Date: 19980323 Docket: C.A. 144428

NOVA SCOTIA COURT OF APPEAL
Cite as: Halbgewachs v. Halbgewachs, 1998 NSCA 88
Chipman, Jones and Flinn, JJ.A.

BETWEEN:

KARL DAVID HALBGEWACHS	)	Angus E. Schurman
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Alex MacLeod
	)	for the Respondent
NANCY CAROL HALBGEWACHS	)	
	)	
Respondent	)	Appeal Heard:
	)	March 23, 1998
	)	
	)	
	)	Judgment Delivered:
	)	March 23, 1998

THE COURT: Appeal allowed per oral reasons for judgment of Flinn, J.A.; Jones and Chipman, JJ.A. concurring.

FLINN, J.A.:

The appellant and respondent were divorced by decree absolute granted on June 13th, 1983. The decree nisi, by consent of the parties, incorporated the terms of a property settlement agreement between the parties. At the time each party was represented by counsel.

Over 13 years later, the respondent applied to a judge of the Supreme Court for a division of the appellant's pension entitlement. Justice Carver decided that the appellant's pension entitlement had not been addressed by the parties at the time of the property settlement agreement. He, therefore, ordered that the pension entitlement be divided on a 50-50 basis; however, the appellant was not required to repay benefits paid prior to the date of his order.

In **Messom v. Levy et al** (1997), 159 N.S.R. (2d) 252 (N.S.C.A.), Justice Hallett said the following at p. 259:

> In Bank of Nova Scotia v. Golden Forest Holdings Ltd. (1990), 98 N.S.R.(2d) 429; 263 A.P.R. 429 (C.A.), this court had occasion to consider the power of a superior court to vary a consent order that gives effect to a settlement. We concluded that such an order could not be varied unless the settlement agreement itself could be varied. By implication we approved the following statement from **Chitel v. Rothbart et al.** (1987), 19 C.P. c. (2d) 48 (Ont. S.C.):
>
>> 'A consent order may only be set aside or varied by subsequent consent, or upon the grounds of common mistake, misrepresentation or fraud, or on any other ground which would invalidate a contract. .....'

The trial judge made no finding, nor was there evidence to support a finding, that would bring this case within the above stated principles.

The appeal is, therefore, allowed and the order of the trial judge dated December 16th, 1997, is set aside.

Under all of the circumstances, the Court will make no order as to costs.

Flinn, J.A.

Concurred in:

Jones, J.A.

Chipman, J.A.

C.A. No. 144428

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

KARL DAVID HALBGEWACHS	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
NANCY CAROL HALBGEWACHS	)	FLINN, J.A. (Orally)
Respondent	)	