NOVA SCOTIA COURT OF APPEAL

Citation: *MacLennan v. MacLennan*, 2003 NSCA 9

Date: 20030121
Docket: CA 176686
Registry: Halifax

Between:

Allan Frederick MacLennan

Appellant

v.

Colleen Elizabeth MacLennan

Respondent

Judges: Glube, C.J.N.S.; Cromwell and Oland, JJ.A.

Appeal Heard: September 30, 2002, in Halifax, Nova Scotia

Held: **Appeal allowed in part per reasons for judgment of Cromwell, J.A.; Glube, C.J.N.S. and Oland, J.A. concurring.**

Counsel: Theresa M. Forgeron, for the appellant
Elaine N. Gibney, for the respondent

Reasons for Judgment:

I. **Introduction**:

[1] This appeal by the former husband is from the trial judge's order for an unequal division of the matrimonial home, for spousal support of indefinite duration in favour of the former wife and child support for the parties' 22 year old son.

II. **Overview of the Facts**:

[2] The parties were married in 1980 and separated in early 1997. Their two children, Allan and Adam, were born in 1980 and 1986 respectively. Throughout the marriage, Ms. MacLennan (the respondent on appeal) was a full time mother and homemaker while Mr. MacLennan (the appellant) was employed full time outside the home. Since the early 1980's, he has been in retail management and, at the time of trial, was a store manager with 95 employees under his direction.

[3] After separation in 1997, Mr. MacLennan began living five nights out of seven with his girlfriend. They now have a young daughter, Chelsea. (His girlfriend lives in subsidized housing so that she and Mr. MacLennan are not able to cohabit on a full-time basis. They plan to marry.) For her part, Ms. MacLennan remained in the matrimonial home with the children and began working at a local garage.

[4] By agreement, a Family Court order was taken out shortly after separation which gave custody of the two children to Ms. MacLennan with reasonable access to Mr. MacLennan. He was to pay $1030 per month to support Ms. MacLennan and the children and to maintain the payments on the matrimonial debts. Ms. MacLennan was to pay the mortgage, property taxes and fire insurance. The order was to be reviewed when the matrimonial debts were paid. The matrimonial home has an assessed value of $43,200 and at the time of separation had a mortgage of $11,344.

[5] As contemplated by the order, Ms. MacLennan paid the mortgage after separation and it was discharged in January of 2000.

[6] After separation, both children initially lived with Ms. MacLennan. However, Allan lived with his father for a few months and then had his own apartment for about 8 months. Both boys were again living with their mother at the time of trial. Allan was working but planning to return to college in the fall of 2002 and Adam was in school.

[7] After trial, the judge made the following orders: (a) Ms. MacLennan was to have custody of Adam and Mr. MacLennan was to have reasonable access and pay child support for Adam in the amount of $455.00 per month based on income of $55,000 per year; (b) if Allan returned to university, Mr. MacLennan was to pay monthly support of $742 for both boys; (the order also had a provision for adjustment of these amounts in accordance with whether or not Mr. MacLennan received bonuses at work.); (c) Mr. MacLennan was to pay spousal support in the amount of $650 per month; and (d) the matrimonial home was ordered to remain the joint property of the parties but in Ms. MacLennan's exclusive possession until Adam turns 19 (i.e. February, 2005). At that time, Ms. MacLennan can purchase Mr. MacLennan's interest at a "current appraisal value ... less notional real estate commission and legal fees" failing which the property is to be sold and the proceeds divided equally. Ms. MacLennan was to be responsible for maintenance of the matrimonial home during the period of her exclusive possession. The judge's order also dealt with division of personal property, payment of debts as well as life and health insurance and pension issues.

III. Issues:

[8] Mr. MacLennan appeals, raising issues relating to the matrimonial home, the support of Allan if he returned to university and spousal maintenance. For the purposes of analysis, I would define the issues as follows:

1. Division of the matrimonial home:

    1.1. Did the judge err in postponing division and thereby granting an unequal division, in continuing joint ownership and by failing to award occupation rent or other compensation for postponed realization of Mr. MacLennan's share?

2. Child Support for Allan:

    2.1. Did the judge err in finding that Allan would be a child of the marriage if he returned to university?

    2.2. If not, did the judge err in determining the quantum of support in relation to him?

2.3. Did the judge err in her calculation of the credit to Mr. MacLennan with respect to the period during which Allan resided with him?

3. Spousal Maintenance:

3.1. Did the judge err in awarding spousal maintenance or in failing to stipulate a termination or review date for such maintenance?

3.2. Did the judge err in determining the amount of spousal support?

3.3. Did the judge err in directing that Ms. MacLennan would be the named beneficiary under Mr. MacLennan's life insurance until both boys complete their education or turn 24?

IV. Standard of Review:

[9] In both support and division of property cases, a deferential standard of appellate review has been adopted: **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 (N.S.C.A.); **MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321 (C.A.); **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47 (C.A.). The determination of support and division of property requires the exercise of judicial discretion. Provided that the judge of first instance applies correct principles and does not make a palpable and overriding error of fact, the exercise of such discretion will not be interfered with on appeal unless its result is so clearly wrong as to amount to an injustice: **Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136 (S.C.A.D.) at 162; **LeBlanc v. LeBlanc**, [1988] 1 S.C.R. 217 at 223 - 24; **Elsom v. Elsom**, [1989] 1 S.C.R. 1367 at 1374 - 77; **Hickey v. Hickey**, [1999] 2 S.C.R. 518 at paras. 10 - 13.

V. Analysis:

1. Division of the matrimonial home:

1.1. Did the judge err in postponing division and thereby granting an unequal division, in continuing joint ownership and by

> *failing to award occupation rent or other compensation for postponed realization of Mr. MacLennan's share?*

[10] The judge ordered exclusive possession and postponement of division because she thought that this was required to preserve stability for the younger boy, Adam. She said this at p. 15:

> To cause the family to move now would be unfair and unconscionable. This is the only home Adam knows. He has no relationship with his father. I am unwilling to upset this family, especially now when, as stated, they are finally experiencing some positive living and tranquility. This development does not seem to be a consideration for Mr. MacLennan. I order the matrimonial home to remain a joint asset to be sold when Adam turns nineteen (19).
>
> After Adam's nineteenth(19) birthday, Mrs. MacLennan can purchase Mr. MacLennan's interest at a current appraisal value [not provided] less notional real estate commission and legal fees.
>
> In short, I grant an uneven division of the matrimonial home for all the reasons given. I do find it would be unconscionable to hold otherwise.

[11] Mr. MacLennan takes exception to this part of the judge's decision on a number of grounds. The most substantial are these. First, it is submitted that the judge had no jurisdiction to order that the joint tenancy be maintained for the period during which division was to be postponed. Second, Mr. MacLennan argues that the postponement of division as ordered by the judge constitutes an unequal division which the evidence did not justify. I will deal with these two points first before turning to a number of other submissions.

[12] Did the judge have jurisdiction to continue the joint tenancy of the property upon a final division of assets? The appellant submits not. It is argued that the authority to grant exclusive possession as set out in s. 11 of the **Matrimonial Property Act**, R.S.N.S. 1989, c. 275, as amended, is applicable only to interim orders preceding a final division.

[13] As pointed out by Bateman, J.A., writing for the Court in **Sampson v. Sampson** (1999), 180 N.S.R. (2d) 248; 1999 NSCA 136, maintenance of co-tenancy can be problematic, as for example, if mortgage renewals occur or major repairs are necessary: para. 17. While mortgage renewals were not involved in the present case, the period of postponement was a period of years, increasing the risk of unforeseen difficulties with the property. For this reason, if postponement of division is to be achieved after trial as

opposed to the ordering of exclusive possession on an interim basis, it will generally be wrong, absent unusual circumstances, to maintain joint ownership. Instead, ownership should be separated and the postponed interest secured in an appropriate manner.

[14] I do not think it necessary to resolve the jurisdictional issue in this case. In my view, there were no unusual circumstances here and it was an error in principle to maintain the joint ownership of the property for such an extended period of time. Following the approach mentioned in **Sampson**, the property ought to be conveyed to Ms. MacLennan, subject to a mortgage, on terms I will address later, to secure Mr. MacLennan's interest. If the parties are unable to agree on the terms of the mortgage, that matter should be remitted to the trial judge for determination.

[15] That brings me to the second point which is that the postponement constitutes an unequal division which is not justified on the evidence.

[16] The case law in Nova Scotia supports the appellant's submission that, generally, court ordered postponement of realization of a one-half interest in a matrimonial asset (as opposed to delay in realization caused, for example, by market forces) creates an unequal division of that asset: see, for example, **Sampson** at para. 12. (There might, perhaps, be rare circumstances in which this would not necessarily be the case, but the facts here do not require consideration of that possibility.) In this case, the order postpones for a period of years the division of the parties' only significant asset and gives ongoing use and enjoyment of it to one of them (and a child or children of the marriage) throughout that period. This constituted an unequal division as the judge recognized.

[17] The question then becomes whether the judge erred on this record in finding that this unequal division was justified. The judge relied on **Sampson**, and in particular this passage:

> [14] The appellant says that in order to support an unequal division based upon the needs of the child, there must be evidence that a child would suffer an adverse effect if required to move and the judge must determine that no other division of assets would satisfy the court's desire to allow the child to remain in the matrimonial home. I do not accept the appellant's suggestion that in every case it is necessary for the custodial parent to present evidence of harm to the child should a move occur or to affirmatively demonstrate that other provision for shelter is not adequate. Whether such evidence is necessary will depend upon the circumstances of each case. The matrimonial home

> here was the only home that Darcy has known. It is near her school and all of her friends are in the neighborhood. It is reasonable to infer that Darcy would benefit from remaining in the home, if financially feasible. The preservation of stability to the extent possible for children after divorce is always desirable. It is a modest home with a mortgage payment of $300 monthly. Taxes, heat, insurance and power added about another $300 to the monthly cost. The postponement period is relatively short, five years, and sufficient to see Darcy through completion of high school. This, in my view, and obviously in the trial judge's view, is a reasonable horizon.

[18] In argument, the appellant submitted that there is not to be found in this record the sort of strong evidence which is required to show that failure to postpone division would clearly be unfair and unconscionable: see for example **Donald v. Donald** (1991), 103 N.S.R. (2d) 322 (C.A.) and **Dennis-Fisher v. Fisher** (1994), 131 N.S.R.(2d) 367 (C.A.). Excerpts from the record are advanced with a view to showing that Adam has done well in spite of the separation and estrangement from his father and that a move from the matrimonial home would not be particularly upsetting.

[19] The trial judge, of course, was obliged to consider all of the evidence bearing on these questions. As pointed out in **Sampson**, it is not necessary in every case for the custodial parent to demonstrate that harm to the child will result should a move occur or that other provision for shelter is not adequate. Rather, the facts of the particular case must be considered. As in **Sampson**, it was a reasonable inference here that the child would benefit from remaining in the home if financially feasible and, as in **Sampson**, this home is a modest one where mother and son can live very economically, probably more economically than any other reasonable alternative. Also as in **Sampson**, the period of postponement is less than five years. Mr. MacLennan, in his own testimony at trial, expressed concern about what Adam was going through and the effect on him if forced to leave the only home he had ever known. In my opinion, the conclusion the judge reached that an unequal division was justified to the extent of a four year postponement of the division of this modest home was reasonably open to her on the record as a whole.

[20] The appellant submits that if division is to be postponed, there should be an allowance in Mr. MacLennan's favour to compensate him for the loss of use of the asset or its value during the period of postponement. This could take

one of two forms. One option would be to give Ms. MacLennan title now, but subject to a mortgage in favour of Mr. MacLennan in a fixed amount, bearing interest: see **Sampson**, at para. 17. A second option would be to direct Ms. MacLennan to pay occupation rent.

[21] As a result of her decision to maintain the joint tenancy, the judge addressed only the second of these options. She declined to award occupation rent, reasoning as follows at p. 17:

> The Family Court Order appears the most reliable source of reference to calculate matrimonial debt which I find to be ten thousand six hundred and twenty-five dollars ($10,625.00). The mortgage at date of separation was eleven thousand three hundred and forty-four dollars and ninety cents ($11,344.90). The husband paid the loan and the wife paid the mortgage.
>
> The husband agreed at trial he was required to pay less maintenance because he assumed responsibility for the debts. Clause (8) of that Order confirms this arrangement.
>
> Mrs. MacLennan took care of the mortgage in part due to maintenance received from Mr. MacLennan. She also maintained the property and paid the taxes.
>
> I find these bills are close enough to cancel each other out without further consideration.
>
> My review of case law, particularly *Gibson v. Montgomery (1999), 177 N.S.R. 255* and *Stoodley v. Stoodley (1997), 172 N.S.R. 101* confirm occupational rent is not a frequently used remedy. In this case, Mrs. MacLennan does not have the means to raise one (1) or two (2) sons and work for fifteen thousand dollars ($15,000.00) per year and pay rent. Furthermore, she is responsible to maintain the asset until it is sold. There will be no adjustment for occupational rent. Mr. MacLennan has not assisted in maintaining the matrimonial home for the past three and one-half (3½) years, except indirectly through spousal and child support.

[22] The appellant says that the judge erred in three respects on this aspect of the case. First, the appellant argues, the judge, in effect, gave Ms. MacLennan the benefit of paying her share of the matrimonial debt twice over. The judge pointed out that the debts assumed by Mr. MacLennan were about equal to the unpaid balance on the mortgage assumed by Ms. MacLennan. However, to give Ms. MacLennan the benefit of occupation of the house and credit for payments is, the appellant says, to give her a double benefit.

Second, the judge erred, it is said, because she made no adjustment of maintenance in light of the fact that Mr. MacLennan was paying shelter expenses and Ms. MacLennan was not. Third, the appellant says the judge erred in concluding the modest expenditures made by Ms. MacLennan on the maintenance of the home were sufficient to offset Mr. MacLennan's claim for occupation rent.

[23] I do not accept these submissions. The judge looked at the situation globally and concluded that Ms. MacLennan's obligation to maintain the home and the fact that maintenance in the Family Court was lower than it would otherwise have been because Mr. MacLennan was paying the family debts balanced off any claim for occupation rent which Mr. MacLennan might otherwise have. The record on these specific points supports the judge's global assessment of the roughly equal burdens and benefits of the arrangement which she ordered. Moreover, her approach reflects the general reluctance to order occupation rent: see, for example, **Smith v. Smith**, 2001 NSSC 5 at para. 15 and **Kennedy-Dowell v. Dowell** (2002), 203 N.S.R. (2d) 130; 2002 NSSF 13 at para. 147. In addition, given the evidence concerning the modest value of the home and the cost of maintaining it, the judge was entitled to rely on what this Court has called the "... reasonable working assumption that the cost of maintaining the home would be roughly equal to the rental value of the [husband's] half interest in it ...": **Best v. Best** (1991), 102 N.S.R. (2d) 61 (C.A.) at para. 26. Finally, the judge, no doubt, took into account that her order for future division of the home gave Mr. MacLennan the benefit of any increase in its value over the period of postponement.

[24] Before concluding on the first main issue, I must deal briefly with some other submissions by the appellant in relation to the division of the home which, in my view, do not raise fairly arguable issues.

[25] It was submitted that the judge erred by referring to s. 13(f) of the **Matrimonial Property Act** because there is no evidence here that Ms. MacLennan's assumption of housekeeping, child care or other domestic responsibilities for the family had resulted in Mr. MacLennan's ability to acquire a business asset. I agree that this section is not relevant to this case. However, no fair reading of the judge's reasons supports the conclusion that she relied on this section at all in reaching her conclusion. The judge did not commit reversible error by simply referring to it where it is clear that it played no part in her reasoning.

[26] It is also argued that the judge erred by saying that she was unwilling to "... upset this family..." because the relevant test under s. 13(h) of the

Matrimonial Property Act is concerned with the needs of a child, not of the family. The judge's use of this phrase does not constitute reversible error. It could not be clearer from the judge's reasons that she concluded that Adam's needs required postponement of the division.

[27] Mr. MacLennan also submits that the judge erred in failing to take account of the needs of his young daughter, Chelsea, from his new relationship in addressing s. 13(h) of the **Act**. The section speaks of the "needs of a child who has not attained the age of majority" and her needs, it is argued, ought to have been considered. This point is premised on a misreading of the statute. The word "child" as it appears in s. 13(h) is a defined term under the **Act** : see s. 2(b). It is apparent that Chelsea is not a child within this definition because she is not a child of both spouses as s. 2(b) requires. The judge did not err in failing to take account of Chelsea's needs in applying s. 13(h) of the **Act**.

[28] I would conclude that the judge did not err in law or make any palpable and overriding error of fact in concluding that the postponement was appropriate in light of Adam's needs or in refusing to award occupation rent.

[29] I have previously concluded that although there was no error in ordering postponement, the judge did err in principle in maintaining the joint tenancy during the period of postponement. I would direct instead that the property be conveyed to Ms. MacLennan and that she execute a mortgage to secure Mr. MacLennan's postponed interest until Adam's 19th birthday. For the same reasons which led me to conclude that the judge did not err in refusing to order occupation rent, I would stipulate the mortgage should not bear interest. If the parties cannot agree on the form of the mortgage, that matter shall be remitted to the trial judge for determination.

2. Child Support for Allan:

2.1. Did the judge err in finding that Allan would be a child of the marriage if he returned to university?

[30] The judge ordered Mr. MacLennan to pay Ms. MacLennan support for Allan, if in university, in an amount equal to the difference between the basic Guideline amount for one child and two based on Mr. MacLennan's income. She held simply that "... if [Allan] is in a recognized learning institution he is entitled to support." Although not explicit in her reasons or order, it is implicit that the judge was referring to full time university attendance at the

University College of Cape Breton and that his return, if any, would be within a matter of weeks.

[31] As the judge noted, the evidence concerning Allan's situation was not detailed. We do know that he was born on March 23, 1980 and was, therefore, 21 at the time of trial in April 2001. After some time on his own and with his father, he was once again living in the matrimonial home with his mother, having moved there the previous November.

[32] Mr. MacLennan testified that Allan had been in university earlier, had decided to stop his university education for "..this next term, this year" and did not want to return. According to his father, Allan was working at the Marconi Campus call centre full time. Mr. MacLennan agreed in cross-examination that Allan had over $11,000 in student loans and that the reason that he stoped going to university was that he owed tuition that he could not afford to pay.

[33] Ms. MacLennan confirmed that Allan was living with her, having moved back in November of 2000 after having moved out the previous April or May. She said that she purchases clothing and food for both boys. She testified that she had paid off a $1500 loan Allan had from the university which had prevented him from returning to school until it was paid. He had attended university for 2 years, passing 3 out of 5 credits in first year and four out of five in second. He did not return for the year during which the trial was held but, according to his mother, "... hopefully he's going to go back in September [i.e. 2001]." Allan was working full time (37 hours per week) making $8.00 or $8.50 per hour. He was working all day shifts, but was not taking any courses in the evening. Allan was contributing $100 per week from his earnings towards the household expenses. Ms. MacLennan had returned all that he had paid her up to shortly before the trial to allow him to buy a computer. His payment of $100 per week started because Allan was not able to save money. His mother told him to give her the $100 per week and, without telling him, she put it away as, in effect, savings for him. As she said at trial, this money was used to buy the computer and "... now he's starting to save hopefully for his semester in the fall." She stated, in response to questions from the judge, that he had not applied yet (i.e. as of April, 2001).

[34] The appellant says that the judge erred, on this record, in finding that Allan was a child of the marriage. In considering this submission, it must be remembered that the judge's order was conditional on Allan returning to school. It follows that she did not find that he was a child of the marriage at

the time of trial, but that he would be if he returned to university. With that in mind, there are two main aspects of the appellant's submission that must be considered.

[35] The first is the argument that the judge erred in law by her implied holding that Allan would automatically be a child of the marriage if he were in full time attendance in university. It is submitted that the determination of whether he is a child of the marriage requires an analysis of such facts as his financial circumstances, his aptitude, or lack of it, for university study and his capacity to assist with the cost of his education. The judge, it is argued, did not perform this analysis and, had she done so, could not have reached the conclusion she did.

[36] Second, it is submitted that at the time of trial, Allan's future attendance at university was speculative and that the order should not have been made on the basis of speculation. Counsel relied on the fact that Allan had not applied to return and apparently had no firm plan to do so.

[37] The issues here are framed by ss. 15.1 and 2(1) of the **Divorce Act**, R.S. 1985, c. 3 (2nd Supp.). The Court may make an order requiring a spouse or a former spouse to pay for the support of a child of the marriage: s. 15.1. A "child of the marriage", for the purposes of this case, means a child of the spouses who, at the material time, is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life: s. 2(1). As pointed out by Freeman, J.A. for the Court in **Giorno v. Giorno** (1992), 110 N.S.R. (2d) 87 (S.C.A.D.) at para. 15, "other cause" includes, but is not limited to the pursuit of higher education.

[38] Freeman, J.A. also provided an admirable summary of the authorities in **Martell v. Height** (1994), 130 N.S.R. (2d) 318 at para. 8:

> ¶ 8 It is clear from the various authorities cited by counsel that courts recognize jurisdiction under s. 2(1) of the **Divorce Act** to hold parents responsible for children over 16 during their period of dependency. How long that period continues is a question of fact for the trial judge in each case. There is no arbitrary cut-off point based either on age or scholastic attainment, although as these increase the onus of proving dependency grows heavier. As a general rule parents of a bona fide student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry-level employment in an appropriate field.

[39] I agree with the appellant that a child at or over the age of majority is not automatically a child of the marriage for the purposes of support simply by virtue of being a full time undergraduate university student, although I would add that most such students will qualify as such. As required by the provisions of the **Divorce Act** to which I have referred, it must be shown that the child is unable to withdraw himself or herself from parental charge. The party claiming support has the burden of establishing entitlement.

[40] The application of this threshold requires, as Chipman, J.A. pointed out in **Yaschuk v. Logan** (1992), 110 N.S.R. (2d) 278 (S.C.A.D.) at para 59, that each case be examined carefully in light of its own facts. The weighing of these facts and exercising judgment in relation to them is, as he said, particularly in the province of the trial judge. The issue is whether the judge made an error of law or a palpable and overriding error of fact in concluding that Allan would be a child of the marriage if he returned to full time university attendance in the coming weeks.

[41] The authorities have developed lengthy lists of factors relevant to determining whether an adult child remains a "child of the marriage" for support purposes: see, for example, **Cole v. Cole** (1995), 143 N.S.R. (2d) 378; N.S.J. No. 362 (Q.L.)(Fam. Ct.) at paras. 12 and 13; **Farden v. Farden** (1993), 48 R.F.L. (3d) 60; B.C.J. No. 1315 (Q.L.) (S.C. Master); T.W. Hainsworth,*"Support for Adult Children"* (1999 - 2000), 17 Can. Fam. L.Q. 39 at pp. 51-53. As helpful as they are, such lists of relevant factors must not be used in place of the language of the statute or be invoked to impose a burden on parties to call evidence about the obvious or on judges to address non-issues in their reasons for judgment. Judges are entitled to draw reasonable, common sense inferences from the proven facts and to take into account notorious facts such as that post secondary education is expensive, well paid part time employment for full time students is scarce and that the demands of full time course work limit the time available for part time work: **Darlington v. Darlington** (1997), 32 R.F.L. (4th) 406; B.C.J. No. 2534 (Q.L.)(B.C.C.A.).

[42] In this case, the judge had before her evidence that Allan was living at home, had substantial student loan obligations, had enjoyed a measure of success in his previous two years of university study, but had been unable to return to university for financial reasons. If he had actually been enrolled in full time studies rather than working full time at the time of trial, it would, in my view, have been a reasonable inference on this record that he continued to be a child of the marriage.

[43] The appellant submits, however, that the fact that he was not and had no definite plan to return results in the judge's order for support in the amount of $247 per month if he returned to university full time being in error.

[44] Part of this point is met by the fact that the judge made the support order conditional on Allan being in university. The evidence of his intention to return was not definite. However, the fact that support would only become payable if he did seems to me to overcome the weak evidence of settled intention to return to school. It would have been preferable, in my view, to put some time limit and a requirement that attendance be full time on this conditional order but, as noted, I think it is clear that is what the judge intended. I do not think that the judge erred in law simply by making the payment of support conditional upon the return to school provided that the evidence supports her conclusion that he would be a child of the marriage if that condition were met. While generally the "material time" for the purposes of determining the child's status is the time of trial, I think that in the case of a conditional order premised on foreseeable future events to occur, or not, in known circumstances, the material time is the time, if ever, at which the condition is fulfilled.

[45] The question then becomes whether the judge erred in concluding that if he returned to full time attendance in the near future, Allan would be a child of the marriage. In my view, she did not. The judge's conclusion is supported by the record. She had before her evidence concerning Allan's student debt load, his withdrawing from university on financial grounds, his residing with and being supported in part by his mother. In addition, she was entitled to take into account common knowledge about the cost of education and the difficultly of a full time student being self sufficient. In combination, the conclusion that Allan would be a child of the marriage if he returned in the near future to full time university studies is reasonable.

[46] The appellant says that instead of doing what the judge did, she ought to have made no provision for support for Allan, leaving it to Ms. MacLennan to apply to vary when and if Allan returned to school. However, in my view, the approach taken by the judge here seems to me to have been pragmatic and just. While it is easy for lawyers and judges to say that parties can always return to court for variation, the costs and delays of legal proceedings regrettably often make this unrealistic for parties with modest means and immediate needs. Moreover, the young person's path back to university should be made easier, not harder. After all, as Chipman, J.A. observed in **Yaschuk** at para. 59, "... an education that will fit a child for a career can be

properly regarded as a necessity." The judge was no doubt concerned here that if further proceedings were necessary to obtain assistance for return to school, the effect would be to place a time-consuming and expensive roadblock in Allan's path. I would uphold the judge's order, with minor changes, as being both legally sound and clearly appropriate in the particular situation which faced her in this case.

[47] The order should be amended to specify that attendance at UCCB must be full time (that is, Allan must have the status of a full time student) and must take place no later than January of 2002, that is within four (4) months of the judge's written decision.

2.2. Did the judge err in determining the quantum of support for Allan?

[48] The judge noted that she had heard little about Allan's needs. She therefore applied the *Guideline* amount as addressed in s. 3(2) of the *Guidelines*. While it is argued that the judge had no basis for doing so, I would find, on the contrary, that there was no evidence before her that would have permitted her to find that the *Guideline* amount would be inappropriate if Allan were in full time attendance at university. (Q.L.)(S.C.) The onus of showing that the *Guideline* amount is inappropriate is on the party so claiming: James C. MacDonald and Ann C. Wilson, *Child Support Guidelines Law and Practice* (looseleaf, updated to release 2, 2002) at 9.15.5; **Wesemann v. Wesemann** (1999). 49 R.F.L. (4th) 435; B.C.J. No 1387 (Q.L.)(S.C.). I would, however, direct that Mr. MacLennan be provided with all financial information pertinent to Allan's schooling, if he has returned to school, including student loan amounts, tuition and book costs, academic results, his place of residence and living costs and income from employment.

2.3. Did the judge err in her calculation of the credit to Mr. MacLennan with respect to the period during which Allan resided with him?

[49] The appellant submits that the judge erred in fact and law in the calculation of the credit awarded to Mr. MacLennan for the period of time Allan, Jr. lived with him. On this point, the judge said as follows:

> Allan lived with his father for three (3) months and then had his own apartment for five (5) months. I find both parents assisted Allan [sic] was in his own apartment. When Allan lived with his father, Mr.

> MacLennan reduced the maintenance by three hundred and fifty dollars ($350.00) for the three (3) months he cared for Allan. Allan left the home as he did not want to follow house rules. Many of his mother's expenses remained fixed despite his absence. I credit Mr. MacLennan with two hundred dollars ($200.00) per month for the three (3) months, for a total of six hundred dollars ($600.00).

[50] It is submitted that the period which Allan lived with his father was in fact five, not three months and, therefore, the credit should have been $1000 not $600 as was ordered by the judge. It appears that the judge was mistaken on this point and that the credit ought to have been $1000 as submitted by the appellant.

3. Spousal Maintenance:

3.1. Did the judge err in awarding spousal maintenance or in failing to stipulate a termination or review date for such maintenance?

[51] The judge ordered spousal support without time limit in the amount of $650. She found as follows:

> The parties were married for seventeen (17) years. The husband worked outside the home. The wife took care of the home and children. I am satisfied this was the arrangement the parties agreed to during the years of cohabitation. Mr. MacLennan worked long hours and became successful in his career. His annual income is approximately sixty thousand dollars ($60,000.00) per annum. He has seniority, job security and employment benefits.
>
> Mrs. MacLennan returned to the work force post separation at age thirty-eight (38). She had no marketable skills. She has no security, no seniority, no pension plan. Her employment income is fifteen thousand dollars ($15,000.00) per annum. This sum is supplemented now by the Child Tax Credit and the G.S.T. rebate.
>
> ...
>
> No one item in this list [in s. 15.2(6) of the **Divorce Act**] is to have priority over the other considerations. ...
>
> ... Madam Justice McLaughlin of the Supreme Court of Canada in <u>Bracklow</u> clarified the law by concluding that the law recognizes three conceptual grounds for entitlement to spousal support: (1) compensatory; (2) contractual; (3) non-compensatory. The different

> models of marriage and their corresponding theories of spousal support were discussed in detail by the Court. ...
>
> ***Bracklow v. Bracklow*, [1999] S.C.J. No. 14** at paragraph 57 states marriage, while it may not prove to be "til death do us part", it is a serious commitment, not to be undertaken lightly. It involves the potential for lifelong obligations. There are no material cut-off dates.
>
> It is clear Mrs. MacLennan suffered economic hardship both as a result of staying home and caring for the home and as a result of the marriage breakdown.
>
> Mrs. MacLennan is clearly entitled to ongoing spousal support. She has satisfied the Section 15 onus. The amount of support to be paid is six hundred and fifty dollars ($650.00) per month.

[52] The appellant says the judge erred in three respects.

[53] First, it is submitted that the judge had no or insufficient evidence to reach a conclusion that Ms. MacLennan had no security, no seniority and no pension plan or that she suffered economic hardship both as a result of staying at home and caring for the home and as a result of the marriage breakdown.

[54] In my view, this submission has no merit. The record amply supports the judge's conclusions.

[55] The second argument is that a termination or a review date of the spousal support order should have been set, particularly in light of what the appellant says are the inadequate steps taken by Ms. MacLennan to achieve self-sufficiency.

[56] It is apparent from the judge's questions to Ms. MacLennan at the conclusion of her testimony that the judge was alive to the issue of whether Ms. MacLennan was making appropriate efforts to become self-sufficient. There was evidence that she had found employment at an Irving gas station promptly after separation, that her rate of pay had increased from $5.65 to $7.30 per hour, that she was upgrading her skills by taking on bookkeeping at the service station and felt that she had a prospect of moving up to manager in the future.

[57] The appellant stressed Ms. MacLennan's alleged lack of diligence in pursuing other, more lucrative jobs. There was a good deal of cross-examination and argument with respect to her failure to follow through effectively in applying to call centres opening in the area. However, there was little evidence about remuneration, security or possibility for advancement in those or other jobs. The **Divorce Act** requires consideration of, among other things, the objective that support orders should promote, in

so far as practicable, the economic self-sufficiency of each spouse within a reasonable period of time: s. 15.2(6)(d). The practicability and reasonable time frame for self-sufficiency in this case must be assessed in the context of a long term marriage and of a spouse who had not worked outside the home between 1979 and 1997, who had ongoing care and custody of Adam and whose spouse was in a managerial position making roughly $60,000 per year. Moreover, this Court has held on a number of occasions that time limited orders based on anticipated achievement of self-sufficiency in cases of this nature should not be made unless the evidence supports the conclusion that, with reasonable effort, self-sufficiency probably will be achieved within the limited time: **Huggins v. Huggins** (2000), 183 N.S.R. (2d) 194; 2000 NSCA 30 (C.A.); **MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321; **Donald v. Donald, supra**.

[58] In my view, the judge made no error in concluding that Ms. MacLennan had suffered economic disadvantage as a result of the breakdown of her marriage and the role which she had assumed during it. The judge did not err in concluding that Ms. MacLennan's efforts to become self-sufficient were reasonable in all of the circumstances. There was no evidence upon which to conclude that with reasonable effort she would be completely self-sufficient in a defined time period.

[59] Whether to impose a review date is within the discretion of the judge. I do not think the judge here erred in principle by not doing so.

3.2. Did the judge err in determining the amount of spousal support?

[60] A trial judge's determination of the amount of support, absent error of fact or law, is a matter particularly entitled to deference on appeal. Mr. MacLennan's income is roughly four times that of his former wife. The figures advanced by Mr. MacLennan's counsel on the appeal are based on an income for him of $6000 less than shown on his 2000 T-4 slip and show as an expense a $650 per month debt payment incurred for a holiday trip after separation. I see no reviewable error in the judge's determination of the amount of spousal support.

3.3. Did the judge err in directing that Ms. MacLennan would be the named beneficiary under Mr. MacLennan's life insurance until both boys complete their education or turn 24?

[61] The only submission advanced in support of this ground of appeal is that the judge's decision does not adequately recognize the needs of Mr. MacLennan's infant daughter by his new relationship. However, I do not think the judge erred in principle in retaining Ms. MacLennan as the beneficiary of the existing policy until Adam and Allan are independent.

Disposition:

[62] Subject to the variation with respect to the title to the property, the adjustment of credit for the period of time Allan lived with his father and the minor revisions of the order relating to the support for Allan, I would dismiss the appeal. As the respondent has been substantially successful, I would order that the appellant pay to the respondent the costs of the appeal in the amount of $1500 plus disbursements.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Oland, J.A.