is the remedy that Mr. Croft requests. He asks the Court to vary the judge's final order for division of common law property to remove the requirement that Mr. Croft pay Ms. Foote $90,000.00. The Nova Scotia Court of Appeal took a similar approach to correct an error of procedural fairness in a family law proceeding in *Slawter v. Bellefontaine*, 2012 NSCA 48.

[27] A second possibility is to remit the matter to the trial court with direction that the parties be given notice and an opportunity to be heard on the issue of the Final Consent Order. This Court took a similar approach in *Taylor*.

[28] In my view, the decision as to which option is appropriate is better left to the trial court. From the record, it unclear whether the judge decided that he had the authority to revive the $90,000.00 debt, with whatever consequences that entailed, or whether by doing so "[f]or purposes of finality", he was merely trying to simplify the paperwork without having any consequential effects on the parties or anyone else (para. 57). There are insufficient reasons to explain his decision. As such, I would decline Mr. Croft's invitation to amend the order and instead send the matter back to the trial court for reconsideration.

ISSUE 2: DID THE JUDGE ERR IN DETERMINING MR. CROFT'S 2021 INCOME?

[29] Mr. Croft submits that the judge erred in determining his 2021 income for child support purposes by double counting a contribution that Mr. Croft's employer made to his RRSP. He argues that this was contrary to the judge's stated intention:

> [89] Similar to how I dealt with Ms. Foote's severance income in 2019, Mr. Croft had a so-called one-time payment of $13,481.00 made to his RRSP for 2021 by his employer. No more information as to what the payment represented was provided, but it is suffice to say that it is similar to Ms. Foote's 2019 severance income in that it is remuneration or income associated with his service to his employer. Although this amount was contributed to his RRSP, Mr. Croft also withdrew $13,800.00 from his RRSP in that year. As a result, the $13,481.00 does represent available income for the support of the children and no adjustment to his Line 15000 income for 2021 is warranted. Mr. Croft's Line 15000 income in that year was 124,122.00.

[30] To understand what the judge meant by "[s]imilar to how I dealt with Ms. Foote's severance income" (para. 89), it is necessary to consider paragraphs 80 to 83 of his decision. Ms. Foote received a non-recurring severance payment from her employer in December 2019. The judge found that the full amount of the severance was included in Ms. Foote's Line 15000 income for 2019. The judge found that Ms. Foote contributed $3,650.58 of this amount into her RRSP that year. Leaving aside for the moment that Ms. Foote submits that the judge erred as to the amount of her RRSP contribution, the judge dealt with the severance income as follows:

> [83] While this is a non-recurring amount, it is remuneration or income associated with years of service from her employer. Most of the total sum was not put into a retirement

> fund. As a result, **I am satisfied that the fairest determination of income under section 14 of the *Child Support Guidelines* would be to include the full severance payment in Ms. Foote's 2019 income *less* the RRSP contribution that year, as that amount represents the available income for the support and benefit of the children.** Therefore, Ms. Foote's income in 2019 for child support purposes shall be *$118,082.32* ($122,797.00 - $3,650.68 (RRSP) - $1,064.00 (union dues)).
>
> **(**Emphasis added.)

[31] Mr. Croft submits that it is clear from paragraph 89 of the decision that the judge intended to treat Mr. Croft's one-time payment similarly to how he treated Ms. Foote's one-time payment, and to include his employer's RRSP contribution in his income *because* he withdrew the money in the same year. The error Mr. Croft alleges is that by not making any adjustment to his line 15000 income, the judge effectively counted Mr. Croft's one-time payment twice, adding over $26,000.00 in periodic income as opposed to the $13,481.00 that he found was available income for child support.

[32] Mr. Croft submits that the double counting happened because according to his 2021 Tax Return Summary (Appeal Book, Tab 12), his line 15000 income included both the $13,800.00 that he withdrew from his RRSP (at line 12900) and the $13,481.00 RRSP contribution from his employer (included in employment income at line 10100). A letter from Mr. Croft's employer, which was filed and accepted by the judge after trial, established that the employment income amount included both Mr. Croft's salary and the employer's RRSP contribution (Appeal Book, Tab 13). Thus, Mr. Croft submits, by not making any deduction from line 15000, the judge counted both the employer's contribution *and* Mr. Croft's RRSP withdrawal.

[33] For common law parents, calculation of annual income for child support purposes is governed by sections 13 through 18 of the *Child Support Guidelines Regulations*, NLR 40/98. Pursuant to section 14, the starting point is the parent's line 15000 income, adjusted in accordance with Schedule B. However, pursuant to section 15, if the court is of the opinion that this would not be the fairest determination of income, the court may have regard to the parent's income over the last 3 years and determine an amount that is fair and reasonable in light of any pattern of income, including non-recurring payments.

[34] Mr. Croft rightly concedes that income determination under the *Child Support Guidelines* involves the interplay of the judge's factual findings and his judicial discretion and, accordingly, his decision is entitled to deference and should only be interfered with if it is shown that he made a palpable and overriding error in his

assessment or his appreciation of the evidence (*Thomas v. Thomas*, 2019 NLCA 32, 4 C.A.N.L.R. 232, at paras. 40-48; and *Hickey v. Hickey*, [1999] 2 S.C.R. 518, at para. 12). A palpable and overriding error is an obvious error, one that is "clearly wrong", "unreasonable", and "not reasonably supported by the evidence" (*H.L. v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 110). It must also be an error that affects the outcome of the case (*H.L.*, at paras. 55-58, 69).

[35] In *Dillon v. Dillon*, 2005 NSCA 166, the Nova Scotia Court of Appeal dealt with a similar case, one in which the parent had both received an RRSP contribution from his employer and withdrawn RRSP funds in the same year. The Court found that the judge's failure to deduct the parent's RRSP withdrawal from his line 15000 income resulted in double counting and an unfair calculation of his income. The Court held it was a palpable and overriding error of fact (para. 29).

[36] I do not take *Dillon* as holding that the "fairest determination" of income cannot include both an RRSP withdrawal and an RRSP contribution made in the same year. This is a matter for the judge to determine on the facts of the case. However in the present case, the judge's reasons suggest that he intended to treat Mr. Croft's one-time payment in the same manner as he had Ms. Foote's one-time payment, which would have required the judge to deduct the RRSP contribution from Mr. Croft's line 15000 income. Failing to do the calculation so as to give effect to his stated intention, at least without further explanation, is a palpable and overriding error. As such, I would send the matter back to the trial court for reconsideration. In doing so, I would acknowledge that it is possible that the judge intended to count both the RRSP contribution and the withdrawal but that he did not clearly explain his reasons for doing so.

ISSUE 3: DID THE JUDGE ERR IN DETERMINING MS. FOOTE'S 2019 INCOME BY DEDUCTING THE INCORRECT AMOUNT FOR HER RRSP CONTRIBUTION?

[37] Ms. Foote submits that the error in calculating her 2019 income flows from paragraph 83 of the judge's decision, quoted above. In that paragraph, the judge found that the fairest determination of Ms. Foote's 2019 income would be to include the full severance payment in Ms. Foote's 2019 income *less* her RRSP contribution that year. He found that her RRSP contribution for 2019 was $3,650.68.

[38] Ms. Foote submits that this was an error because she contributed $21,000.00 to her RRSP in 2019, as evidenced by her 2019 Notice of Assessment, which was

before the judge. Ms. Foote could not identify the source of the $3,650.68 amount that the judge used.

[39] Mr. Croft could not explain the source of the $3,650.68 either. He conceded that Ms. Foote's 2019 Notice of Assessment showed a $21,000.00 RRSP contribution.

[40] Based on Ms. Foote's 2019 Notice of Assessment, I am satisfied that the judge made a palpable and overriding error when he found that her RRSP contribution for 2019 was $3,650.68.

ISSUE 4: DID THE JUDGE ERR IN FINDING MS. FOOTE LIABLE FOR OCCUPATION RENT?

[41] The judge found that Ms. Foote had exclusive possession of the former family home for 29 months following their separation. During this period, Mr. Croft stayed with his mother. The judge found that Mr. Croft was financially unable to obtain an alternate property, suitable for the children to live with him, until he was able to convey his interest in the family home to Ms. Foote, and further, that many of the significant delays in having Mr. Croft's interest conveyed were caused by Ms. Foote (Decision, at para. 24).

[42] The judge cited this Court's decision in *Gosse v. Sorensen-Gosse*, 2011 NLCA 58, 311 Nfld. & P.E.I.R. 76, for the proposition that a spouse "has the same right of use, possession and management of the matrimonial home as the other spouse" and, therefore, is entitled to occupation rent if the other spouse has exclusive possession of the matrimonial home. The judge, although using the term "matrimonial home", rightly noted that the parties were not married and that the basis for occupation rent was the fact that the family home was owned and occupied by them jointly. He noted that he had wide discretion as to whether there were exceptional circumstances that would justify declining to award such rent (Decision, at paras. 14-15).

[43] The judge ultimately decided that Mr. Croft was entitled to $34,800.00 in occupation rent (Decision, at para. 26).

[44] At trial, Ms. Foote did not deny that she owed occupation rent, rather she disputed the amount that Mr. Croft claimed (Decision, at para. 17). On appeal, Ms. Foote submits that occupation rent should not have been awarded because she and

Mr. Croft maintained a sexual relationship during at least a portion of the relevant period.

Analysis of the judge's consideration of occupation rent

[45] The judge correctly stated the law related to occupation rent in this province. The Court cannot interfere with his decision unless he made a legal error in his application of the law to those facts or made a palpable and overriding error in his findings of fact.

[46] Ms. Foote has not identified any legal error or any palpable and overriding error. There was no evidence at trial that the parties had engaged in periodic sexual relations following their separation. That fact would not have affected the assessment of occupation rent in any event. Ms. Foote has not shown, or even alleged, any error in the judge's finding that she had exclusive possession of the home for the 29 month period. A spouse with exclusive possession may allow the other spouse in the home as a guest.

[47] As a result, I would dismiss Ms. Foote's cross-appeal with respect to occupation rent.

ISSUE 5: DID THE JUDGE ERR IN NOT ORDERING THAT MR. CROFT CONTRIBUTE TO THE COST OF BRACES?

[48] At trial, Ms. Foote sought contribution from Mr. Croft for a number of the children's special expenses, including one child's braces. Mr. Croft opposed contributing to the braces because of other financial pressures he was facing. He did not consider the braces medically necessary and, while he was not against getting braces at some point, he felt that this was not the optimal time (Decision, at paras. 124-125).

[49] Orthodontic treatment costs are special expenses considered under section 7(1)(c) of the *Child Support Guidelines*. In assessing whether to order a contribution toward special expenses, that section requires the court to consider "the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and those of the child and to the family's spending pattern prior to the separation". The judge correctly cited this law (Decision, at para. 98).

[50] The judge also correctly noted that the burden was on Ms. Foote to establish that the cost for the braces fit within the parameters of the *Child Support Guidelines*. He cited *McInness v. Hamilton*, 2013 NWTSC 58, a case that also dealt with orthodontic treatment, for the proposition that it can be contemplated in a wide range of circumstances. He quoted from *McInness*: "At one end of the spectrum, it may be absolutely required for medical reasons. At the other end of the spectrum, it may be desirable, but purely for cosmetic reasons" (Decision, at para. 127).

[51] The judge ultimately found that Ms. Foote had not persuaded him that the brace's expense was a necessary and reasonable section 7 special expense. In coming to this conclusion, he considered Ms. Foote's evidence:

> [126] Ms. Foote testified that it was "never a process of it being a need or not a need." She said [the child] had many gaps between [their] teeth and braces were the only option to correct that. She said that [the child] was self-conscious about [their] teeth and wanted braces. She said the child's dentist did not recommend it, but he did not say no either. Ms. Foote did not get a referral to an orthodontist. Instead, she made the appointment herself….

[52] On appeal, Ms. Foote directed the Court's attention to an insurance claim form for the braces expense that included the statement, "Referred by: [name of dentist]" (Ms. Foote's Factum, Tab 2(b)). This is some evidence of a referral. However, Ms. Foote acknowledged that there was no referral letter from the dentist. She also acknowledged that there was no evidence that the braces were medically necessary.

Analysis of the braces expense

[53] The judge found that "[t]here was no evidence to suggest the orthodontic expense was medically necessary and there was insufficient reliable evidence to support its reasonableness, such that it had to be incurred sooner rather than later and that failing to conduct the procedure would result in consequences that would not be in the best interests of the child" (Decision, at para. 129). These are findings of fact and should not be interfered with absent a palpable and overriding error.

[54] Although the judge did not consider the reference to the referral on the insurance claim form, his reasons demonstrate that his findings were grounded in the evidence, including Ms. Foote's testimony, and the lack of evidence. As a result, I would dismiss Ms. Foote's cross-appeal with respect to the braces expense.

DISPOSITION

[55] For these reasons, I would allow the appeal and allow the cross-appeal, in part.

[56] Based on the consent of the parties, I would order immediate payment of the sum of $5,000.00 from Mr. Croft to Ms. Foote, as compensation for the jeep that Mr. Croft retained post-separation.

[57] I would remit the matter to the Supreme Court of Newfoundland and Labrador, Family Division, on the issues of:

1. The incorporation of the Final Consent Order into the final property order following trial;

2. The inclusion of Mr. Croft's employer's RRSP contribution in the calculation of Mr. Croft's 2021 income; and

3. The deduction of Ms. Foote's RRSP contribution in the calculation of her 2019 income.

[58] I would dismiss the other grounds of cross-appeal.

[59] Given the parties have had mixed success on appeal I would not order costs.

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K.J. O'Brien J.A.

I concur : _____

Francis J. O'Brien J.A.

I concur : _____

William H. Goodridge J.A.