

NOVA SCOTIA COURT OF APPEAL
[Cite as: Westhaver v. Westhaver, 1999 NSCA 149]

Freeman, Bateman and Cromwell, JJ.A.

BETWEEN:

TERRANCE WESTHAVER)	Bruce J. Preeper, Q.C.
)	for the appellant
Appellant)	
)	
- and -)	
)	
HEATHER WESTHAVER)	Kevin Coady
)	for the respondent
Respondent)	
)	
)	
)	Appeal heard:
)	November 30, 1999
)	
)	Judgment delivered:
)	November 30, 1999
)	
)	

THE COURT: Appeal dismissed per oral reasons for judgment of Cromwell, J.A.;
Freeman and Bateman, JJ.A. concurring

CROMWELL, J.A.: (Orally)

[1] The appellant Terrance Westhaver appeals an order of MacLellan, J.F.C. (as she then was) requiring him to pay maintenance to the respondent Heather Westhaver. The Notice of Appeal lists 16 grounds, but the appellant, in his factum, states the issue on appeal to be simply:

Did the Learned Trial Judge err in Law in ordering the payment of \$800.00 per month maintenance by the appellant to the respondent under all the circumstances with a further order that this order be reviewed within one year on the basis of a psychological assessment of the respondent.

[2] The trial judge in an 11 page oral decision reviewed the applicable sections of the **Family Maintenance Act**, R.S.N.S. 1989, c. 160. She found that the appellant had a gross monthly income of \$5500 per month, and a net income in excess of expenses of between \$900 - \$950 per month, not taking a Visa account into consideration. She further found that Mrs. Westhaver's living expenses were \$1570 (compared with \$2300 for Mr. Westhaver) and that her gross income was \$745 per month, leaving a deficit of over \$800 per month.

[3] Mrs. Westhaver was injured in a car accident which occurred during the marriage. The trial judge found, as a result of these injuries, Mrs. Westhaver was unlikely to be able "...to turn a dollar in the competitive workplace." The judge ordered monthly maintenance of \$800 to be reviewed within one year. She observed that the after tax amount of the order to Mr. Westhaver was approximately \$480.

[4] Our role on appeal is not to retry the case or to substitute our opinion for that

of the trial judge. The determination of an application for support or maintenance is fact-based and discretionary in nature so that trial judges "... must be given considerable deference by appellate courts when such decisions are reviewed."

(Hickey v. Hickey, [1999] S.C.J. No. 9 (Q.L.); (1999), 172 D.L.R. (4th) 577 at 583

[D.L.R.] The Court of Appeal should only intervene if "... there is a material error, a serious misapprehension of the evidence, or an error in law." **(Hickey v. Hickey, supra** at p. 584 [D.L.R.].

[5] It is argued that the trial judge erred in failing to consider s. 4(f) of the **Family Maintenance Act**. 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 his 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] The Order is reviewable within one 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.

[7] A number of arguments were advanced dealing with the amount of maintenance awarded. The judge erred, it is submitted, in basing the order on Mrs. Westhaver's budget which assumed she would have her own apartment when she, in fact, was residing with family at the time of the hearing and in failing to take account of Mr. Westhaver's maintaining the matrimonial assets and debts or of the share of the matrimonial assets to which Mrs. Westhaver would be entitled upon division. These arguments have no merit. The judge carefully reviewed the evidence and the relevant considerations and reached a conclusion that is supported by the evidence.

[8] We are not persuaded that the trial judge's decision contains any material error, serious misapprehension of the evidence or any error in law.

[9] The appeal is dismissed with costs which we would fix in the amount of \$1,000.00 inclusive of disbursements.

Cromwell, J.A.

Concurred in:

Freeman, J.A.

Bateman, J.A.