Date: 20000810
Docket: 1207-001695

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Blackmore v. Blackmore, 2000 NSSC 147

Between:

STERNS MURRAY BLACKMORE,

Petitioner

- and-

PEGGY ANNE BLACKMORE,

Respondent

D E C I S I O N

HEARD BEFORE:	The Honourable Justice John M. Davison
PLACE HEARD:	Truro, Nova Scotia
DATE HEARD:	June 19, 2000
DECISION:	August 10, 2000
COUNSEL:	Melinda J. MacLean, Q.C. for the Petitioner
	David J. Mahoney for the Respondent

Davison, J.:

[1] This is a divorce proceeding. The parties were married on July 8, 1978 and separated in April, 1997. There were two children born of the marriage - Kirk Ernest Blackmore, born June 2, 1982 and Morgan Ashley Blackmore, born April 20, 1986.

[2] I have heard the evidence as to the possibility of reconciliation and determine that there is no such possibility. I am satisfied all matters of jurisdiction have been fulfilled. Requirements of the *Divorce Act* have been complied with in all respects, and the ground for divorce, as alleged, has been proved. The divorce judgment shall be granted on the ground set forth in s. 8 (2) (a) of the *Divorce Act* in that there has been a breakdown of the marriage and the spouses have lived separate and apart for more than a year immediately preceding the determination of the divorce proceeding and have been living separate and apart since the commencement of the proceeding.

[3] There have been issues raised before the court with respect to matters involving the *Matrimonial Property Act* 1980, c.9, s. 1 and the *Divorce Act*. Counsel have been successful in reaching agreement on a number of facts including the valuation of assets. It was agreed that the matrimonial home

which consists of two lots and is situate in North River, Colchester County has a value of $59,000 and that a line of credit is secured by a collateral mortgage which had a balance, at the time of separation, of $42,500 leaving an equity in the matrimonial home of $16,500.

[4] There were a number of assets which are in the hands of Mrs. Blackmore which have the following agreed values:

Tent trailer -	$500.
A motor vehicle (van) -	3,000.
The contents of the matrimonial home	3,100.

There are also assets in the hands of the husband, including a motor vehicle valued at $1,100, an ATV valued at $850 and a number of other items including a 22 calibre rifle, a 12" television set and tools which counsel agree have no value for the purpose of this proceeding.

[5] At the opening of the proceeding it was indicated that there was a vinyl record collection on which no agreement had been reached, and there was no evidence advanced with respect to the valuation of that item.

[6] There was a loan from the Bank of Nova Scotia which was referred to throughout the proceedings as the Scotia loan, and it was agreed at trial that

at the time of separation this loan amounted to $2,600, but written submission from counsel for Mr. Blackmore advises correspondence from the Bank of Nova Scotia which arrived after trial indicates the loan had a balance of $4,561.81 on the date of separation.

[7] The husband is a sprinkler fitter and a member of the Plumbers/Pipefitters Union and he is entitled to pension benefits administered by the Global Benefit Plan Consultants Incorporated on behalf of the sprinkler industry pension plan and both counsel agree that this is a valuable pension.

[8] The husband is 42 years of age, as is the wife, and it was agreed that if he retired at age 50, at the point of separation the pension earned benefit would be equivalent to $41,439. He testified his present intention is to retire at age 50, but it is possible he will remain on the job to age 55 or 60. There was an actuarial report with respect to the pension filed, and both parties agree that the information contained in that report is accurate. The value of the pension benefit was calculated on the date of separation assuming termination on that date, and the value of the pension during the marriage was prorated based on service accrued during the marriage. At age 50 the pension would bring in a monthly income figure of $591.24. If retirement was effected at age 60, the basic entitlement was $27,934.80 and a monthly pension of

$844.63. If retirement was effected at age 65, the basic entitlement was $18,875.31 with a monthly pension of $844.63.

[9] The issue with respect to the property relates primarily to the house and the pension, the two major matrimonial assets. The petitioner says that the pension should be valued at retirement at age 50 by taking 1/3 of the value for income tax purposes and leaving a net figure of approximately $28,000. This reduction in the value of the pension is only appropriate if the court agrees with the submission of the petitioner that he retains the full benefit of the pension and the wife receives the family home. It is argued that that is the only fair method because to divide the assets in a different fashion would mean that she must pay the petitioner the sum of money which she could not afford.

[10] The respondent says that there should be no discount in the pension and the pension should be divided and paid in accordance with the terms of the *Nova Scotia Pension Benefits Act* R.S.N.S. 1989, c. 340 as amended. The respondent says that the issue with respect to payment by her to the petitioner can be resolved by the use of a second mortgage in favour of the petitioner on the matrimonial home. The proposed mortgage would be delayed with respect to repayment which would give rise to an unequal

division of assets under the *Matrimonial Properties Act*. The respondent says that such an unequal division is appropriate by reason of s. 13 (h) which reads as follows:

> **13** Upon an application pursuant to Section 12,, the court my 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:
>
> . . .
>
> (h) the needs of a child who has not attained the age of majority;

[11] The issue of child support was unresolved pending the determination of the appropriate income of the petitioner and consideration of dental expenses and hockey expenses under s. 7 of the Child Support Guidelines.

[12] There is also at issue the question of spousal support, and the respondent seeks spousal support and also seeks retroactive spousal support from September 1998 to the present time. The petitioner alleges that the respondent is not entitled to spousal support.

[13] Both parties have education to the extent they both graduated from grade 12. The wife took a course for a year in secretarial work. At the time of the marriage, the wife was doing piecework for Stanfield's Ltd. in Truro as a receptionist and secretary for about 18 months and then took up employment as a secretary with Kent Homes during which time Kirk was born on June 2, 1982. She worked at Kent Homes for about five years making a minimum wage of $3.85 per hour.

[14] After Morgan was born on April 20, 1986, the wife became involved in part- time work and became a child care worker at the Y.M.C.A. The wife testified the parties agreed that she have more time at home. She was able to take her young child to work. She worked at the Y.M.C.A. from September 1986 to May 1997 when she was laid off. The wife testified she felt comfortable working at the Y.M.C.A. because she was able to be home when the children came home and at that time she did not want secretarial work on a full-time basis. The husband was away quite often and she had to look after the children.

[15] She worked for her brother for a short time, but was unemployed at the time of separation. She filed for employment insurance and received $2000 towards a computer course. She began work with Wood Gundy Inc. as a

receptionist in September 1998 and then went to a secretarial job at the Department of Transportation and Public Works beginning in April 1999. She described the job as "casual work" and termination of employment has been the subject of a series of three-month extensions, but the wife maintains her present term expires on September 30, 2000, and she probably will not receive a further extension because of the government's financial circumstance.

[16] Mr. Gordon Eaton testified. He is the manager of building services for the Department of Transportation and Public Works. He described Ms. Blackmore as a casual employee who was hired for a series of months and who obtained extensions because no permanent employee was hired to fill that position. Mr. Eaton said there was a "very slim" chance of the wife getting an extension at the end of September 2000.

[17] The wife testified she sent out resumes and applications for jobs.

[18] She filed an exhibit which set forth her earned income from 1987 until separation and the last four years of the period are as follows:

1994	$ 5,474
1995	5,526
1996	11,111

1997 7,433 (laid off in May)

Mr. Eaton said her present wage was about $20,000 per year.

[19] Mr. Blackmore works as a sprinkler fitter and his income has been reasonably consistent from year to year. There is usually a short period of time each year when he is laid off. Being laid off is a consistent occurrence each year, and he was in his second week of lay off at the time of trial. He expected to be back to work within a month. Over the last three years his income was as follows:

YEAR	EMPLOYMENT	EMPLOYMENT INSURANCE	OTHER INCOME	TOTAL
1997	$24,244	$10,361	$35	$34,640
1998	44,650	2,430	111	47,191
1999	43,198	398	121	43,717

In the first four months of the year 2000 the husband had earned $18,880.

[20] The responsibility for maintaining the family home has been that of the wife. She now lives in the home and has the major responsibility of the children. At the time of separation there were debts to Sears and Canadian Tire which will be the responsibility of the wife. There was a Visa debt and a loan from Scotiabank which will be the responsibility of the husband.

MATRIMONIAL PROPERTY ACT

[21] In my view disposal of pension benefits as proposed by the husband is not acceptable. This is a marriage which lasted about 20 years. The wife, in my view, has been placed in a disadvantaged position with respect to her employment and her future income. She has no source of future retirement income other than Canada Pension. She has no other individual pension, no investments or RRSP's. Even if she found suitable employment she, at the age of 42, has limitations of time in attempting to provide for her future.

[22] It is my opinion it is reasonable and fair she be entitled to share in the pension acquired by the husband during the years of marriage. I would direct that an equal division of the pension be allotted to the wife pursuant to s. 61 of the *Nova Scotia Pension Benefit Act*, R.S.N.S. 1989, c. 340 and the *Matrimonial Property Act,* R.S.N.S. 1989, c. 275.

[23] It appears from the written submissions of counsel that the husband does not take issue with the family remaining in the matrimonial home. The husband testified this would be desirable .

[24] There was not a great deal of evidence presented concerning the benefit to the children of continuing to reside in the matrimonial home. They are not young children but they have lived in the home for 14 years and it would be

considered by the children as the "family home". It is the only home they have known and permitting them to remain in the home provides them with security and stability following the breakdown of the marriage. It should also be noted the wife was primarily responsible for maintaining this home and was able to provide a comfortable home for the family.

[25] The home has an agreed value which is modest and an immediate sale probably would not generate funds to permit the wife and children to move to more suitable accommodation.

[26] The youngest child is only 14 years of age and has a number of years before he attains a high school diploma. In my view the children will benefit by being permitted to remain in their home in the community with which they are familiar. The residential home can be retained, and it would be unfair and unconscionable as those terms are contemplated by s. 13 of the *Matrimonial Property Act,* S.N.S., 1980, c. 9 to require them to move. I will order a retention of the home in the name of the petitioner pursuant to s. 13(h) of the *Act*.

[27] The retention of the home in the name of the petitioner renders an unequal division of the matrimonial property. I am aware that one who seeks an unequal division under s. 13 has a heavy burden, but I believe that in the

facts of this case, the test set out in *Harwood v. Thomas* (1980), 45 N.S.R. (2d) 414 at 417 has been met. The Appeal Division of the Nova Scotia Supreme Court (as it then was) stated:

> Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the Act and prescribed by Section 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair - not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be.

[28] I am also aware of the directions given by the Nova Scotia Court of Appeal in *Bennett v. Bennett* (1992), 112 N.S.R. (2d) 79, *Fisher v. Fisher* (1994), 131 N.S.R. (2d) 367 and *Donald v. Donald* (1991), 103 N.S.R. (2d) 232.

[29] It was agreed the matrimonial home was valued at $59,000.00. There is no question the authorities in this Province stipulate that, except in exceptional

circumstances, valuation of homes for the purpose of distribution of assets under the *Matrimonial Property Act* involves deduction of real estate commission and legal fees on resale of the home. See *Gomez-Morales v. Gomez-Morales* (1990), 100 N.S.R. (2d) 137 (N.S.C.A.) and *Bellemare v. Bellemare* (1990), 28 R.F.L. (3d) 165. In this case I would use a 6% real estate fee for a deduction of $3,540.00, plus $531.00 HST thereon together with a $600.00 legal fee to attain a value for purpose of division of the house at $54,329.00.

[30] The petitioner will execute a deed conveying his interest in the matrimonial home on Hiram Lynds Road, in North River, Colchester County to the respondent who will be responsible for the payment of the existing line of credit with the agreed value of $42,500.00.

[31] The equity in the home after deduction of the amount of the line of credit and disposition fees is $11, 829. The amount to be postponed for the sale of the home is $5,915. and this figure will be adjusted by further differences in division between the parties under the *Matrimonial Property Act.* The terms of the postponement will be similar to those set out by Goodfellow, J., in *Robski v. Robski* (N.S.S.C. October 31, 1997).

[32] The terms of the postponement which shall take place after Mr. Blackmore executes a deed conveying his interest in the matrimonial property at Hiram Lynds Road, North River, Colchester County are:

1. Mrs. Blackmore shall be responsible for the line of credit of $42,500.

2. Mrs. Blackmore shall execute and deliver a mortgage to Mr. Blackmore on the property at Hiram Lynds Road, North River, Colchester County in the amount required to adjust the division of assets in the division between the parties under the *Matrimonial Property Act*.

3. The terms of the mortgage will include:

    (a) It is payable at any time without notice or penalty;

    (b) It shall be payable on the earliest of any of the following events:

        (i) when the home no longer is occupied by at least one child;

        (ii) in the event Mrs. Blackmore should remarry;

        (iii) in the event Mrs. Blackmore shall, in any calendar year, cohabit on a common-law basis with a particular person for a period totalling in excess of six months;

        (iv) in the event Mrs. Blackmore refinances or sells the property; and,

(v) when the last child residing in the home attains the age of majority, or, prior to the age of majority, no longer remains a child as defined by the Divorce Act of Canada.

4. The mortgage shall bear interest in accordance with the Act Respecting Interest on Judgment Debts, R.S. 1989, c. 233, at the rate of five per cent. The interest shall commence the 1st day of October, 2000.

5. Mrs. Blackmore shall, at all times, prior to the satisfaction of the mortgage, maintain fire insurance coverage payable to Mr. Blackmore to the extent of the amount postponed.

[33] It remains to effect final division of the assets and determine the amount of the second mortgage to Mr. Blackmore. For the most part the value of the assets and liabilities have been the subject of agreement between the parties. But there is confusion as to the amount of the Canadian Tire account, Sears account and municipal taxes, all of which will be the responsibility of Mrs. Blackmore.

[34] There is also a submission by Mr. Blackmore with respect to his Scotibank loan balance by reason of late arrival of information from Scotiabank by letter dated after the trial.

[35] To be more specific, the wife stated the real property taxes outstanding on the matrimonial home, including "taxes for this year" amount to $2,059. In the written submission of counsel for the husband dated July 6, 2000, she said:

> The husband has no objection to inclusion of the municipal taxes to March 31, 2000 as a matrimonial debt. The current tax bill indicates arrears to June 2, 2000 of $1208.90 plus interest at $233.64.

Counsel for the husband also refers to the Statement of Property of the wife filed June 12, 2000 which sets out a Canadian Tire account as of separation at $1,953.05. There was a statement to support this figure but no documentation to support the Sears account figure of $1,438.19 at separation. The total of these figures and the $2,059 for taxes amount to $5,450. Yet the counsel for the wife claims in his written memorandum $5,650 for the three debts.

[36] With respect to the letter from the Bank of Nova Scotia, I cannot accept that figure unless there is agreement between counsel or further evidence.

[37] It seems to me these debts and the proof thereof is ascertainable. I would expect counsel could agree to these figures and advance them to me in writing. If no agreement can be reached, I will review written submissions.

SPOUSAL SUPPORT

[38] Spousal support is governed by the provisions of s. 15 of the *Divorce Act* 1985 which reads in part as follows:

> **Spousal support order**
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> 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
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> **Terms and conditions**
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> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
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> **Factors**

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

Objectives of spousal support order

(6) An order made under subsection (1) or an interim order under subsection (2) that provides 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 any obligation for the support of any child of the marriage;

(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.

[39] As I stated in *Gibson v. Montgomerie* (1999), 177 N.S.R. (2d) 255 at 264:

> The Supreme Court of Canada has enunciated principles inherent in the awarding of spousal support in *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.) and *Bracklow v. Bracklow* (S.C.C.) unreported, March 25, 1999.

In *Moge* Justice L'Heureux-Dube stated at p. 384:

> ... Today, though more and more women are working outside the home, such employment continues to play a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forgo educational and career advancement opportunities. These same sacrifices

> may also enhance the earning potential of the other spouse (usually the husband), who, because his wife if tending to such matters, is free to pursue economic goals.

at p. 388 Justice McLaughlin stated:

> [79] The financial consequences of the end of a marriage extend beyond the simple loss of future earning power or losses directly related to the care of children. They will often encompass loss of seniority, missed promotions, and lack of access to fringe benefits, such as pension plans, life, disability, dental, and health insurance (see Heather Joshi and Hugh Davies "*Pensions, Divorce and Wives' Double Burden"* (1992), 6 Int'l J. L. & Fam. 289). As persons outside of the workforce cannot take advantage of job retraining and the upgrading of skills provided by employers, one serious economic consequence of remaining out of the workforce is that the value of education and job training often decreases with each year in comparison to those who remain active in the workforce and may even become redundant after several years of non-use. All of these factors contribute to the inability of a person not in the

labour force to develop economic security for retirement in his or her later years.

The *Moge* case clearly directed the court to consider all four objectives in s. 15(6) and self sufficiency is only one objective and enjoys no paramountcy. In fact, its impact is modified by the words "insofar as practicable". The purpose of spousal support is to relieve economic hardship that results from marriage or its breakdown. What did the marriage or the breakdown do to impair or improve the wife's economic prospects?

In the *Bracklow* case, the main issue was what duty does a healthy spouse owe a sick spouse when the marriage collapses. But the court does make reference to general principles involved in awarding spousal support. At p. 14 Justice McLachlin refers to the four objectives set out in s. 15.2(6) as interpreted by the *Moge* case and says against these objectives the court must consider the factors set out in s. 15.2(4) of the *Divorce Act* and look at the "condition, means, needs and other circumstances of each spouse" and McLachlin J. states, at p. 14:

> ... The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

Again, at p. 15 McLachlin J. says:

> ... Under the Divorce Act, compensation arguments can be grounded in the need to consider the "condition" of the spouse; the "means, needs and other circumstances" of the spouse, which may encompass lack of ability to support oneself due to foregoing career opportunities during the marriage; and "the functions performed by each spouse during cohabitation", which may support the same argument. In sum, these compensatory statutory provisions can be seen to embrace the independent, clean-break model of marriage and marriage breakdown.

[40] The purpose of spousal support is to relieve economic hardship resulting from the marriage or the breakdown of the marriage. The court must assess the advantages and disadvantages as a result of the role of the spouse in the

marriage. The *Act* still recognizes the obligation on each spouse to contribute to their own support.

[41] In considering all four objectives in s. 15(6) the court must explore the advantages and disadvantages obtained by each spouse with respect to the marriage and with respect to the marriage breakdown. Inquiry must be made as to what financial consequences accrued to each party as a result of the care of the children and what economic hardships, if any, accrued as a result of the breakdown of the marriage. What is practicable to promote the economic self sufficiency of the parties? All of these questions must be answered.

[42] This was a long marriage. Two children were born of the marriage and Ms. Blackmore was the primary caregiver. Mr. Blackmore was often away from home performing his employment duties.

[43] It can be said she did not have jobs which resulted in major financial return during her early married years, but it is also clear she adopted vocations which were part time and casual after the children were born to enable her to be more effective in her child care. In my view, during those years, she became economically disadvantaged in that she lost opportunity to acquire

and hold positions of employment from which greater benefit would be attained than that available to her now.

[44] When I consider the objectives and factors set out in s. 15.2 of the *Divorce Act*, I determine the wife is entitled to spousal support. The husband should pay the wife $300 a month by way of spousal support.

[45] Counsel for the wife argued the wife should receive a major increase in spousal support after September 30, 2000 in view of the evidence of Gordon Eaton that she has a slim chance of having a further extension in her present employment. Obviously the court cannot found spousal support on that evidence and must render its decision on the facts that exist at this time.

[46] Furthermore, I would add the parties have probably realized that following a divorce, circumstances change and two households are more costly than one. The petitioner does not have a large income, and it may be necessary to sell the home if the respondent becomes unemployed and move to a less costly living accommodation.

[47] The respondent seeks retroactive spousal support. Both parties have been represented by counsel throughout these proceedings, and there has been no application for interim spousal support. Presumably the wife accepted the amounts paid by the husband to her prior to trial. A review of the figures

indicates to me the husband's contributions were fairly reasonable. I will not award retroactive spousal support.

CHILD SUPPORT

[48] In my opinion income for the purpose of ascertaining child support should be the approximate average of Mr. Blackmore's 1998 and 1999 incomes. A fair figure for the income would be $44,700. The husband shall pay $613 a month for child support.

[49] The wife requests further payment under s. 7 of the Child Support Guidelines for dental expenses and cost associated with hockey.

[50] The husband may wish to continue his habit of assisting with the hockey expenses, but the evidence before me does not permit me to declare that expense a special or extraordinary expense under s. 7.

[51] There was evidence one child has had considerable dental problems, and under s. 7, I direct the husband to pay that portion of dental expenses of the two children in proportion to the respective incomes of the parties.

[52] The husband agreed to include the children under the medical coverage available to him through his employment.

SUMMARY

[53] The husband claims an amount for occupational rent on the basis Ms. Blackmore continues to reside in the matrimonial home.

[54] The wife required the home for herself and her children. The use of the home would contribute to an increase in stability for the children following the divorce.

[55] There is also merit in the submission of counsel for the wife that the use of money given to her by the husband to maintain the home is of benefit to the husband in maintaining the value of the home.

[56] It is only in rare circumstances that a claim for occupational rent will succeed, and I do not find circumstances in this case justify such an award.

[57] The husband shall pay the wife $300 a month spousal support and $613 a month child support. The claims for retroactive spousal support and occupational rent fail.

[58] The husband's pension will be divided between the parties and paid in accordance with the terms of the *Nova Scotia Pension Benefits Act*.

[59] The husband shall convey the matrimonial home to the wife who will execute a mortgage in favour of the husband for the extent of the equalization payment.

[60] There remains the calculation of the equalization payment with agreement of counsel as to the several debts which have not been valued or, in the absence of agreement, further written submissions from counsel.

[61] I am inclined to award party and party costs to the wife in view of my findings but will consider any written submissions on costs.

J.