C.A. No. 122779

NOVA SCOTIA COURT OF APPEAL
Cite as: MacIsaac v. MacIsaac, 1996 NSCA 128

Pugsley, Matthews & Bateman, JJ.A.

BETWEEN:

HILARY B. MACISAAC	)	Margot E. MacDonald for the Appellant
Appellant	)	
- and -	)	Lorne J. MacDowell for Ms. MacDonald
MOIRA M. MACISAAC	)	
Respondent	)	Appeal Heard: March 21, 1996
	)	Judgment Delivered: May 14, 1996

THE COURT: Appeal allowed to the extent of increasing the equalization payment, payable by the respondent to the appellant by $1,666.50 and imposing conditions upon the lump sum payable in accordance with Appendix A to the decision hereto. The appellant shall pay to the respondent costs of $1500 plus disbursements per reasons for judgment of Bateman, J.A.; Pugsley and Matthews, JJ.A. concurring.

E R R A T U M

p. 24 and p. 30 - **Divorce Act, 1995** should read **Divorce Act**

BATEMAN, J.A.:

This is an appeal from an order fixing maintenance and dividing assets on divorce.

Background:

The parties were married on August 26, 1967. At the time of the marriage the respondent wife was employed as a secretary and the appellant husband as a teacher. Following the birth of the parties' first child in 1969, the respondent remained at home to look after the children. She returned to work in 1981 and worked part-time until 1986. Upon separation, on November 12, 1992, she moved to Halifax. Two of the parties' three children were still dependent and remained with Mr. MacIsaac in the matrimonial home. The respondent returned to reside in the matrimonial home in June of 1994. The appellant moved to the cottage, and subsequently to an apartment. The youngest son remained in the home with his mother. The appellant has continued his employment as a school teacher. He has a Bachelor of Education Degree and a Master's Degree. His annual salary is $56,000.00. The respondent was unemployed at the time of trial but had held several part-time jobs since the separation in 1992. She continued to live in the former matrimonial home with one son, Mark, who attends university. It is agreed that all three children are now independent. Since the divorce, the respondent has reverted to her former name. I will refer to her throughout this decision as Ms. MacDonald.

June 18, 2012

Grounds of Appeal:

In the Notice of Appeal Mr. MacIsaac set out 13 grounds of appeal, some of which have been abandoned. Those grounds still in issue at the time of the hearing of the appeal are:

> 6. The learned trial judge erred in law in providing relief to Ms. MacDonald for the use of her inheritance toward the purchase and acquisition of the matrimonial home and in the alternative by providing

> full relief to Ms. MacDonald for the use of her inheritance.
>
> 7. The learned trial judge erred in law in providing relief to Ms. MacDonald for her inheritance, but failing to consider Mr. MacIsaac's contribution from his parents.
>
> 8. The learned trial judge erred in law in considering real estate commission and legal fees as disposition costs of Ms. MacDonald.
>
> 9. The learned trial judge erred in law in reducing the value of the family cottage by 25% and not considering the actual cost spent on the family cottage by Mr. MacIsaac and respondent.
>
> 13. Such other grounds as may arise upon review of the transcript or upon the hearing of the appeal - the learned trial judge erred in failing to divide pre-inheritance funds held by Ms. MacDonald.

Ms. MacDonald has cross-appealed on the following grounds:

> 1. That the learned trial judge erred in law in placing a time limit on spousal support awarded to Ms. MacDonald/cross-appellant;
>
> 2. That the learned trial judge erred in law in awarding the amount of $900.00 per month, when the amount should have been greater;
>
> 3. That the learned trial judge erred in law in not providing Ms. MacDonald/cross-appellant with an opportunity to be heard on costs and/or not awarding costs to Ms. MacDonald/cross-appellant;
>
> 4. Such other grounds as may appear from the transcript;
>
> 5. That Ms. MacDonald/cross-appellant seeks costs in this matter;

Standard of Review:

In **Moge v. Moge** (1992), 43 R.F.L. (3d) 345 (S.C.C.) L'Heureux-Dube, J., at p.

359, accepted the following statement of Morden J.A. in **Harrington v. Harrington** (1981), 33 O.R. (2d) 150, at p. 154:

> As far as the applicable standard of appellate review is concerned I am of the view that we should not interfere with the trial Judge's decision unless we are persuaded that his reasons disclose material error and this would include a significant misapprehension of the evidence, of course, and, to use familiar language, the trial Judge's having 'gone wrong in principle or (his) final award (being) otherwise clearly wrong': *Attwood v. Attwood*, [1968] P. 591 at p. 596. In other words, in the absence of material error, I do not think that this Court has an 'independent discretion' to decide afresh the question of maintenance and I say this with due respect for decisions to the contrary . . .

Chipman, J. A. wrote, for the court, in **Edwards v. Edwards** (1995), 133 N.S.R. (2d) 8 (N.S.C.A.) at p. 20:

> Having regard to all the evidence and particularly the respective incomes of the parties, I cannot say that the trial judge erred in his assessment. This court is not a fact finding tribunal. That is the role of the trial judge. Ours, as has been said many times, is a more limited role. We are charged with the duty of reviewing the reasons of the trier of fact with a view of correcting errors of law and manifest errors of fact. The degree of deference accorded to the trial judge with respect to factual findings is probably no higher anywhere than it is in matters relating to family law. Hart, J.A. put it well when he said on behalf of this court in **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 at 198:
>
> > In domestic matters the trial judge always has a great advantage over an appellate court. He sees and hears the witnesses and can assess the emotional aspects of their testimony in a way that is

> denied to us. Unless there has been a glaring misconception of the facts before him or some manifest error in the application of the law, we would be unwise to interfere.

A similar standard is applicable to appeals from a division of assets made pursuant to the **Matrimonial Property Act**, R.S.N.S. 1989 c. 275.

Analysis:

(A) Division of The Assets:

(i) The Unequal Division:

> 6. The learned trial judge erred in law in providing relief to Ms. MacDonald for the use of her inheritance toward the purchase and acquisition of the matrimonial home and in the alternative by providing full relief to Ms. MacDonald for the use of her inheritance.
>
> 7. The learned trial judge erred in law in providing relief to Ms. MacDonald for inheritance, but failing to consider Mr. MacIsaac's contribution from his parents.
>
> 8. The learned trial judge erred in law in considering real estate commission and legal fees as disposition costs of Ms. MacDonald.

Ms. MacDonald had inherited money upon her mother's death in 1989. These funds were kept separately in her name. Under the will, she was entitled to purchase her mother's home for a price of $60,000 which was $15,000 less than the assessed

value of the property. At that time the parties were living in a house but considering the purchase of alternate accommodation. They decided to exercise the option under the will.

They sold their existing house for $72,000 and invested that sum plus $60,000 of the inheritance into the purchase and renovation of the mother's home. At the time of the divorce hearing the market value of the matrimonial home was $172,000.

Ms. MacDonald sought an unequal division of the value of the matrimonial home. In particular, she requested return of the $60,000 and the $15,000 saved on the beneficial purchase under the will. The trial judge divided the assets unequally in favour of Ms. MacDonald to the extent of $30,000, by returning to her the $60,000 invested. He said in this regard:

> The issue in dispute in regard to the matrimonial home is whether there should be an unequal division in favour of the respondent based on the fact that she used $60,000 of her inheritance to purchase the home in 1989. It is also contended on her behalf that, since she was entitled to purchase the home for 20% less than its assessed value, an additional $15,000 (20%) should be given to her by way of an unequal division. She also requests that disposition costs of a real estate fee of 6% and legal fees of $750 be considered to create an unequal division.
>
> The petitioner objects to the notion that there should be any unequal division with regard to the matrimonial home. He also contends that, at the time the parties purchased their first home in 1971, he received $5,000 from his mother to make the

down payment on the house. He requests that this be considered when the division of this asset is made.

At trial, the respondent testified that it was her father who gave the $5,000 for the down payment, and that the $5,000 given by the petitioner's mother was used to buy furniture.

I am not prepared to consider the contribution from the parents of the parties to the purchase of the first home in deciding on the division of the present matrimonial home. There is conflicting evidence as to what actually happened in 1971 when the first home was purchased and what the money was actually used for. These contributions were made some 24 years ago, and I am not prepared to trace these funds. Also, I am not satisfied that either party has established what actually happened at that time.

The parties agreed that the matrimonial home is worth $172,000. The parties agreed that the respondent paid the purchase price of $60,000 out of her inheritance.

Considering that the purchase was only some three years prior to the separation and that the money used to purchase the home was from funds obtained by the respondent as an inheritance, I am prepared to order an unequal division of this asset pursuant to Section 13(e) of the ***Matrimonial Property Act****. Under the circumstances, I find it would be unfair and unconscionable to order an equal division in light of the source of the funds used to purchase the home.*

I am not prepared to reduce the value of the house by the 20% reduction from the assessed value as requested by the respondent.

The respondent indicated that she intends to retain the matrimonial home and buy out the petitioner's interest. She also indicated, however, that she should be entitled to disposition costs in case she has to sell the home.

> *I am satisfied that the case law has established that disposal costs should be considered when valuing an asset* (**Clancy v. Clancy** (1991), 99 N.S.R. (2d) 147 and **Gomez-Morales v. Gomez-Morales** (1990), 100 N.S.R. (2d) 137). Here the request is for a 6% real estate commission and $750 legal fees. *I recognize that it might become necessary for the respondent to sell the house to obtain the monies necessary to pay the petitioner, and therefore, I find that these are appropriate amounts to deduct from the value of this asset.*
>
> I would therefore order an unequal division of the matrimonial home and direct that the respondent receive the sum of $121,535 and that the petitioner receive the sum of $50,465. The respondent's share is made up of the initial contribution of $60,000, real estate commission of $10,320 and legal fees of $750 with the remainder of $100,930 being split between the parties. (emphasis added)

In **Donald v. Donald** (1991), 103 N.S.R. (2d) 322, Chipman J.A. stated at p. 328:

> In examining the factors set out in s. 13 to see if one or more of them should displace the entitlement of equality declared in the preamble of the **Act**, a court requires *strong evidence* showing that in all the circumstances an equal division would clearly be unfair and unconscionable on a broad view of all the relevant factors: **Harwood v. Thomas** (1981), 45 N.S.R. (2d) 414; 86 A.P.R. 414 (C.A.), at 417 per MacKeigan, J.A. Thus the onus rested upon the respondent to produce this strong evidence. [emphasis in original]

Counsel for Mr. MacIsaac submits that the learned trial judge erred in that the injection of capital from Ms.

MacDonald's inheritance did not provide the "strong evidence" required to warrant the unequal division.

Section 13(e) of the **Matrimonial Property Act**, provides:

> 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:
>
> . . .
>
> (e) the date and manner of acquisition of the assets;

Pursuant to **Section 4(1)(a)** of the **Act,** inheritances by one spouse are exempt from inclusion as a "matrimonial asset" except to the extent they are used for the benefit of the family. Mr. MacIsaac did not seek division of those monies inherited by Ms. MacDonald but held separately. The parties agreed that the $60,000 invested in the matrimonial home, although from an inheritance, had been used for the benefit of the family and thus had lost any status under **s. 4(1)(a)**. The matrimonial home was thus, **prima facie**, subject to equal division, as are all matrimonial assets.

Mr. MacIsaac submits that the judge erred in considering the fact that the monies invested into the home came from an inheritance as a basis for the unequal division. In other words, he submits that the fact that an asset is inherited is relevant only to exemption under **s. 4(1)(a)** and cannot be

considered as a basis for unequal division under **s. 13**. Alternatively, he submits that the judge erred in principle in concluding that equal division would, in these circumstances, be unfair or unconscionable.

The parties agreed that Ms. MacDonald lost the benefit of the exemption under **s. 4(1)(a)** with the investment of the funds in the home. The burden was, thus, upon Ms. MacDonald to satisfy the court that an equal division would be unfair or unconscionable. **Section 13(e)** expressly authorizes the judge to consider both the date and manner of acquisition of an asset, in deciding whether equal division would be unfair or unconscionable. The judge was satisfied that Ms. MacDonald had met the burden.

The judge did not fully compensate Ms. MacDonald. The parties shared equally in the benefit resulting from the fact that the property was purchased for a price below assessed value. Additionally, they shared in the full appreciation in the value of the property since purchase, including any appreciation attributable to Ms. MacDonald's investment of the $60,000.

In making a finding under **s. 13** a judge is called upon to exercise a measure of discretion. That discretion is not unfettered. It must be exercised judicially. Provided the discretion is exercised within acceptable limits, and not arbitrarily, this court will not interfere.

In **R. v. Casey** (1988), 80 N.S.R. (2d) 247, at p. 248, Macdonald J. A. referred to a statement of Lord Halsbury to

explain what is meant by the judicial exercise of a discretionary power:

> In **Sharp v. Wakefield et al.**, [1891] A.C. 173, Lord Halsbury expressed what is meant by the judicial exercise of discretionary power in the following terms (p. 191):
>
> > An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and 'discretion' means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion: Rooke's Case; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

In **Ward v. James**, [1965] 1 All E.R. 563 at p. 570, Lord Denning commented on an Appeal Court's review of a judge's discretion:

> This brings me to the question: in what circumstances will the Court of Appeal interfere with the discretion of the judge? At one time it was said that it would interfere only if he had gone wrong in principle; but since **Evans v. Bartlam**, that idea has been exploded. The true proposition was stated by Lord Wright in **Charles Osenton**

> **& Co. v. Johnston**. This court can, and will, interfere if it is satisfied that the judge was wrong. *Thus it will interfere if it can see that the judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed with him.* A good example is **Charles Osenton & Co. v. Johnston** itself, where Tucker, J., in his discretion ordered trial by an official referee, and the House of Lords reversed the order because he had not given due weight to the fact that the professional reputation of surveyors was at stake. *Conversely it will interfere if it can see that he has been influenced by other considerations which ought not to have weighed with him, or not weighed so much with him*, as in **Hennell v. Ranaboldo**. It sometimes happens that the judge has given reasons which enable this court to know the considerations which have weighed with him; but even if he has given no reasons, the court may infer from the way he has decided, that the judge must have gone wrong in one respect or the other, and will thereupon reverse his decision; see **Grimshaw v. Dunbar**. (emphasis added)

In **Grimshaw v. Dunbar**, [1953] 1 All E.R. 351 (H.L.), at p.353, Jenkins, L.R. said:

> . . . did the judge here exercise his discretion on wrong considerations or wrong grounds, or did he ignore some of the right considerations? If so, then he decided on wrong principles, his error was a matter of law, and this court can interfere. . .
>
> . . . In my view, although no reasons are given by a judge exercising, or refusing to exercise, a discretionary jurisdiction, it may nevertheless, be possible, on looking at the facts, to say that, if the judge has taken all the relevant circumstances into consideration and had excluded from consideration all irrelevant circumstances, he could not possibly

> have arrived at the conclusion to which he came, because on those facts that conclusion involves a palpable miscarriage of justice. . .

In **Girard v. Girard** (1983), 33 R.F.L. (2d) 79 (B.C.C.A.), Lambert, J. A., dissenting in the result, wrote at p. 84:

> The first question relates to the scope of this appeal. Melvin L.J.S.C. decided that an equal division would not be unfair. *This appeal is not a rehearing of that issue. An appeal does not contemplate that we will simply decide the question that was before Melvin, L.J.S.C., and, if our decision is different from his, substitute our decision for his.*
>
> In accordance with the principles that govern a Court of Appeal on an appeal from the decision of a trial judge on the application of a statute, we should allow the appeal only if there is an error in principle (that is, an error in law in the interpretation of the statute or in the principles dealing with its application), or if there is a palpable and overriding error in a finding of fact (as, for example, by ignoring a material fact or overlooking some clear and undisputed evidence) or, finally, where law, fact and judgement are intertwined, if the decision is clearly wrong. (emphasis added)

The terms "unfair" and "unconscionable" do not have precise meaning. Lambert, J. A. wrote in **Girard v. Girard, supra**, at p. 86:

> I come then to the legislative purpose expressed in the word 'unfair'. That word evokes ethical considerations and not merely legal ones. It is not a lawyer's word. The section does not give a judge a broad discretion to divide property in accordance with his own conscience. There can be no doubt about that. The question of

> unfairness must therefore be measured by an objective standard. The standard is that of a fair and reasonable person whose values reflect those generally held in contemporary British Columbia. Such a person, while not insisting that everyone adopt his or her behaviour preferences, can recognize unfairness in the form of a marked departure from current community values.

In **Leblanc v. Leblanc**, [1988] 1 S.C.R. 217 the husband appealed an order of the trial judge dividing the family assets unequally in favour of the wife. The decision was reversed on appeal to the New Brunswick Court of Appeal. As this was a New Brunswick case, the statutory criteria differed, however, the principle applied is relevant. On further appeal to the Supreme Court of Canada, the judgment of the trial court was restored. La Forest, J., wrote for the court at p. 223:

> The question here is whether, on the facts such as those in this case, *the circumstances are such as to permit a court to exercise its discretion* under s. 7(f) to depart from the general rule.
>
> He clearly found, as a matter of fact, that the acquisition, preservation and improvement of the marital property resulted almost exclusively from the wife's efforts and that there was no significant contribution by the husband in child care, household management or financial provision. This, in his view, constituted sufficient grounds for the exercise of his discretion to depart from the usual rule of equal division. . . . It is sufficient for me to say that in the circumstances *the trial judge was entitled to exercise his discretion under s. 7(f) and that he made no error in exercising it as he did*. (emphasis

added)

The test is not whether we would have divided the assets unequally. Applying **LeBlanc**, we must decide whether there were facts before the trial judge that fell within the criteria enumerated in **s. 13**, which entitled the trial judge to exercise his discretion to divide unequally and whether, in doing so, he considered irrelevant factors, gave no weight to relevant factors or failed to properly instruct himself. The decision reveals no such error.

In **Donald v. Donald, supra**, this court reversed the unequal division of assets where the trial judge based the division upon a factor not enumerated within **s. 13**. Here however, the judge expressly identified **s. 13(e)** as applicable. A reasonable interpretation of **s. 13(e)**, which refers to the "date and manner of acquisition", includes consideration of the fact that inherited monies were invested shortly before the separation. In **Fisher v. Fisher** (1994), 131 N.S.R. (2d) 367 (C.A.), this court reversed an unequal division where there was no express finding by the trial judge that an equal division would be unfair or unconscionable. The trial judge, here, however, stated that an equal division would be unfair *and* unconscionable.

Here, a significant sum of money was injected by one party into the matrimonial assets shortly before separation. Is that a reasonable factor for the trial judge to consider in determining whether equal division would be unfair or

unconscionable? Can we say the judge was clearly wrong in so exercising his discretion? In dividing the assets unequally, did the trial judge fail to exercise his discretion judicially? He did not.

The cases cited by Mr. MacIsaac in support of his position bear little factual similarity to this case. In **Leprise v. Crow** (1991), 101 N.S.R. (2d) 194 (C.A.) the court confirmed that funds used to acquire matrimonial property lost their exemption under **s. 4(1)(a)**. That was agreed by the parties here. In **Osborne v. Osborne** (1994), 130 N.S.R. (2d) 194 (C.A.), the trial judge did divide the assets unequally considering several factors under **s. 13**. In **Coady v. Coady** (1995), 144 N.S.R. (2d) 106 (S.C.), an undetermined part of a husband's trust fund, which had been used to purchase the matrimonial home, was not repaid to Mr. Coady on the division of assets. The bulk of the trust funds, which were not used in the marriage, were held to be exempt. There is nothing in the decision to suggest that Mr. Coady was seeking return of the funds contributed to the home. The issue was whether the use of a part of the trust fund for matrimonial purposes tainted the entire fund. It did not.

The only case cited which is factually similar to this is **Draper v. Draper** (1993), 114 N.S.R. (2d) 242 (N.S.S.C.). There Glube, C.J.T.D., divided the matrimonial home unequally in favour of the wife who had contributed inherited funds to its purchase.

When a judge, in exercising his or her discretion, comes

to a result that it is at odds with the result in *like* cases, a close examination of the exercise of discretion is in order. A proper exercise of discretion should lead to similar results in similar cases. The cases cited by Mr. MacIsaac, however, are not sufficiently comparable to provide guidance nor in those cases were analogous issues raised.

It is reasonable to infer that both the amount of the contribution and the fact that it was made so close to the time of separation, when considered in the context of the length of the marriage, moved the trial judge to make the unequal division.

In **Lawrence v. Lawrence** (1981), 47 N.S.R. (2d) 100 (N.S.S.C.A.D.), Hart, J. A., for the court, wrote at p. 115:

> There are thirteen statutory reasons given in this section to guide the judge in exercising his discretion and *he may act upon any one of these*. (emphasis added)

This statement was recently approved by this court in **Mosher v. Mosher** (1995), 140 N.S.R. (2d) 40, per Pugsley, J. A., at p. 60.

While **s. 13(e)** is more commonly engaged in marriages of short duration, where one spouse has brought significantly more assets than the other into the marriage, it is not expressly restricted to those circumstances. Where there are contributions outside the normal scope of a marriage, either in terms of time or amount, the court is invited to consider whether such warrants a departure from equal division. The starting point is equal division but the statute clearly contemplates otherwise in

certain circumstances. The court is invited, in those limited circumstances to redress the unfairness through an unequal division.

As to the submission, raised by Ground 7, that the judge erred in failing to consider the funds allegedly provided by Mr. MacIsaac's father at the time of the marriage, the sufficiency of the evidence is a matter for the trial judge. As is clear in the excerpt from the decision, above, the judge was not satisfied that the evidence adequately established the contribution by the parties' respective parents at the time of marriage. By contrast, however, there was no dispute that Ms. MacDonald contributed the $60,000 shortly before the separation nor that it came from her inheritance.

Mr. MacIsaac submits, in support of Ground 8, that the trial judge erred in crediting Ms. MacDonald with disposal costs on the eventual sale of the home. This Ground, as framed, suggests that the judge erred in permitting any deduction for real estate commission and legal fees. The argument in Mr. MacIsaac's factum and before the panel, however, related to the requirement that the parties share the full amount of the fees. Mr. MacIsaac submits that Ms. MacDonald should be responsible for the disposition costs attributable to $60,000 of the total value of the home.

This court recognized in **Gomez-Morales v. Gomez-Morales** (1990), 100 N.S.R. (2d) 137, that in appropriate circumstances, disposition costs can be considered in valuing an asset. The

judge, here, found that Ms. MacDonald might have to dispose of the matrimonial home to provide the equalization payment to Mr. MacIsaac, resulting from the division in assets. Alternatively the sale of the home was likely, in any event, given the quantum of maintenance. He permitted a deduction for real estate commission of 6% and $750 for legal fees. The value of the matrimonial home was, thus, not the full $172,000, but the appraised value, less real estate commission and legal fees. In not apportioning the real estate commission and legal fees, he did not err. Had he apportioned the fees, Ms. MacDonald would not have received the full $60,000, to which the trial judge had found she was entitled.

(ii) The Reduction in the Value of the Cottage Property:

> 9. The learned trial judge erred in law in reducing the value of the family cottage by 25% and not considering the actual cost spent on the family cottage by Mr. MacIsaac and respondent.

The parties owned a one third interest in a cottage property, the other two shares being owned by Ms. MacDonald's brother and sister. Ms. MacDonald wished to retain the share on the division of assets, with appropriate credit to Mr. MacIsaac. They agreed that the market value of the cottage property was $85,000. The trial judge accepted Ms. MacDonald's argument that a reduced value should be attributed to the parties' one third share, being a partial interest only, because that share would not attract price equal to one third of

market value. There was no evidence before the trial judge on this point, although it is one of common sense. The trial judge held that the one third interest had a value of $25,000 not $28,333, which would represent one third of the full market value. Ms. MacDonald was permitted to keep the cottage share and ordered to pay to Mr. MacIsaac one half of the reduced value. Mr. MacIsaac takes issue with this valuation which favours Ms. MacDonald.

I agree with the submission of Mr. MacIsaac that there was no evidence before the trial judge supporting the reduction in value due to the partial share. Accordingly, I find that the trial judge erred in this regard, in that he proceeded on an absence of evidence. The value of the cottage should be adjusted to the full one third of the market value. This would result in an additional $1,666.50 payable by Ms. MacDonald to Mr. MacIsaac on equalization.

(B) Support Issues:

Mr. MacIsaac raises the following grounds in this regard:

> 1. The learned trial judge erred in law in granting monthly spousal support in the amount of $900 per month to Ms. MacDonald.
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> 2. The learned trial judge erred in law in ordering Mr. MacIsaac to pay spousal support in the amount of $9000 per month to Ms. MacDonald for a period of two years, or longer, or less, based upon a change in circumstances.

Ms. MacDonald cross appeals on this issue as follows:

> 1. That the learned trial judge erred in law in placing a time limit on spousal support awarded to Ms. MacDonald/cross-appellant;
>
> 2. That the learned trial judge erred in law in awarding the amount of $900 per month, when the amount should have been greater;

(i) Quantum of Support:

Mr. MacIsaac submits that the trial judge erred in fixing both the quantum and duration of the maintenance. He further submits that the trial judge erred in not requiring Ms. MacDonald to encroach upon capital to support herself, rather than using interest and dividend income only. He says that the trial judge's calculation of the investment income available to Ms. MacDonald was understated. He submits, as well, that the judge should not have awarded Ms. MacDonald maintenance that enabled her to remain in the matrimonial home.

In addition, Mr. MacIsaac takes issue with the sufficiency of the evidence before the trial judge on certain issues. In particular, he submits that the trial judge should not have accepted Ms. MacDonald's evidence about her efforts to find employment. As I have noted above, the sufficiency of the evidence is a matter for the trial judge. There was evidence before him supporting the factual findings set out in his decision.

In ordering Mr. MacIsaac to pay support the trial judge

said:

> The respondent also requests periodic support. I find that she is clearly in need of such support. She is presently unemployed and basically living on her investment income and capital. Her amended statement of financial information indicates needs of $2,822. She has an investment portfolio valued at $119,000 from which she will receive income of about $7,000 per year $583 per month. In 1993, she had employment income of $9,800, and in 1994, had employment income of $5,300 and $7,400 in unemployment insurance benefits.
>
> In order to meet her needs, The respondent has been drawing out of her investment portfolio. Her income statement indicates the sum of $1,500 per month from that source. There is a Family Court order requiring the petitioner to pay spousal support of $500 per month. *She has therefore been living on a total of $2,000 per month. That amount appears reasonable.*
>
> I find that, until the respondent gets established in long term employment, her employment income will probably continue to be in the range of $10,000 per year.
>
> The respondent has requested that she receive spousal support in the amount of $1,900 per month. (emphasis added)

The support must be considered taking into account each party's capital position after the division of assets. As a result of the division of assets ordered by the trial judge, Ms. MacDonald was left with the matrimonial home, having a net value after disposition costs, of $160,930 and the share of the

cottage, valued by the trial judge at $21,249.75. Ms. MacDonald was to pay to Mr. MacIsaac an equalization payment of $61,809.87, excluding a credit for a lump sum retraining allowance that I will address below. Ms. MacDonald thus had a net value of $120,369.88 in the house and cottage, after payment to Mr. MacIsaac of the equalization payment. Mr. MacIsaac had $61,809.87. Had the assets been divided equally, each would have received $91,809.88. The unequal division thus benefited Ms. MacDonald to the extent of $30,000.

The judge also equally divided Mr. MacIsaac's pension at source; a long service award of $10,260, with one-half to be paid to Ms. MacDonald when received by Mr. MacIsaac upon retirement; and an R.R.S.P. in a gross amount of $9960, to be divided by rollover. The chattels were divided by agreement. I do not consider the pension, long service award or R.R.S.P. to be "capital" in the sense of being immediately available to the parties to assist with support.

The judge found that Ms. MacDonald required retraining to successfully reenter the workforce. The evidence was that she was unemployed at time of trial. His assumption, therefore, that she would have annual employment income of $10,000 is difficult to fathom. Not only did she not have employment, she would not have employment during retraining.

Ms. MacDonald's investment portfolio at the time of the divorce was approximately $120,000. Her average annual

investment income for 1993 and 1994 was $7,100. If she used those investment funds as a source of the equalization payment on the assets, the portfolio would be reduced to about $59,000. This capital sum would produce an annual income of about, $3,500 ($290 monthly) using past return as a guide. Accepting, for the moment, the judge's finding that maintenance of $2000 per month was the right amount, Ms. MacDonald's net need for support, after deducting her investment income, was $1,710. Assuming she did have employment income of $10,000 per year, or $833 per month, her net need would be $877 per month. The $900 monthly ordered by the trial judge would not meet that need taking into account tax consequences. It is difficult, therefore, to determine from the decision how he arrived at the monthly sum.

It may be that the trial judge assumed that Ms. MacDonald would sell the home and receive investment income on the capital. In that event, the net amount produced on the sale of the home, assuming a sale at full appraised value, would be $160,930. To this I would add Ms. MacDonald's investment portfolio of $120,000 and deduct the equalization payment rounded to $61,000. There would therefore be available for investment the net sum of $220,000. Using the rate of return received by Ms. MacDonald in 1993 and 1994, she might expect annual investment income from this sum of approximately $13,000 or $1100 per month. Without employment income, and with the amount of maintenance

ordered, her gross would just meet the $2000 per month. After tax, her net would fall short of her monthly requirement. Additionally, the $2000 monthly maintenance was based upon Ms. MacDonald residing in the mortgage free matrimonial home. Having disposed of the home, Ms. MacDonald would require rental accommodation. This would increase her monthly maintenance need. She could not meet even her most reasonable expenses without encroaching upon capital. This refutes, therefore, the submission of Mr. MacIsaac that the trial judge erred in not requiring Ms. MacDonald encroach upon capital. At the level of maintenance ordered, until she found employment, she would have no option but to draw upon her capital, and might well be required to do so even after she is employed.

I am left to conclude that the level of support ordered by the trial judge was not intended to address Ms. MacDonald's need but was limited by Mr. MacIsaac's ability to pay. I note, however, that the amount ordered seems low, given Mr. MacIsaac's annual income. It would have been of great assistance to this court had the trial judge clearly articulated the basis for the quantum.

While I have grave concerns as to the adequacy of the quantum of maintenance fixed by the trial judge, taking into account Ms. MacDonald's capital position, I cannot say that it was so clearly wrong as to constitute reversible error.

(ii) Termination of Maintenance:

The trial judge placed a two year limit on the payment of maintenance. In this regard he said:

> In this case, I find that the spousal support should be payable for a maximum period of two years. I, however, recognize the concern expressed by the Supreme Court of Canada in the case of **Messier v. Delage** (1983), 35 R.F.L.(2d) 337, and therefore, either party may apply to either extend or reduce the length of time for which support will be paid based on a change in circumstances. Either party may also, of course, apply to vary the amount during this term based on a change in circumstances.
>
> *I have made this order with these terms to attempt to promote the self-sufficiency of the respondent while recognizing that predicting the future is very difficult. I also recognize that the respondent is leaving this marriage with considerable assets including one-half of the petitioner's pension.* (emphasis added)

Section 15 of the **Divorce Act, 1995**, provides in part:

> (5) In making an order [for support] under this section, the court shall take into consideration the condition,means, needs and other circumstances of each spouse and of any child of the marriage for whom support is sought, including
>
> > (a) the length of time the spouses cohabited;
> >
> > (b) the functions performed by the spouse during cohabitation; and
> >
> > (c) any order, agreement or arrangement relating to support of the spouse or

child.

> (7) An order made under this section that provide for the support of a spouse should
>
> > (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
> >
> > (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses pursuant to subsection (8);
> >
> > (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
> >
> > (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

In his decision the the trial judge summarized Ms. MacDonald's employment history:

> Prior to the marriage, the respondent worked as a secretary. She has a diploma from Mount St. Bernard College following a two-year secretarial course. She graduated in 1963 and worked as a secretary at St. Francis Xavier University from that time until her marriage in 1967. She continued working there until the birth of her first child in 1969. She then stayed home with the child and had another child in 1970 and Mark was born in 1972. In 1981, she took

a part-time job where she worked two days per week. That lasted until 1986. Following that, she worked for four months at the manpower office in Antigonish. From then until the separation in 1992, she did not work.

Since the separation, she has worked at a number of temporary jobs. Her last employment was between February 1994 and May 1994 when she worked for the Liberal Party of Canada dealing with the Federal Convention in Ottawa.

In May 1994, she moved back into the former matrimonial home in Antigonish. From May 1994 to November 1994, she worked for her brother at a local lounge, Piper's Pub. She was not paid for this but her brother gave her $2,000 when she finished in November.

Since November 1994, The respondent testified that she has been looking for work but has not been successful in obtaining employment. Her unemployment insurance has now run out.

I am satisfied here that, considering the law as established by **Moge v. Moge** (1992), 99 D.L.R. (4th) 456, that The respondent is entitled to spousal support. . . .

This marriage was clearly a traditional marriage in that The respondent stayed home and looked after the children in the home while the petitioner was the money earner. I reject the suggestion that she is no worse off now than she was prior to the marriage. The realities of what happened in the 28 years since her marriage is that the workplace has changed drastically. She has abilities that obviously will permit her to obtain employment in either her

> former job as a secretary or some other position. She is 50 years old and has indicated that she is interested in taking retraining in computer studies. That appears to be a reasonable and feasible approach for her to take. She should be able to achieve self-sufficiency within a reasonable period of time. . .

In support of his order that the maintenance be time limited, the judge quoted the following passage from **Heineman, infra**, a decision of this court:

> In **Heineman v. Heineman** (1989), 91 N.S.R. (2d) 136, the Nova Scotia Supreme Court Appeal Division (as it then was) dealt with the issue of the length of time for a spousal support order. Hart J.A. did an extensive review of the case law on the issue and concluded: (Page 161)
>
> > If the wife is able to earn some income but as a result of a lengthy marriage is unable to earn enough to meet her needs for a reasonable standard of living then, in my opinion, the husband is responsible to supplement her income to the extent necessary to meet that standard.
> >
> > The most difficult cases will arise when the dependent spouse is still of an age when self-sufficiency to a reasonable standard of living could be maintained by acquiring or reacquiring skills or training acceptable to the employment market. *Here the judge will have to strike a balance between the position of a temporal*

> *limit on maintenance to encourage the acquisition of self-sufficiency and the allowance of unlimited maintenance to cover the shortfall in the spouse's employability.* It will be up to the judge to determine the practicability of obtaining economic self-sufficiency under s. 15 of the **Divorce Act** and whether a time limitation should be used to encourage that status.
>
> Despite the fact that this case was decided prior to **Moge v. Moge,** I believe it is not inconsistent with the principles set out in that case by the Supreme Court of Canada.

In **Messier v. Delage**, [1983] 2 S.C.R. 401, the Supreme Court of Canada upheld a decision of the Quebec Court of Appeal which set aside a time limitation in a spousal support order. At p. 415 Chouinard J. wrote, for the majority of the court:

> The decision must therefore be made on the facts of each case. The facts may change with time: this is the way of life. This is why s. 11(2) provides that an order may be varied from time to time; . . . *The decision therefore must not be made in accordance with events which may or may not occur.* (emphasis added)

While **Messier** was decided under the predecessor to the current **Divorce Act**, it remains good law, as was recognized by this court in **Heineman v. Heineman, supra**.

As to the employment prospects of Ms. MacDonald the trial judge said:

> This marriage was clearly a traditional marriage in that the

> respondent stayed home and looked after the children in the home while the petitioner was the money earner. I reject the suggestion that she is no worse off now than she was prior to the marriage. The realities of what happened in the 28 years since her marriage is that the workplace has changed drastically. She has abilities that obviously will permit her to obtain employment in either her former job as a secretary or some other position. She is 50 years old and has indicated that she is interested in taking retraining in computer studies. That appears to be a reasonable and feasible approach for her to take. She should be able to achieve self-sufficiency within a reasonable period of time.

The evidence before the trial judge was that, despite efforts, Ms. MacDonald had been unsuccessful in obtaining continuing employment since the separation. Indeed, the judge accepted that she required retraining to successfully re-enter the workforce. The judge found that Ms. MacDonald had suffered disadvantage due to her absence from the workforce. There was no finding that she was malingering. The capital position of Ms. MacDonald, resulting from the division of assets, did not, by itself, warrant a termination order.

As this court recognized in the passage from **Heineman**, quoted by the trial judge, there may be circumstances when it is appropriate to place a temporal limit upon maintenance. This would occur, for example, where the marriage is of short duration and the obligation a limited one; or when there is clear evidence that a dependant spouse will obtain employment

within a known time frame; or where there is a concern that the dependant spouse, who should be employed, is not making reasonable or realistic efforts to obtain employment. These are but a few obvious examples and not intended to be an exhaustive list of the situations in which a temporal limit is appropriate. Here, however, there was no evidence before the trial judge from which he could conclude that Ms. MacDonald would have employment within the two years, nor what level of income she would receive if employed. He erred in placing a temporal limit on the maintenance.

The words of Matthews, J. A., from **Sproule v. Sproule** (1986), 73 N.S.R. (2d) 131 at p. 136, are apt:

> Here, it cannot be said with any degree of certainty, as suggested by the trial judge, that 'with some appropriate training, the petitioner could, in all probability, rejoin the work-force and become virtually independent.' That is, to use the words of Mr. Justice Chouinard in **Messier** at p. 353 'hypothesizing as to the unknown and then unforeseeable future'.

I add, that the time limited order here, over emphasizes self- sufficiency and does not pay adequate regard to the other objectives set out in **s. 15(7)** of the **Act**. As was recognized in **Moge v. Moge** (1992), 43 R.F.L. (3d) 345, all four objectives must be taken into account. L'Heureux-Dube, J. said at p. 377:

> It is also imperative to realize that the objective of self-sufficiency is tempered by the caveat that it is to be made a goal only 'in so far as is

> practicable.' This qualification militates against the kind of 'sink or swim' stance upon which the deemed self-sufficiency model is premised.

And at p. 387:

> The exercise of judicial discretion in ordering support requires an examination of all four objectives set out in the Act in order to achieve equitable sharing of the economic consequences of marriage or marriage breakdown.

The trial judge attempted to soften the impact of the terminal order by providing that either party might apply to extend or reduce the period of time during which maintenance is payable.

Section 17 of the **Divorce Act, 1995** makes provision for a former spouse to apply to vary a support order. **Section 17(4)** provides, however:

> Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse . . . occuring since the making of the support order . . . and, in making the variation order, the court shall take into consideration that change.

In effect, then, by placing the time limit on the maintenance, the judge reversed the onus which would otherwise be upon the payor spouse on an application to vary. The onus would be upon Ms. MacDonald to demonstrate that the maintenance should continue. Time limited orders which

reverse the onus may be used by the court, but only where the facts support such an order. Absent a finding by the trial judge that Ms. MacDonald had certain future employment; had not made reasonable efforts up to the time of trial to obtain employment; or that she sought to pursue unrealistic retraining goals; given her age, the length of the marriage, her unsuccessful attempts to find employment and her time out of the workforce, this was not an appropriate case in which to order terminal maintenance.

I conclude that the trial judge erred in law in placing a temporal limitation on the maintenance. In particular, he inappropriately emphasized self-sufficiency to the exclusion of the other objectives in s. 15(7) of the Act. He failed to adequately consider the disparities in the parties' incomes; Ms. MacDonald's lengthy absence from the workforce attributable to her assumption of family responsibilities; the uncertainty of her re-entry; the uncertainty of her income upon re-entry; her age; the lifestyle enjoyed by the parties during the marriage; her lack of success in obtaining lasting employment after separation; and the fact that even upon gaining employment, she may require supplemental maintenance to reach a reasonable standard of living. The judge's reference to Ms. MacDonald's capital position resulting from the division of assets and her own financial resources is not an adequate substitute for a fuller consideration of the above factors.

I would remove the time limitation. I add that in my

view, it is indeed helpful to a future court on variation and to the parties, for the judge to have expressed his expectation of Ms. MacDonald's prospects of self sufficiency. I do not mean to discourage such efforts. The trial judge's expectations in this regard, however, can be met, short of imposing a time limit upon the maintenance. I recognize, as well, that whatever the expectations set out by the judge at trial, the court cannot fetter a future court's discretion on an application to vary maintenance.

(iii) Lump Sum Support:

> 3. The learned trial judge erred in law in ordering Mr. MacIsaac to pay lump sum spousal support in the amount of $7,000 to cover the cost of retraining for Ms. MacDonald.

The trial judge ordered:

> The respondent requests a lump sum award of spousal support to permit her to enter a retraining program. She indicates that she has investigated the possibility of taking computer training in Halifax. These courses involve tuition of $7,000 to $11,000 per year. She requests a lump sum of $9,000.
>
> The petitioner, in his brief, suggests that such training might be available locally for less cost.
>
> In the circumstances, I would order that the petitioner pay to the respondent the sum of $7,000 as a lump sum award to cover the cost of a retraining program for her. This amount will be set-off against her

> asset allocation (see **Moore v. Moore** (1987), 77 N.S.R. (2d) 267).

Mr. MacIsaac submits that the trial judge erred in ordering a lump sum. His submission in this regard relates to the adequacy of the evidence before the trial judge. He says that Ms. MacDonald's evidence about her plans to retrain was not sufficiently specific to warrant an award. It was her evidence that she had looked into courses at the Atlantic Computer Institute and at Compu College, the cost of which ran between $7,000 and $10,000 per year. She did not feel she could afford that and had not arranged to take a course. Leading up to the divorce hearing, Ms. MacDonald was unemployed, drawing on capital, and in receipt of interim maintenance of $500 per month. It is not surprising that in those circumstances, she had not arranged to take retraining. The judge was satisfied with the evidence.

In view of the judge's finding that Ms. MacDonald required retraining, the award of the lump sum was made to address a current need. The judge might have concluded that Ms. MacDonald could have financed the course from her own resources. Taking into account, however, the low level of maintenance and the fact that all of Ms. MacDonald's financial resources would be required to provided a reasonable level of support, I cannot say that the judge erred in imposing this obligation upon Mr. MacIsaac.

Counsel for Ms. MacDonald submits that the lump sum

should have been payable only in the event that Ms. MacDonald undertakes the training. Counsel for Ms. MacDonald does not disagree with that limitation. Accordingly, I would vary the order of the trial judge to a limited extent and in accordance with Appendix A to this decision.

(iv) Cross-Appeal As to Costs:

Ms. MacDonald cross-appeals:

> 3. That the learned trial judge erred in law in not providing Ms. MacDonald/cross-appellant with an opportunity to be heard on costs and/or not awarding costs to Ms. MacDonald/cross-appellant;

The judge declined to award costs on the trial. He said:

> The parties have not addressed the issue of costs, but in the circumstances, I would order that each party bear their own costs.

The parties filed post-trial memoranda. At the conclusion of Ms. MacDonald's memorandum was a request that the matter of costs be adjourned for 30 days pending application of either party. Apparently, at the conclusion of the trial the judge did not ask counsel to address costs in their post trial submissions. Costs are in the discretion of the trial judge and are always in issue. Counsel cannot expect a separate hearing on costs at the conclusion of each trial and should be prepared to address costs in their briefs to the judge, or at the conclusion of the trial. If there have been settlement offers, counsel may not be in a position to address costs prior to the

decision being rendered. In such a case, counsel should alert the trial judge that there have been offers, and ask that costs be reserved. Should counsel be of the view that the judge should not know, prior to rendering judgement, that settlement offers have been made, and the judge fixes costs in her decision, the matter can be revisited, with leave of the judge, before the Order is taken out.

I cannot say that the judge committed reversible error in making his decision on costs before hearing from the parties.

(iv) Miscellaneous Grounds:

Mr. MacIsaac submits that Ms. MacDonald had "pre-inheritance savings" of about $11,500 that should have been divided by the trial judge. These savings, if they existed, were not the subject of evidence at trial. Counsel for Mr. MacIsaac has concluded from a review of Ms. MacDonald's investment statements, which were provided before the trial, that there were such funds. There is no clear evidence that these savings remained at the time of the divorce hearing. Ms. MacDonald was not asked at trial whether such funds existed. The judge was not asked to divide the funds. There was no error.

Disposition:

I would allow the appeal to the extent of adjusting the value of the cottage property as set out above; altering the terms for the payment of the lump sum, consistent with Appendix A

and placing the limitation on the payment of the retraining allowance. I would allow the cross-appeal to delete the termination date placed upon the maintenance.

Costs:

Ms. MacDonald has been substantially successful on this appeal. I would order costs to her of $1500 plus disbursements, the latter to be proved by Affidavit.

APPENDIX A

Mr. MacIsaac shall pay to Ms. MacDonald a lump sum in the lesser of $7,000 or the actual cost of her training course, including materials, provided the she actually undertakes employment training and provides Mr. MacIsaac with proof thereof. This obligation shall expire in the event that she does not commence the training by June 30, 1997.

Ms. MacDonald may hold back from the equalization payment due to Mr. MacIsaac the amount of $7,000 which she shall keep in an interest bearing account. In the event that she does not take the training she shall pay these funds over to Mr. MacIsaac with accrued interest not later than June 30, 1997.

Should Ms. MacDonald elect to take a retraining program she shall provide Mr. MacIsaac with the particulars including commencement date, duration and cost.

J.A.

Concurred in:

Pugsley, J.A.

Matthews, J.A.

C.A. No. 122779

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

HILARY B. MACISAAC) Appellant)

- and -) REASONS FOR) JUDGMENT BY:)

MOIRA M. MACISAAC) BATEMAN,) J.A. Respondent))))))