187 Nfld. & P.E.I.R. 270

Skinner v. Skinner

Newfoundland Unified Family Court

Cook J.

Judgment: March 10, 2000

Skinner v. Skinner

Wendy S. Skinner, Plaintiff and George W.N. Skinner, Defendant

Wendy S. Skinner, Petitioner and George W.N. Skinner, Respondent

George W.N. Skinner, Plaintiff and Wendy S. Skinner, Defendant

Newfoundland Unified Family Court

Cook J.

Heard: December 8, 1999
Heard: December 9, 1999
Heard: December 22, 1999
Judgment: March 10, 2000[FN*]
Docket: 0569, 08831, 0078

Counsel: Linda M. Rose, Q.C., for Wendy S. Skinner.

David C. **Day**, Q.C., for George W.N. Skinner.

Cases considered by Cook, J.:

Becker v. Pettkus, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257, 34 N.R. 384, 8 E.T.R. 143, 19 R.F.L. (2d) 165 (S.C.C.) -- applied

Bracklow v. Bracklow, 169 D.L.R. (4th) 577, 236 N.R. 79, 44 R.F.L. (4th) 1, 120 B.C.A.C. 211, 196 W.A.C. 211, [1999] 1 S.C.R. 420, 63 B.C.L.R. (3d) 77, [1999] 8 W.W.R. 740 (S.C.C.) -- applied

Clarke v. Clarke, 28 R.F.L. (3d) 113, 113 N.R. 321, [1990] 2 S.C.R. 795, 73 D.L.R. (4th) 1, 101 N.S.R. (2d) 1, 275 A.P.R. 1 (S.C.C.) -- applied

Drover v. Drover (No. 2) (1985), 53 Nfld. & P.E.I.R. 279, (sub nom. Drover v. Drover) 156 A.P.R. 279, 46 R.F.L. (2d) 126 (Nfld. C.A.) -- applied

Hussey v. Palmer, [1972] 1 W.L.R. 1286, [1972] 3 All E.R. 744 (Eng. C.A.) -- considered

Kearley v. Kearley (1991), (sub nom. Kearley v. Kearley (No. 1)) 94 Nfld. & P.E.I.R. 158, (sub nom. Kearley v. Kearley (No. 1)) 298 A.P.R. 158 (Nfld. U.F.C.) -- not followed

Martin v. Martin (1998), 168 Nfld. & P.E.I.R. 181, 517 A.P.R. 181, 42 R.F.L. (4th) 251 (Nfld. C.A.) -- applied

Moge v. Moge (1992), [1993] 1 W.W.R. 481, 99 D.L.R. (4th) 456, [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, 30 W.A.C. 161, 43 R.F.L. (3d) 345, 145 N.R. 1, [1993] R.D.F. 168 (S.C.C.) -- applied

Mosher v. Canada (Minister of Human Resources Development) (1998), 2 C.E.B. & P.G.R. 8713 (Can. Pen. Apps. Bd.) -- considered

Rathwell v. Rathwell, [1978] 2 S.C.R. 436, [1978] 2 W.W.R. 101, 83 D.L.R. (3d) 289, 19 N.R. 91, 1 E.T.R. 307, 1 R.F.L. (2d) 1 (S.C.C.) -- applied

Waterman v. Waterman (1995), 16 R.F.L. (4th) 10, 133 Nfld. & P.E.I.R. 310, 413 A.P.R. 310 (Nfld. C.A.) -- applied

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally -- referred to

s. 15.2(1) [en. 1997, c. 1, s. 2] -- pursuant to

s. 15.2(4) [en. 1997, c. 1, s. 2] -- referred to

s. 15.2(6) [en. 1997, c. 1, s. 2] -- pursuant to

Family Law Act, R.S.N. 1990, c. F-2

Generally -- referred to

s. 5(c) -- considered

s. 18(1)(c) "matrimonial assets" (i) -- considered

s. 18(1)(c) "matrimonial assets" (ii) -- considered

s. 18(2) -- considered

s. 19 -- considered

s. 21 -- considered

s. 22 -- considered

s. 26(f) -- considered

RULING on issues of division of matrimonial property, and spousal support.

***Cook, J.*:**

Introduction

1 At issue are unresolved matters under the *Family Law Act* and the *Divorce Act*, both having been consolidated and heard concurrently. These include: how $20,000 received from Ms. Skinner's father, and used as a down payment on a matrimonial home, should be characterized; how $40,000 which Ms. Skinner received from a personal injury settlement, and which was paid on a mortgage on a matrimonial home, should be characterized; whether a constructive trust should be implied and, whether there are any other circumstances which justify an unequal division of the parties' matrimonial home. Also at issue is when Ms. Skinner is entitled to her share of her husband's vacation pay, which cannot be paid to him until his termination or retirement.

2 Ms. Skinner also seeks spousal support. It was agreed at the hearing that evidence and argument on this issue would be restricted to Ms. Skinner's "entitlement" to financial support and, if it is determined that she is, in fact, entitled to such support, a separate "quantum" hearing would have to be held unless the parties can independently reach a resolution.

Background and Counsels' Submissions

3 The parties married May 31, 1974, separated March 31, 1997 and divorced April 13, 1999. They have two sons, one born December 14, 1976 and the other December 27, 1977.

4 During the parties cohabitation Ms. Skinner worked outside their home part-time, full-time and not at all, primarily in the fields of nursing and education. This was through choice, injuries and unavailability of employment.

5 Ms. Skinner's two sons, who attend university, have lived with her since she and her husband separated, except for work terms outside St. John's. She claims no knowledge of their work incomes because financial matters are between her sons and their father. She does not believe in charging her sons for "room and board" because they are at university where there is stress and because of "deaths in the family". In fact, she thinks that if she did so charge them,

they would "move out".

6 The parties acquired a matrimonial home at 411 Elizabeth Avenue, St. John's in 1986. This matrimonial home was subsequently replaced by a matrimonial home at 21 Gambier Street, St. John's. The parties initially lived with their young family, rent free, in a basement apartment of Mr. Skinner's parents' home.

7 Part of the purchase price for the 411 Elizabeth Avenue property came from a $20,000 cheque which Ms. Skinner's father made out to both parties. Mr. Skinner contends that he would only accept the $20,000 if the cheque was made out to both he and his wife as a gift. Ms. Skinner contends that even though the cheque was made out to both parties, it was, in essence, part of her inheritance and she, in turn, had to be paid back by her husband.

8 There is no documentation to support a $20,000 loan. There is also no evidence to suggest that Ms. Skinner's father ever required repayment of a $20,000 loan and, there is no evidence that Ms. Skinner requested repayment of a loan until "family problems" arose.

9 Ms. Skinner has been injured in five motor vehicle accidents and one "slip and fall" accident. She also had a neck strain injury in 1980. She had to have extensive physiotherapy and rehabilitation as well as having to wear neck and back braces. She still claims to have pains in her back, neck and arms for which she must take painkillers. She acknowledges "memory problems" caused, either by drugs which she has to take for asthma or, by her accidents.

10 Ms. Skinner's most serious motor vehicle accident was in July 1986 as a result of which she ultimately received, in January 1991, slightly in access of $40,000 by way of a "global settlement". She then paid $40,000 towards the mortgage balance outstanding on 21 Gambier Street. Despite her July 1986 accident, she was able to get back to replacement teaching at Booth High School in September, albeit having to wear a back brace. She now admits that she may have made an error in getting back to work so soon and this could have worsened her condition.

11 Ms. Skinner maintains that, because of the impact of the accident, her husband agreed, in exchange for her putting $40,000 on the mortgage, to do housework and also to undertake needed renovations to 21 Gambier Street. She also maintains that her husband agreed to pay back the $40,000.

12 Prior to separation in 1997, Mr. Skinner did do some housework and he did carry out renovations. According to Ms. Skinner her husband rewired the kitchen, constructed a television room and bathroom in the basement, which contained a sink cupboard and toilet, installed tiles in the kitchen, bathroom and entry, carpeted wooden steps, as well as constructing a wooden patio on the rear of their home with railings and steps. She maintains however that a wall-oven has not been installed in the kitchen and better materials could have been used in many areas. She also maintains that enlarging the front step has also not been done as well as completing some kitchen renovations and repairing windows and siding.

13 Mr. Skinner agrees that in exchange for his wife putting $40,000 on their Gambier Street

mortgage, he agreed to do housework because of the impact of the 1986 accident had on his wife. He also acknowledges his undertaking to carry out renovations.

14 Mr. Skinner indicated that he did housework and carried out renovations, as promised, up to separation. He also indicated that the renovations were extensive and the materials used were adequate. He argues that he did all that was expected of him prior to separation and disputes his wife's contention that he agreed to actually pay back the $40,000.

15 There were no written agreements made between the parties respecting either the $20,000 down-payment on 411 Elizabeth Avenue or the $40,000 which was applied to the Gambier Street mortgage. In fact, Ms. Skinner at one time in her testimony indicated, insofar as the $40,000 was concerned that, "it wasn't a big thing with me to get paid back".

16 Day, Q.C. on behalf of Mr. Skinner, submits that even if the Court was to consider an unequal division of 21 Gambier Street favoring Ms. Skinner there are other factors which should "counter" such an unequal division. These include: Mr. Skinner paying over $46,000, from a partial inheritance of over $70,000, towards matrimonial debts, as well as previously arranging with his parents to house his family rent free for a 10 year period prior to the parties acquiring a matrimonial home.

17 It is also submitted by Mr. Skinner's counsel that during cohabitation, his client was the primary earner and caregiver and this allowed his wife to: convalesce from five motor vehicle accidents and one "slip and fall" accident; complete a Bachelor of Special Education Degree; complete a Bachelor of Education Degree; commence a Masters of Nursing Program and to start a Mary Kay business, all in addition to being able to change careers and to, in effect, only undertake employment intermittently.

18 Day, Q.C. also asks that the Court consider Ms. Skinner's 1992 deregulation of a $12,000 RRSP, unbeknownst to Mr. Skinner, which sum, after triggering an income tax liability, was used to start up a Mary Kay business which was unsuccessful, in addition to spending the balance on unspecified expenditures.

19 Ms. Skinner's initial claim for economic loss from the 1986 accident was for $15,000 and, as she received over $40,000 as a net "global" settlement, her counsel, submits that a reasonable inference is that at least 50 percent should be inferred as past economic loss which, he contends, is a matrimonial asset. He submits further that this reduces the division exempt portion of the $40,000 to at least $20,000 which is more than offset by Mr. Skinner's overall contributions to the marriage, especially by doing housework and carrying out extensive renovations.

20 Rose, Q.C., on behalf of Ms. Skinner, submits that there was a verbal agreement between the parties respecting the $40,000 and Mr. Skinner held the funds as a trustee under a constructive trust. She submits further that he was enriched and because he is no longer doing any of the housework and he only completed part of the renovations, the funds should now be returned to Ms. Skinner. She admits a difficulty in quantifying what is impressed with a trust. She also submits that the $20,000 sum came from Ms. Skinner's inheritance and was a loan only

which Mr. Skinner should repay.

21 The value of Mr. Skinner's vacation pay was $24,284.80 at separation. It cannot be paid to him until termination or until he retires.

22 Rose, Q.C. submits that Mr. Skinner's vacation pay is not a contingent asset as such and it can be "used up". She asks that her client now receive 50 percent of his vacation pay net of tax and argues that *Kearley v. Kearley* (1991), 94 Nfld. & P.E.I.R. 158 (Nfld. U.F.C.) supports her position.

23 Day, Q.C. contends that *Kearley* can be distinguished because the vacation pay had been crystalized and paid and therefore was able to be calculated with precision. He argues that to share it now would also be impossible because one would have to know what Mr. Skinner's *future* income tax rate will be. He thus argues for a tax rate calculation when the funds are actually received where as Rose, Q.C. argues that the rate, at separation, should apply.

24 There is some property personal to each of the parties, as well as furnishings and appliances, the division of which has yet to be satisfactorily resolved, and the parties have also asked for direction with respect to these matters.

25 A significant issue is whether Ms. Skinner has an "entitlement" to spousal support.

26 Because she has been injured six times, suffers from asthma and has low blood pressure and memory losses, Ms. Skinner claims that she is limited to light duty nursing and cannot get back into that field of employment.

27 Even though Ms. Skinner also has education and special education degrees, she claims she cannot get full-time work in these fields despite attempts and competitions. She emphasizes that she tried working as early as September 1986, in a back brace, but has only had one full-time job (in 1988) since her major accident in 1986. In addition to her physical handicaps, she attributes her lack of success in securing employment to her age (48) and lack of seniority.

28 Ms. Skinner has received employment insurance but no longer qualifies to receive it. She has not applied for a Canada Pension Plan disability pension.

29 Rose, Q.C. concedes that Ms. Skinner was not part of a "traditional" marriage but argues that the marriage also does not fit within the notion of a "modern" marriage, as such. She asserts that there was a pattern of dependency throughout the marriage and because of her injuries and health problems she has very real need, as evidenced by the fact that she was only able to earn slightly in excess of $6,000 in 1999 as a substitute teacher.

30 Ms. Skinner's counsel argues that *Bracklow v. Bracklow* (1999), 44 R.F.L. (4th) 1 (S.C.C.) supports her assertions because Ms. Skinner is economically disadvantaged and suffers economic hardship because of her marriage and, because of this, the Court should arrive at an amount which "strikes justice". She argues that Mr. Skinner has a very good income, two homes, one of

which is mortgage free, and $165,000 left from inheritances and, because he is able to contribute toward his former wife's needs, he should be ordered to do so.

31 Day, Q.C. acknowledges that *Bracklow* provides the juridical framework for spousal support entitlement but argues that *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.) establishes that entitlement to spousal support is not presumptive.

32 Mr. Skinner's counsel argues that entitlement has not been established because of a number of factors. These include Ms. Skinner: not seeking a contribution from her sons when living with her and not on work terms; not seeking a Canada Pension disability pension; settling a personal injury claim for $50,000 when she thought the claim was worth $250,000 and, because she made unilateral job decisions which adversely affected her. He also argues that Ms. Skinner irresponsibly managed monies available to her since separation and went back to work too early following her 1986 accident.

33 Mr. Skinner's counsel also submits that Ms. Skinner's present circumstances are principally related to accidents unconnected to the marriage or its breakdown and Ms. Skinner should support herself from sources other than Mr. Skinner.

Analysis

A. Applicable Law

34 These applications are brought pursuant to *s.21 and s. 22* of the *Family Law Act* and pursuant to *s.15.2(1)* of the *Divorce Act*.

35 *Section 18.(1)* of the *Family Law Act* states, in part:

> 18.(1) In this Part
>
> . . . . .
>
> (c) "Matrimonial assets" includes all real and personal property acquired by either or both spouses during the marriage, with the exception of,
>
> (i) gifts, inheritances, trusts or settlements received by 1 spouse from a person other than the other spouse and an appreciation in value of them during the marriage,
>
> (ii) personal injury awards, except the portion of the award that represents compensation for economic loss,
>
> . . . . .

36 A matrimonial home is a matrimonial asset: *s.18.(2)*.

37 A court may order a matrimonial asset be divided in equal shares: *S.21. (1)*, but it may instead order an unequal division if it concludes that an equal division would be grossly unjust or unconscionable after taking into account factors delineated in *s.22* of the *Family Law Act*.

38 Even though $20,000 was used as a down payment on 411 Elizabeth Avenue, because this matrimonial home was replaced with 21 Gambier Street as a matrimonial home, the determination of the effect of the $20,000 provided by Ms. Skinner's father will be determined insofar as 21 Gambier Street is concerned.

39 Therefore, what has to be determined is whether the $20,000 cash infusion for a down payment on 411 Elizabeth Avenue and the $40,000 personal injury settlement which was applied against the 21 Gambier Street mortgage should result in an order that these funds are exempt from equal division, or alternatively whether an unequal division of 21 Gambier Street, which is the parties matrimonial home, should be ordered.

40 *Section 22* of the *Family Law Act* states:

> 22. The court may make a division of matrimonial assets that is not equal where the court is satisfied that a division of these assets in equal shares would be grossly unjust or unconscionable taking into account the following factors:
>
> (a) the income, earning capacity, property and other financial resources that each of the spouses has or is likely to have in the foreseeable future;
>
> (b) the financial needs, obligations and responsibilities that each of the spouses has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the spouses before the breakdown of the marriage;
>
> (d) the age of each party;
>
> (e) the duration of the marriage;
>
> (f) a physical or mental disability of either of the spouses;
>
> (g) the contributions made by each of the spouses to the welfare of the family, including a contribution made by a spouse in looking after the matrimonial home or caring for the family;
>
> (h) the loss of a potential benefit to a spouse by reason of a dissolution or annulment of the marriage;

(i) the unreasonable impoverishment or dissipation of matrimonial assets by either of the spouses;

(j) the length of time that the spouses have lived separate and apart from each other during the marriage; or

(k) the date of acquisition of each matrimonial asset.

(i) How should the $20,000 payment be characterized?

41 The following evidence looms large: there was no documentation to support a $20,000 loan; there is no evidence that Ms. Skinner's father ever demanded repayment of all or part of the $20,000; the cheque was made out to both parties; there is no evidence, apart from Ms. Skinner's assertion, that the $20,000 was part of her inheritance which her husband had agreed to pay back to her and, there is no evidence that the $20,000 loan repayment was requested prior to the parties' marital difficulties.

42 When the foregoing evidence is considered in conjunction with the evidence of Mr. Skinner, who contends that he would only accept a $20,000 gift if made payable to both he and his wife, the more logical inference is that the $20,000 was provided by Ms. Skinner's father as a gift and not a loan and, as the $20,000 cheque was made payable to *both* Mr. and Mrs. Skinner and used as a down payment by them on their matrimonial home, it is my finding that it is not a gift or inheritance that comes within *s.18.(1)(c)(i)* of the *Family Law Act*. It is thus not excluded as part of the parties' matrimonial assets.

(ii) How should the $40,000 be characterized?

43 Ms. Skinner received a personal injury settlement of $40,000 net. Even though this was not theoretically an "award" it was, upon receipt, apart from the portion of it that may have represented compensation for economic loss, excluded as a matrimonial asset; *s.18.(c)(ii)*.

44 Ms. Skinner, of course, did not keep the $40,000 but applied it against the mortgage on their 21 Gambier Street matrimonial home and, what has to be determined is the effect of such action by Ms. Skinner.

45 Mr. Skinner contends that because of his wife's physical impairments, he agreed to do some of the housework and also to carry out renovations, which he was then, no doubt, better able to afford, in "exchange" for his wife paying the $40,000 down on their mortgage. Ms. Skinner agrees but *also* contends that her husband agreed to pay back the $40,000. She also testified that it wasn't a big thing with her to get paid back. Mr. Skinner, of course, denies that there was a loan.

46 I find that Mr. Skinner presented as a more credible witness than did Ms. Skinner. I thus find his evidence to be more credible than the inconsistent evidence of Ms. Skinner, respecting the $40,000. My conclusion has also been minimally drawn from the fact that Ms. Skinner does

have admitted "memory problems" and these, unfortunately from her standpoint, and through no fault of her own, obviously work to her disadvantage when credibility has to be determined.

47 I have therefore concluded there was no "loan" as such but there was an agreement whereby Mr. Skinner agreed to do housework and renovations, which he did prior to separation, in consideration of his wife placing her $40,000 personal injury settlement against their mortgage. Because of this, all of the $40,000, including the economic loss portion, is not excluded as a matrimonial asset pursuant to *s.18.1(c)(ii)* of the *Family Law Act*.

(iii) Do the facts warrant the imposition of a constructive trust?

48 Lord Denning M.R. in *Hussey v. Palmer*, [1972] 3 All E.R. 744 (ENG. C.A.) stated that a constructive trust is based upon facts "where justice and good conscience require it". Nevertheless, there must be, as long accepted in Canada: *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436 (S.C.C.); *Becker v. Pettkus*, [1980] 2 S.C.R. 834 (S.C.C.); *Drover v. Drover (No. 2)* (1985), 53 Nfld. & P.E.I.R. 279 (Nfld. C.A.):

1. Enrichment of the recipient;

2. deprivation of the donor; and

3. the absence of a juristic reason for the enrichment.

49 In *Drover*, Morgan, J.A., states at par.21:

> The concept of constructive trust is imposed without reference to intention to create a trust and its purpose is to provide a remedy that would prevent the unjust enrichment of one person at the expense of another. It was described by Dickson, J., as he then was, in Rathwell at p. 445 as follows:
>
> > The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. The principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason -- such as a contract or disposition of law -- for the enrichment period.

50 As to the $20,000, on the evidence I have made a finding of a "gift" to *both* Mr. and Ms. Skinner which was used as a down payment on their then matrimonial home. There is therefore a juristic reason for Mr. Skinner's entitlement. It is therefore not absent and because of this the third element has not been proven and therefore, insofar as the $20,000 is concerned, the constructive trust argument is unsuccessful.

51 There is no doubt that Mr. Skinner was enriched when $40,000 of Ms. Skinner's settlement funds were paid down on their mortgage. She was also deprived of the $40,000. The issue thus becomes whether the imposition of a constructive trust is appropriate in these circumstances.

52 On the evidence, I also find that the $40,000 which Ms. Skinner paid on their mortgage also satisfies the requirements of enrichment and deprivation. But, as I have found no agreement for Mr. Skinner to repay the $40,000, there is a juristic reason for the enrichment which, in effect, means that the third required element (absence of juristic reason) has not been proven. Therefore a constructive trust cannot be imposed insofar as the $40,000 is concerned either.

(iv) Should there be an unequal division of the matrimonial home irrespective of the previous findings or, should Ms. Skinner recover otherwise?

53 I have determined that there was an agreement reached between the parties whereby Ms. Skinner paid $40,000 in consideration of her husband doing housework and carrying out renovations, which he did up to separation. There is no evidence as to how long Mr. Skinner was to do housework and the evidence is contradictory as to the scope of the renovations to be carried out.

54 I have concluded that Mr. Skinner partially performed his agreement because he did housework from early 1991 up to March 1997 when the parties separated. He also performed extensive renovations over that period of time.

55 Although difficult to quantify (March 11, 1999, Reply to Demand for Particulars), I agree with the position put by Day Q.C. and find that a substantial portion of Ms. Skinner's negotiated personal injury settlement can be attributed to economic loss which thus makes it a matrimonial asset pursuant to *s.18.(1)(c)(ii)* of the *Family Law Act*. I have also concluded that the non-economic loss component of the settlement has been offset by Mr. Skinner's housework and extensive renovations. In short, there is no constructive trust because the foregoing constitutes proof of a juristic reason.

56 I am also not convinced, on the evidence, that there is any other reason which would justify an order for an unequal division of the matrimonial home pursuant to *s.22* of the *Family Law Act*. This is because the purpose of *s. 22* is to provide for an unequal division of matrimonial assets where it would be grossly unjust or unconscionable not to do so, provided that an applicant can bring himself or herself within the confined factors set out in that section.

57 *Cameron, J.A.*, in discussing *s.22* in *Martin v. Martin* (1998), 168 Nfld. & P.E.I.R. 181 (Nfld. C.A.) at p. 197, stated that the applicant has to meet a "heavy onus". In my view, not only has the "heavy onus" not been met by Ms. Skinner, but the facts also show that it would be grossly unjust and unconscionable to order an unequal division in Ms. Skinner's favor especially so when the large amount which Mr. Skinner put into family debts and expenditures from his own inheritances is concerned coupled with Mr. Skinner arranging with his parents to house his family rent free for 10 years. In short, I cannot conclude from an analysis of all of the facts that an injustice has flowed to Ms. Skinner such that an unequal division of the matrimonial home, or

any other matrimonial assets, is warranted.

(v) Vacation Pay.

58 I deem Mr. Skinner's vacation pay, valued at $24,284.80 at separation, to be a matrimonial asset as it was "acquired" during the marriage. In *Kearley* it was ordered that the respondent receive one-half of her husband's entitlement to his vacation pay, at separation, to be paid even though he could not receive it until termination or retirement.

59 *Section 19* of the *Family Law Act, "*... entitles each spouse to an equal division of matrimonial assets acquired during the marriage". *Section 26.(f)* provides that it may be ordered "that one spouse pay to the other spouse the amount that is set out in the order to provide for the division of property"; nevertheless, one of the stated purposes of the "law with respect to matrimonial property", pursuant to *s.5.(c)*, is to "provide for the deferred sharing of most other property acquired during marriage".

60 There is no doubt that Mr. Skinner's vacation pay can, and has been, calculated with precision as of separation. There is also no doubt that his income tax rate can be calculated with precision as of separation.

61 Irrespective of the foregoing however, it is my view that it would not be fair and equitable to order Mr. Skinner to pay one-half of his vacation pay minus taxes to Ms. Skinner at this time from funds which he may receive at a later date and to which a different tax rate could apply. Because of these factors, I have concluded that Ms. Skinner's portion of Mr. Skinner's vacation pay should be paid, after taxes, when received by Mr. Skinner.

62 One problem with the foregoing approach is that Mr. Skinner could, if he so wished, manipulate that which he will ultimately receive in vacation pay by unreasonably using up vacation days and effectively decreasing that which Ms. Skinner will ultimately receive. Because this *could* work to her disadvantage and, because it would be a logistical nightmare to properly monitor such behaviour from separation to termination or retirement, I will attempt to order what I think strikes a fair and equitable balance.

63 I thus determine Ms. Skinner's entitlement to Mr. Skinner's vacation pay to be one-half of $24,284.80, after taxes, if and when received. And, in this regard Mr. Skinner is to take all reasonable steps that a prudent taxpayer would take to reduce the tax payable at that time. I have therefore rejected the approach taken in *Kearley*.

64 If Mr. Skinner's vacation pay is less than $24,284.80, Ms. Skinner is to receive 50 percent of one-half of $24,284.80, which is $6,071.20. I believe that this will comply with the principle set out by *Wilson, J.* in *Clarke v. Clarke*, [1990] 2 S.C.R. 795 (S.C.C.) where, in discussing a method of division of a matrimonial asset (in that case a pension), she stated:

> ... When selecting the appropriate method of distribution it is important to bear in mind that the primary goal of the legislation is to effect the adjustment of property in an

equitable manner.

(vi) Is Ms. Skinner "entitled" to spousal support?

65 As Marshall, J.A. stated in *Waterman v. Waterman* (1995), 133 Nfld. & P.E.I.R. 310 (Nfld. C.A.), at *p. 316*:

> The power to grant corollary relief by way of support is conferred by s. 15 of the Divorce Act whose broad general principles endow the judge at first instance with extensive latitude to make awards.

66 *Section 15* of the *Divorce Act* states, in part:

> 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.
>
> 15.2(4) In making an order under subsection (1) ... 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;
>
> . . . . .
>
> 15.2(6) An order made under subsection (1) ... 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.

67 *McLachlin, J.* in *Bracklow v. Bracklow* (1999), 44 R.F.L. (4th) 1 (S.C.C.) in discussing the

proper approach in determining whether a spouse should be entitled to spousal support states, at p.26:

> Moge, supra, sets out the method to be followed in determining a support dispute. The starting point is the objectives which the Divorce Act stipulates the support order should serve: (1) recognition of economic advantage or disadvantage arising from the marriage or its breakdown; (2) apportionment of the financial burden of child care; (3) relief of economic hardship arising from the breakdown of the marriage, and (4) promotion of the economic self-sufficiency of the spouses: s.15.2(6). No single objective is paramount; all must be borne in mind. The objectives reflect the diverse dynamics of the many unique marital relationships.
>
> > Against the background of these objectives the court must consider the factors set out in s.15.2(4) of the Divorce Act. Generally, the court must look at the "condition, means, needs and other circumstances of each spouse". This balancing includes, but is not limited to, the length of cohabitation, the functions each spouse performed, ... 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 the 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 N.B.R. (2d) 147 (N.B. C.A.), at p. 156, per Bastarache J.A... 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.

68 Although marriage *per se* does not automatically entitle a wife to support: *Moge* at p.386, Professor D.A.. Rollie Thompson of Dalhousie Law School, in a paper titled, *Rules and Rulelessness in Family Law: Recent Developments, Judicial and Legislative*, concludes, at p.34, that *"... in all but the briefest of marriages there will be a potential non-compensatory basis for support"*.

69 The evidence discloses that the parties cohabited for almost 23 years. I thus conclude that it was a "long term" marriage. It was neither what is generally referred to as "traditional" or "modern" because of Ms. Skinner's entries and exits from the job market.

70 Although Ms. Skinner had intermittent gainful employment throughout the marriage, primarily in the nursing and education fields, I agree with Rose, Q.C. that there was a pattern of dependency such that Ms. Skinner relied extensively on Mr. Skinner's much higher income, especially after her 1986 accident.

71 I have concluded that Ms. Skinner has very real medical problems brought on, in no small measure, by the injuries which she sustained in six accidents. She also has asthma, low blood pressure and memory loss. In fact, it was obvious at the hearing that she had some genuine

difficulty ambulating.

72 Mr. Skinner, although not "well off" is "comfortable". He has two homes, one of which is mortgage free in addition to $165,000 left from inheritances. He earns $82,000 annually. This can be contrasted with Ms. Skinner's 1999 income which was barely over $6,000; a paltry sum and not enough to meet her basic needs. Her marriage breakdown has thus resulted in an economic disadvantage which requires relief from the resulting economic hardship.

73 I have concluded that Ms. Skinner's present medical problems are real and will not disappear overnight, if at all. And, even if they do, because of her age and lack of seniority, she will have a difficult time becoming competitive not only in the fields of nursing and education but in the job marketplace generally. I have also concluded that there is not sufficient evidence of Ms. Skinner's "fiscal irresponsibility" since separation to warrant a bar to her entitlement to spousal support.

74 Ms. Skinner has needs and very limited means. Mr. Skinner has definite means to help support his spouse of 23 years.

75 Applying the facts of this case to the principles set out in *Moge* and *Bracklow* and after considering all objectives set out in *s. 15.2.(6)* and all factors set out in *s.15.2(4)* of the *Divorce Act*, I have concluded that Ms. Skinner is entitled to spousal support which will help her strive for self-sufficiency as well as helping to alleviate the adverse consequences caused by her marriage breakdown.

76 In short, after considering the legislation referred to, as well as *Moge* and *Bracklow*, coupled with an analysis of all of the facts and dynamics of this particular case, I have concluded that justice requires Ms. Skinner being awarded some spousal support.

77 In arriving at the foregoing decision, I have placed little weight on the fact that Ms. Skinner collects no funds from her sons for "room and board" as I am not convinced that the funds which they earn are not reasonably required and spent by them for legitimate needs, including post-secondary education and related expenses.

78 Similarly, I have placed no weight on the fact that Ms. Skinner has not applied for a Canada Pension Plan disability pension because for her to be successful, she must prove a "severe" and "prolonged" disability which precludes her from doing *any* type of gainful employment: *Mosher v. Canada (Minister of Human Resources Development)* [reported (1998), 2 C.E.B. & P.G.R. 8713 (Can. Pen. Apps. Bd.)] *(May 1998), (Pensions Appeal Board)*. There is also, of course, no proof that she would have met the minimum qualifying requirements as well and, even if she was successful there is no evidence as to how much she would actually receive and the impact that this would have on her ability to earn some other income.

79 The fact that Ms. Skinner thought that her personal injury claim was worth $250,000 is not, in my view, indicative as to what the claim was worth. The evidence discloses that she settled her claim for approximately $50,000 upon legal advice being provided to both her and to the

tortfeasor's insurer. This, in my view, is much more realistic as to what her personal injury claim was actually worth.

80 I do not fault Ms. Skinner for getting back to work, in a brace, some two months after her 1986 accident, even if this did, as she admitted, set her back. I consider her efforts on the contrary, as exhibiting a good work ethic just as she did when she attempted to diversify her skills by getting more education and by making job choice decisions.

Summary and Disposition

81 These matters are summarized and disposed of as follows:

1. The $20,000 from Ms. Skinner's father was provided to both parties as a gift. It cannot be construed, on the balance of probabilities, as Ms. Skinner's inheritance which Mr. Skinner had to repay.

2. The non-economic loss component of the $40,000 personal injury settlement was applied by Ms. Skinner against the mortgage on the matrimonial home in consideration of Mr. Skinner doing housework and carrying out renovations, which he did over a period of years.

3. A "loan" of $40,000 by Ms. Skinner to Mr. Skinner cannot be supported on the evidence.

4. There are no facts to impose a constructive trust insofar as the $20,000 or $40,000 sums are concerned. Although Ms. Skinner was "deprived" and Mr. Skinner was "enriched", because of my previous findings, juristic reasons for the enrichments were not absent.

5. As there are no other facts to support an unequal division, neither the matrimonial home at 21 Gambier Street, nor any other matrimonial assets, are to be divided unequally. Ms. Skinner may purchase Mr. Skinner's one-half undivided interest in 21 Gambier Street by paying one-half of the appraised value to Mr. Skinner.

6. Mr. Skinner is permitted to attend at 21 Gambier Street, along with a independent third party, to remove any of his personal belongings and to also remove such matrimonial assets as may be mutually agreed by the parties.

7. The parties are to work diligently to "adjust" for all matrimonial assets at 21 Gambier Street. If they cannot so adjust, they may apply for a determination by this Court.

8. Ms. Skinner is entitled to one-half of Mr. Skinner's $24,284.80 vacation pay at separation, after taxes, upon his termination or retirement. Mr. Skinner is to take all reasonably prudent steps to reduce such tax at that time. If Mr. Skinner's vacation pay is less than $24,284.80, Mr. Skinner is to pay Ms. Skinner $6,071.20 upon his termination

or retirement.

9. Applying *s.15* of the *Divorce Act* and the principles set out in *Moge* and *Bracklow*, to the facts at hand, establishes that Ms. Skinner has an "entitlement" to spousal support.

10. A separate "quantum" hearing on spousal support may be held if the parties, through their counsel, cannot reach a resolution.

11. If there are any other matrimonial matters yet to be resolved, either party may apply for further directions.

82 As both parties have had success there will be no order as to costs.

Order accordingly.

Order accordingly.

FN*. A corrigendum issued by the court has been incorporated herein.

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