Date: 20020930
Docket: 1203-001528

IN THE SUPREME COURT OF NOVA SCOTIA
[cite: Westhaver v. Westhaver, 2002 NSSC 220]

BETWEEN:

TERRANCE EARL WESTHAVER

PETITIONER

- and -

HEATHER LYNN WESTHAVER

RESPONDENT

DECISION

HEARD BEFORE: The Honourable Justice Margaret J. Stewart at Liverpool, N.S.

DATES HEARD: May 24, 2002. (Last brief filed June 11, 2002.)

DECISION DATE: September 30, 2002.

COUNSEL: Deborah I. Conrad, solicitor for the Petitioner
Gerald MacDonald, solicitor for the Respondent

[1] Terrance Earl Westhaver and Heather Lynn Westhaver married on September 7, 1984 after cohabiting for approximately one year. At the time of the hearing Ms. Westhaver was 43 years of age and Mr. Westhaver was 41 years of age having married when they were 26 and 24 years of age respectively. There are no children of the marriage. The only issue is the spousal support as the parties settled and finalized all matrimonial property issues by way of a consent Supreme Court Order dated October 20, 1999 and granted by Justice H. Carver. Mr. Westhaver seeks an Order terminating spousal support retroactive to March 2000 or alternatively, as of the date of trial. Ms. Westhaver seeks support between $800.00 and $1,500.00 per month for an indefinite term.

[2] Although the parties physically separated in June of 1998, when Heather Westhaver left the matrimonial home both acknowledge and accept the marriage had ended prior to that with Ms. Westhaver suggesting for her it was over in 1994, after some 11 years of cohabiting and Mr. Westhaver stating, as a result of being advised by his wife over the phone in April of 1995, just days prior to her motor vehicle accident on April 5, 1995 that she had had an affair, he intended and told her he intended to see a lawyer on

his return. Although of no relevance other than as it relates to the issue of credibility, I place no credence in Ms. Westhaver's sudden revelation at trial of Mr. Westhaver punching her eight or so times in the head in late August of 1997, a few days prior to her conference with Dr. Richard Braha. The consequences of the injuries suffered in the motor vehicle accident arose when both parties had mutually agreed the marriage had failed and for the 35 year old Ms. Westhaver it was one year earlier. Both parties acknowledge and I find they separated in April 1995 after some 11.7 years of cohabiting.

[3] Ms. Westhaver's single truck motor vehicle accident, involving both alcohol use and lack of seatbelt protection resulted in injuries requiring a five month hospitalization and rehabilitation stay before her discharge on September 5, 1995, a month earlier than the rehabilitation team had recommended. During this time Mr. Westhaver took a leave of absence from his work as an engineer on an oil tanker with Algoma Tankers Limited and participated in her recovery. In the circumstances, he remained financially and physically supportive of her. Besides losing the vision in her right eye and some in her left and having no peripheral vision, she suffered closed head brain injury. To date she has not returned to the work force in her capacity as a waitress

or attempted any other form of employment or followed through with occupational rehabilitation counselling. Do to her vision impairment, she is unable to drive. She is in receipt of Canada Pension Plan benefits in the sum of $632.00 per month and has investment income from an insurance cash settlement in July/August 1999 of $63,500.00 of which approximately $14,000.00 was spent on furniture which paid approximately $145.00 per month in 2001 as well as some very nominal insurance policy dividend payments which are reinvested, along with yearly GST and HST rebate. Her total income for 2001 without any spousal support was approximately $9,480.

[4] Prior to their marriage, Ms. Westhaver worked as a waitress and is one and a half credits away from obtaining her B.A. During the marriage she worked part-time as a waitress. Mr. Westhaver who earns approximately $64,110.00 per year as an engineer has always been the major breadwinner working 30 days at sea and returning for 30 days at home.

[5] A decision on spousal support under the **Family Maintenance Act,** R.S.N.S. 1989 c. 160 was rendered by Judge M. Clare MacLellan, as she then was, on March 10, 1999 ordering $800.00 per month as of April 15, 1999 with a review "within one year of March 12, 1999 on the basis of a

psychological assessment" of the then applicant, Ms. Westhaver. The Order acknowledged spousal support payments by Mr. Westhaver as of July 1998 in the amount of $4,500.00. On November 30, 1999 the Court of Appeal upheld the decision indicating at page 2:

> "The Judge was clearly concerned about the currency of the medical evidence. However, she heard the testimony of Dr. Braha, a clinical psychologist, who works almost exclusively with survivors of traumatic brain injury and who had extensive involvement with Mrs. Westhaver between 1995 and 1997. While Dr. Braha had not done a more recent assessment, the judge concluded, on the basis of the evidence, that the 1997 assessment continued to provide an accurate picture of Mrs. Westhaver's present inability to obtain and hold employment. In reaching that conclusion, on the evidence before her, she made no reversible error."

[6] In arriving at her decision to make the Order reviewable in one year, Judge MacLellan at pages 9-11 of her decision stated:

> "I have been asked to make an award indefinitely and I have been asked to make an award for a short period of time. As indicated, I think that Mr. Westhaver is entitled to up-to-date medicals, and I agree with the doctor to a point. The doctor represents one part of the medical team - he does not represent the medical team. I found Mr. Westhaver to be an honest man, as I found Mrs. Westhaver to be credible in her evidence. It is not quite right to say she was all ready to go back to work and we were fighting about how she would get back to work - that leaves me with a nagging doubt. For that reason, I am going to make the duration of this Order one (1) year - that will enable that doubt to be answered; that is, Mr. MacDonald can contact the general practitioner for Mrs. Westhaver and have him send her for an all-team assessment. If they find that she has not improved sufficiently for an assessment, then they say so. This refers us back to the 1997 and 1995 assessments, and that would make the doctor's recent letter topical. I think that this is something that has to be worked through. I am not saying that Mrs. Westhaver is not disabled and will not be disabled forever. I am indicating that, according to the evidence before me now, it is questionable whether she will work. However, I have to resolve that doubt in relation to what Mr. Westhaver

> said. It is his impression that they discussed her going back to work. I have seen people go back to work when you think that they could not, but that was will-power over other things, and I don't know if this is a particular case. I am going to caution against any sort of delay on this. This does not seem to be a hard thing to answer, so it should not be two (2) months before Mrs. Westhaver sees her general practitioner and two (2) months before he writes the QEII. This ought to be done because if somebody is asked to pay spousal maintenance, they are entitled to know the situation, and that is fair. It will certainly stop the resentment or at least stop any further resentment between the parties because somebody is not answering somebody's letter.
>
> If I were to hear this case one (1) year from now and I hear that there is protracted delay or I read letters from doctors saying they are trying to phone you and they cannot reach you, then I would have to think about whether I would impugn that delay against the person who is seeking maintenance, therefore, these are not hard things to solve. The husband is entitled to know what the situation is. It is only fair and proper. I accept for now the psychologist's evidence that this woman has had a great trauma, so what is the big problem in making it clear to the other side that the trauma is long-term or short-term? There should be no big deal so that it does not become one more thing these parties have to work through. I think they've had enough sadness already and ought to get through this as expeditiously as they can.
>
> In any event, the Order is reviewable in one (1) year. It does not cancel in one (1) year, it is reviewable in one (1) year. If the medical information is not there then there may be a difficulty for Mrs. Westhaver.

[7] The Court of Appeal at page two concluded:

> "The Order is reviewable within one (1) year and the trial judge did not err in leaving the longer term assessment of Mrs. Westhaver's ability to contribute to her own support until that review occurred."

[8] Given the medical reports and the progress notes and recollected comments of other professionals besides Dr. Braha, who were involved with Ms. Westhaver during the course of her rehabilitation, the Court acknowledged a

need for clarification as to Ms. Westhaver's ability to contribute to her own support. Both Judge MacLellan and the Court of Appeal assumed at the very least, a referral for an all team determination, as to whether a further full assessment was or was not warranted, would occur. Dr. Braha in his September 12, 2000 letter in response to counsel for Ms. Westhaver's letter of July 10, 2000 elaborated on the process after the fact and commented upon the element of conducting same for medical/legal purposes. He stated:

"I received your letter dated July 10, 2000, and I apologize for the delay in getting back to you. There are several reasons why I might reassess a patient. A reassessment is justified for patients at a later state in their recovery, who have completed previous neuropsychological assessments, who display a marked change in their psychological status or for whom there is a compelling clinical question which cannot be answered on the basis of data obtained from the previous assessment. Normally, I take my lead either from my own observations if I have been working with a patient in a therapeutic capacity, a patient's request for reassessment or from referral from another psychologist or physician. Regardless, I usually conduct a pre-testing review of available background and health-related information and I usually conduct interviews to justify proceeding with the testing. I must reiterate that I am not in a position to conduct assessments for medical/legal purposes through my work at the QEII. Should this be required, I would recommend referral to a private practice psychologist.

While I would not complete a review of one of your client's situations for medical/legal purposes, I would be concerned should there be a marked change in the psychological status of a former patient of mine. Should the latter be the case, I would look forward to hearing from such patients or such patient's physician and I would proceed accordingly from there. Otherwise, I would be happy to provide you with information on psychologists who would be able to provide private practice assessment services."

[9] The initial pretesting review to determine if a full assessment was justified never happened. Neither Ms. Westhaver nor her family doctor, Dr. Bennett, located in Inverness, N.S. requested same. Dr. Bennett, who according to Ms. Westhaver's medical file and evidence, has completed two referrals and three forms for her but has not seen her "very often" since her initial interaction with him in August of 1998, was of the opinion as a result of an office visit with her and her brother on February 6, 2000 that there had been "no change in her situation" to justify a referral for a reassessment. Despite the Court's need for clarification and comments on protracted delays, Ms. Westhaver did not request either an initial interview, presumably based on her belief that nothing had changed, or pursue a private assessment, an option available to her and pointed out by Dr. Braha, who at trial, estimated the cost to be $1,800.00 to $2,800.00. As a result, no up to date report as originally promised by counsel was filed and Mr. Westhaver's counsel had to conduct discoveries in February of 2002 of Ms. Westhaver's General Practitioner, Dr. Mark Bennett and Dr. Richard Braha, her Neuropsychologist as well as of Ms. Westhaver in order to attempt to obtain current medical information. Similarly, Ms. Westhaver's 2001 income tax return was only filed the day of trial without schedules attached.

[10] I find myself in no better position three years later than Judge MacLellan found herself in March 1999. No other team member has ever clarified their position nor were they called at trial and no definitive conclusions regarding Ms. Westhaver's current status has been provided to the Court. Dr. Braha, a Neuropsychologist with some eight years experience with survivors of brain injury, numbering in the hundreds, was once again qualified as an expert. He was not in a position to provide an up-dated report or express a specific opinion concerning Ms. Westhaver's current status, since his last 1997 assessment. He had testified at the March 1999 Family Court trial before Judge MacLellan, elaborating on his November 1998 and February 16, 1999 letters concerning patients with similar brain injuries to Ms. Westhaver's ability to work, as well as his two specific September 12, 1995 and September 19, 1997 neuropsychological assessments of Ms. Westhaver. He last saw her and her husband on October 14, 1997 to review the contents of his September 19, 1997 full assessment, having been a member of her team throughout rehabilitation and during her out-patient treatment. In his September 1997 assessment, he opined that evaluation data on Ms. Westhaver suggested that her status likely represented "persistent long-term reductions in functioning which will continue to prove unique challenges

for Ms. Westhaver in the foreseeable future". In his letter of January 29, 1999 stressing any definitive conclusions regarding Ms. Westhaver's current status would need to be based on a re-assessment, he interpreted his September 1997 statement to mean "at that time he felt Ms. Westhaver was displaying evidence of a prolonged and persistent moderate reduction in several areas of ability". In his letter of February 16, 1999 he again reiterated, as he did during this trial, any definitive conclusions regarding Ms. Westhaver's current level of functioning would need to be based on a formal re-evaluation. Using his experience, he was only able to and did "<u>speculate</u> on her current capacity to earn income" (emphasis added) based on information provided to him by Ms. Westhaver, her family and his impressions of her recovery at the time of his last assessment which was August 1997. Thus, the impression offered in the February 16, 1999 letter as to work ability, was based on his clinical experience with patients with similar injuries rather than any recent formal evaluation of Ms. Westhaver's current level of functioning. Those documents were again before the Court and Dr. Braha's last assessment is now some four years and nine months old. He elaborated on the ability of other patients similar to Ms. Westhaver to achieve and retain competitive employment being severely compromised

and requiring on-going assistance at the work site in order to cope in the long run and that in his experience, there are few if any, employers who are willing to provide this level of structure and support to brain injury survivors attempting to reintegrate into the work force, apart from employers involved in providing sheltered occupational experiences.

[11] In September of 1999, some six months after the Family Court support hearing, Ms. Westhaver moved from Harbour View, Port Hood, N.S. where she had been residing with her family to Kingston, N.S. where, now able to appreciate concepts of time, danger and finances, she lives independently and unsupervised while relying on a neighbour for transportation and on being a source of explanation for concepts if needed. She was discharged from the occupational therapy out-patient treatment in February of 1998 and did not follow up on a 1999 referral to occupational therapy at Middleton Hospital, when they failed to contact her after she left her phone number. She has acquiesced in her efforts at rehabilitation. She has not been involved in any rehabilitation since leaving the matrimonial home in June of 1998 and has moved further away from the rehabilitation resources available in Halifax and from her family members. The recommendations of Dr. Braha in his 1995 assessment and repeated in his 1997 assessment

concerning use of memory book systems and increasing her level of structural and unstructural avocational activities and social interactions are not being employed or followed through. She is no longer involved with any Chapter of the Brain Injury Association. She spends her days cleaning her home, watching T.V., walking across the way to get the mail, going to Zellers and to Dooley's one to two times a week to play video gambling machines to a $25.00 per visit limit and drinking coffee, and occasionally alcohol and smoking. Although noted in her February, 2002 financial statement as a recreational past time, her direct evidence was that she has not played bingo for over a year. She is only able to do one thing at a time, and needs to make notes to herself to assist with planning and organizing thoughts and activities and knows the multi-tasking requirements of waitressing is not feasible or possible, although she would like to do it. For his part, Mr. Westhaver does not believe Ms. Westhaver has reached a plateau in her rehabilitation and does not believe she fully pursued the extensive resources available to her both during and since rehabilitation. A survivor of a brain injury himself, although younger and without the protracted consequences experienced by Ms. Westhaver, Mr. Westhaver is in awe of Ms. Westhaver's short term memory in comparison to his.

Termination of spousal support, he argues would mean she would be forced to assume a lifestyle that is conducive to rehabilitation.

[12] Whether this is the limit of Ms. Westhaver's ability and she is unable to clean other people's homes as she does her own, follow instructions by way of route, repetitive directions or do more, remains an unknown, as Dr. Braha at trial was only able to speculate. Given Judge MacLellan's strong directions and the Appeal Court's confirmation of a longer term assessment of Ms. Westhaver's ability to contribute to her own support being reviewable within one (1) year, I am at a loss why Ms. Westhaver herself did not, during the last three years, request an initial pretesting review, as she indicated on cross that she is always improving or if need be, complete a private neuropsychological assessment and/or vocational assessment, as referenced in the September 1996 report of Susan Woznich, Speech Language Pathologist with the Nova Scotia Hearing and Speech Clinic. Ms. Westhaver is not without funds. The issue could easily have been put to rest and I am asked to draw an adverse inference both to her condition and her failure to make reasonable efforts to obtain employment up to the time of trial.

[13] The one reality or fact that does exist is that at present Ms. Westhaver still continues to qualify for Canada Pension Plan benefits even though Mr. Westhaver is confident that Dr. Joyce, also a member of Ms. Westhaver's rehabilitation team, would not have signed a subsequent form and notes forms are sometimes completed by Dr. Bennett, her present General Practitioner without him having seen her. Her eyesight remains impaired for driving purposes. Her Canada Pension Plan benefit payments for the last four years reflect an acknowledgement of a persistent and present impaired ability to earn an income consistent with Dr. Braha's 1997 assessment of Ms. Westhaver's level of functioning; i.e. two years after her 1995 assessment she was displaying evidence of a prolonged and persistent moderate reduction in several areas of ability, with "moderate" impairment meaning "a substantial reduction in function" in the 15 to 50 percent range. Obviously, qualifying for Canada Pension Benefits is not as specific as a pretesting review but it is a fact. London Life also continues to waive their premium payment, given their acknowledgement of her disabilities. Ms. Westhaver testified to having difficulty concentrating and to lacking peripheral vision. She has, however, taken no steps to improve on her limitations as she understands them to be since June of 1998 and has not

followed through and persevered with computer basics and other compensatory strategies. In the circumstances, Mr. Westhaver does not see himself as an insurer of her health issues, submitting any obligation he may have to Ms. Westhaver has been satisfied by the amount of support he has already paid over the last seven years, whether at 43 years of age she is permanently disabled, which he does not concede, or simply not seeking assistance/counselling or fulfilling her need to maintain and apply compensatory strategies set out in Dr. Braha's recommendations and thereby possibly open opportunities in the work force.

[14] On the evidence, I cannot say Ms. Westhaver is not disabled and it still remains questionable whether she will re-enter the work force.

[15] Any entitlement to support for Ms. Westhaver must be rationalized on non-compensatory grounds with the parties respectively having a need and an ability to pay. She did not incur an economic disadvantage which should be remedied by compensation in the form of support. The marriage was childless and she did not have to give up a career or job prospect to support her husband's career choices. She was employed as a waitress prior to her marriage and continued to work part time at waitressing after she married. There was nothing about Ms. Westhaver's role in the marriage or its effect

on her personal economic prospects that would give rise to a compensatory support claim. The marriage did not result in any unfairness to her or yield any advantage to Mr. Westhaver who has worked for the past 21 years and has $4,500.00 in R.R.S.P's and an outstanding $17,000.00 line of credit. He did not further his career at her expense. She was not required to compromise her economic self-sufficiency for the family unit. Her ability to maintain the accustomed lifestyle of the marriage is the one disadvantage to the break-up.

[16] The issue is one of quantum which incorporates both amount and duration.

[17] Although need alone can be sufficient to establish entitlement to support, on going need and an ability to pay does not automatically entitle a spouse to indefinite support or to receive sufficient support to cancel the need. (*Bracklow v. Bracklow* [1999] S.C.J. No. 14; *Read v. Read* [2000] N.S.J. No. 54 at para. 12.) Section 15.2(1) and (3) of the **Divorce Act**, 1995 authorizes the Court to grant support as it thinks reasonable for such definite or indefinite period as it thinks fit.

[18] Although divorce ends the marriage, the potential for a life long obligation to support a former spouse exists. "In some circumstances the law may require that a healthy party continue to support a disabled party, absent

contractual or compensatory entitlement." (*Bracklow v. Bracklow* [1999] S.C.J. No. 14 para. 48.) At the same time *Bracklow* confirms limited term support may be awarded even if a spouse will not ever be self-sufficient. Justice McLachlin on leaving determination of Mrs. Bracklow's quantum of support to the Trial Judge was prepared to and did in her concluding remarks comment on how she interpreted the circumstances at para. 61:

> "My only comment on the issue is to reiterate that all the relevant statutory factors, including the length of the marital relationship and the relative independence of the parties throughout that marital relationship, must be considered, together with the amount of support Mr. Bracklow has already paid to Mrs. Bracklow. I therefore do not exclude the possibility that no further support will be required, i.e., that Mr. Bracklow's contributions to date have discharged the just and appropriate quantum."

[19] Mrs. Bracklow whose illness was known to her husband was an independent spouse for a portion of the relationship and was totally economically dependant on him for the last three years of their marriage and subsequently did not work and is not able to work for health reasons. After seven and one-half years of cohabiting, Mr. Bracklow at trial in February of 1995 had paid Mrs. Bracklow almost two years of both sporadic voluntary support and court ordered interim support, since their 1992 separation and agreed and paid a further 18 months of payments to September of 1996. For Justice McLachlin three and one-half years of spousal support was quite

possibly a feasible period of time for Mr. Bracklow to be said to have fulfilled his support obligations under the **Divorce Act** criteria for his disabled spouse. She concluded this possibility knowing limited term support would not assist Mrs. Bracklow to achieve self-sufficiency, given her health issues and in so concluding did not anticipate the dependent separated Mrs. Bracklow, who had not compromised her economic self-sufficiency for the family unit, drawing on Mr. Bracklow's resources through indefinite support because he had assumed responsibility for her support during cohabitation. On retrial, the Trial Judge awarded fixed term support for five years from the divorce in March of 1995 until February 2000.

[20] Stressing no one model or philosophy of support prevails, Justice McLachlin directed the relevant factors in the **Divorce Act** must be applied and a balance struck, "that best achieves justice in the particular case before the Court." (*Bracklow v. Bracklow*, supra para. 32). When determining the amount and duration of support, the same factors that go into determining entitlement are considered. S. 15.2(4) factors that the Court must consider are looked at against the background of the objectives set out in S. 15.2(6). All four objectives and in this case three, as there are no children, must be

considered; i.e., recognize any economic advantage or disadvantage to the spouses arising from the marriage or its breakdown; relieve any economic hardship of the spouses arising from the breakdown of the marriage; insofar as practical, promote the economic self-sufficiency of each spouse within a reasonable period of time but no one objective is paramount. As to the factors role in determining support, the Supreme Court of Canada in *Bracklow*, supra at para. 36 elaborated:

> . . . Generally, the court must look at the "condition, means, needs and other circumstances of each spouse". This balancing includes, but it is not limited to, the length of cohabitation, the functions each spouse performed, and any other, agreement or arrangement relating to support. Depending on the circumstances, some factors may loom larger than others. In cases where the extent of the economic loss can be determined, compensatory factors may be paramount. On the other hand, "in cases where it is not possible to determine the extent of the economic loss of a disadvantaged spouse... the court will consider need and standard of living as the primary criteria together with the ability to pay of the other party": Ross v. Ross (1995), 168 NB.R. (2d) 147 (C.A.), at p. 156, per Bastarache J.A. (as he then was). There is no hard and fast rule. 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.

[21] The nature of their relationship was one where Mr. Westhaver did assume the bulk of the financial responsibility during cohabitation and this influenced/affected the lifestyle that Ms. Westhaver became accustomed to given his income as an engineer and hers as a waitress. She pursued her vocation as a waitress and worked on a part time basis. Other career options

were available to her prior to separation and the motor vehicle accident. Child care responsibilities were never a factor in either party's role in the marriage. Neither were there any corporate or executive entertaining demands placed on Ms. Westhaver given Mr. Westhaver's profession. Indeed for half of the time Mr. Westhaver was at sea.

[22] Ms. Westhaver's "serious" commitment to the marriage, unbeknownst to Mr. Westhaver, ended in 1994 after some 11 years of cohabiting which consisted of Mr. Westhaver physically being home for some six months out of the year, given his 30 days on and 30 off work schedule. They mutually agreed to the marriage having failed in April of 1995 just prior to the accident with Ms. Westhaver's revelation of adultery and unhappiness. Ms. Westhaver, in regaining her memory, never wavered in her position and Mr. Westhaver was morally committed and prepared to see her through her rehabilitation both financially and emotionally and did so for five months of hospital and rehabilitation and for two years and ten months preceding their physical separation, some one month after Ms. Westhaver terminated her personal care worker.

[23] Ms. Westhaver's entitlement is one of non-compensatory support as she, now age 43 was not economically disadvantaged by the marriage and only

her accustomed life style was effected by the break up of the eleven and one-half year old childless marriage and even then, only from 1998 when they physically separated, at which point she became the recipient of a direct support payment for the next four years rather than the preceding three years when all expenses were covered by Mr. Westhaver.

[24] According to the parties mutual interpretation of their failed marriage, and Mr. Westhaver's undisputed evidence, except for Ms. Westhaver's Employment Insurance contribution to the household from her seasonal employment before the accident, he was responsible for and contributed to Ms. Westhaver's needs for the three years between the April 1995 and Ms. Westhaver's physical separation in June of 1998, while not being privy to what Ms. Westhaver did with her monthly Canada Pension Plan disability benefits or lump sum payments totalling $9,000.00 from Canada Pension Plan and Zurich Insurance or the sale by her of two pieces of property in 1997 totalling $21,000.00 other than contributing $4,000.00 to her purchase of an $8,000.00 ATV. Later he learned she also paid off a $3,000.00 student loan/bursary. Besides the insurance company's $24,587.00 contribution to medical and speech therapist services, savings were drained to cover a number of Ms. Westhaver's needs totalling $360.00 per week for

a period of time. During the four years since the physical separation, he paid spousal support voluntarily for the nine month period between July of 1998 and March 1999 in the amount of $4,500.00 and has paid $800.00 per month spousal support pursuant to the 1999 Family Court Order for the last three years plus, being a period well past the anticipated review date within one (1) year. Neither party has become involved in other relationships.

[25] Ms. Westhaver is unable to account for most of the $37,000.00 she received in October/November of 1999 from the division of the parties' matrimonial assets other than to state she went down south a few times. The division left her debt free and also with $11,300.00 in R.R.S.P.'s which remains untouched. She has a $40,300.00 London Life policy with a nominal cash surrender value and is unclear if it is a savings instrument or just life insurance. Neither is she able to account for most of the $31,000.00, being half of the proceeds of a sale of a property in August 2000 that she solely owned, other than to say the other half of the proceeds went to her brother and that maybe it was spent on trips and to pay bills and that $5,000.00 was a gift to a relative. Thus, in 1999 she was the recipient of a cash settlement, having decided to end the monthly payments of $330.00 and a division of assets totalling $100,500.00 plus $11,300.00 in R.R.S.P.'s and in 2000 the

recipient of $31,000.00 totalling $131,500. She provided no current statements of investment, but acknowledged having $65,00.00 invested in May of 2001 and as of trial, believing her investment funds to be $40,000.00 or $50,000.00 and still being debt free. Without making any allowances for what she says her expenses have been since September of 1999 when she left rent free accommodations with her mother some five or six months after the $800.00 per month spousal support order was granted and using her 2002 proposed expenses for the entire time, only approximately $19,000.00 would be accounted for in excess of her income and spousal support over the 32 month period, applying a $580.00 per month deficit. Some $61,000.00 to $51,000.00 or allowing for her expenses $42,000.00 to $32,000.00 in potential investment funds and resulting investment income remains unaccounted other than some portion being spent on trips south, $14,000.00 for furniture, $5,000.00 as a gift and between $100.00 to $200.00 per month on video gambling beyond the $100.00 per month mistakenly noted for bingo, rather than gambling, on her 2002 financial statement. She provided no evidence as to what monies, if any she wins from successfully playing the machines. I conclude it is probable that the lack of success may account for a portion of the

unaccounted funds. Since her August 2000 financial statement, her transportation expenses have increased to $400.00 per month from the original $100.00 per month without explanation. She has no medical appointments or counselling or rehabilitation sessions requiring regular trips to Halifax or elsewhere. Similarly, the expense of smoking has increased by $170.00 to $220.00 per month so that $350.00 to $400.00 per month is now spent; but, cable in the amount of $46.00 per month is no longer noted as an expense, although watching T.V. is stated to be a past time in her evidence and neither is the $100.00 per month for Christmas, birthday, events and gifts cited.

[26] I do not consider the particular circumstances of the Westhaver's relationship to be such that they qualify or fulfil the "some circumstances" contemplated by Justice McLachlin in *Bracklow v. Bracklow* that demand a timeless support order in a non-compensatory situation. While I acknowledge each case stands on its own, in *Bracklow v. Bracklow*, Justice McLachlin contemplated time limit support to be appropriate and did not preclude three and one-half years of support paid to date (inclusive of the 18 month transitional support, (February 1995 to September 1996) at the conclusion of the first trial, as arrears were fixed at $16,000.00 on re-trial.)

possibly being sufficient support for the 7.4 years of cohabitation (September 1985 - December 1992). Other than the Westhavers' relationship being longer than the Bracklows' by 4.3 years, there are any number of parallels warranting time limited support: 1) no children played a factor in Westhavers' relationship as they did earlier on in Bracklows'; 2) the ramifications/consequences to Ms. Westhaver and to society if a time limit order is imposed are the same as what Mrs. Bracklow will now have experienced, except Ms. Westhaver has an investment cushion in comparison to Mrs. Bracklow's negative investment situation and Ms. Westhaver still maintains $11,300.00 in R.R.S.P. funds while Mrs. Bracklow's $11,650.00 pension payment was used to pay bills and living expenses. 3) Mrs. Bracklow's disability pension of $846.00 per month is her sole source of income and as of re-trial resides in subsidized housing whereas Ms. Westhaver's disability pension and investment income is $69.00 less per month without subsidized housing. 4) Both Mr. Westhaver and Mr. Bracklow continue to have good paying jobs. Mr. Bracklow earns $71,000.00 and has R.R.S.P. savings of $61,218.00 along with a new now unemployed wife who contributed to a home purchase and Mr. Westhaver earns $63,000.00 with $4,500.00 in R.R.S.P.'s and is $17,000.00 in debt. 5)

Neither Ms. Westhaver or Mrs. Bracklow own an automobile. 6) Mrs. Bracklow has no savings and at retrial owed $8,500.00 whereas Ms. Westhaver has approximately $40,000.00 - $50,000.00 in investments and no debt. 7) From the time of separation in December of 1992 Mrs. Bracklow received voluntary sporadic support payments of $200.00 per month and Mr. Bracklow was earning $45,000.00 per year, and $275.00 per month under an interim order from August 1993 and then $400.00 per month from May 1994 to trial in February of 1995. At best, she received support for two years before trial and at retrial when Mr. Bracklow was earning $71,000.00 per year, she received $400.00 per month for a fixed term of five years from March 15, 1995 to and including February 15, 2000 of which Mr. Bracklow had already paid 18 months. Ms. Westhaver has been the recipient of $800.00 per month support for the past four years except for a nine month voluntary period between July 1998 to March 1999 when she received $4,500.00 in support. She had nominal lifestyle changes in the preceding three years, while acquiring and dealing with funds in the amount of $30,000.00 independently and at the same time, controlling her monthly disability pension and her $330.00 per month insurance payment separately and personally.

[27] Whether one relies on the evidence of Ms. Westhaver's prior, although somewhat dated, neuropsychological assessments of 1995 and 1997 as to prolonged inability to function in conjunction with her continuing to qualify for Canada Pension Plan disability benefits as sufficient to conclude her permanently unable to be employed and achieve self-sufficiency or whether one relies on the evidence of Ms. Westhaver's failure and lack of reasonable efforts up to time of trial; 1) to follow through with reassessment or at least the pre-testing review, in circumstances where her doctor stressed any definitive conclusions regarding her current level of functioning would need to be based on a formal re-evaluation of her since his report some 4.9 years ago, while at the same time indicating the pre-testing review may preclude the need for a re-evaluation. 2) to comply with Dr. Braha's recommendations and assume a lifestyle which is conducive to rehabilitation; 3) to participate in and follow through with rehabilitation and vocational counselling since the separation in June of 1998, and in particular, since the March 1999 court appearance, I conclude this to be an appropriate case in which to order terminal maintenance.

[28] In an effort to reach a just and appropriate award for both parties, I have considered all of the relevant **Divorce Act** criteria and objectives including

the length and nature of the parties' relationship along with practical and policy considerations such as the social obligation model and the independent or clean break model. I conclude Mr. Westhaver shall continue to pay spousal support of $800.00 per month until and including December 2002.

[29] As was the case in the retrial of *Bracklow*, I do not intend this determination to be subject to foreseeable variation in the parties financial circumstances or Ms. Westhaver now deciding to seek a pretesting review or private assessment which confirms her functioning limitations. In arriving at my conclusion, I found her to be disabled and besides failing to pursue rehabilitation and follow compensatory strategies, her ability to become self-sufficient is questionable in light of continuing to qualify for Canada Pension Plan benefits which confirms Dr. Braha's detailed 1997 opinion that her limitations would be prolonged and persistent, even though it is not the best evidence or indeed the evidence the courts requested her to provide to finalize the issue.

[30] In the circumstances, each party will bear their own costs.

J.