Date: 1999 02 15
Docket: 6101-02559

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CINDY LOUISE FAIR

Petitioner

- and -

PAUL EDMUND JONES

Respondent

Trial of proceedings for divorce, child support, and division of matrimonial property.

Heard at Yellowknife, NT, January 11-15, 1999

Reasons filed: February 15, 1999

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES

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REASONS FOR JUDGMENT

[1] This is an action for divorce, child support, and division of matrimonial property. A divorce judgment was issued at the conclusion of the trial. These reasons address the contentious issues of child support and property division.

History of the Marriage

[2] The parties were married in Yellowknife on July 8, 1989. Each of them had been married previously. The petitioner (wife) had two children from her previous marriage, Aaron (born on March 23, 1978) and Saro (born on August 29, 1979). She was the sole caregiver to these children for most of their lives.

[3] The evidence revealed that, because this was a second marriage for both of them, and particularly because of the inclusion of the two children in the new family, the parties

gave quite a bit of thought to their expectations of the marriage. They discussed their emotional and financial concerns. The respondent (husband) was going to assume a "father" role vis-à-vis the children so he was unsure as to how things would develop. Clearly, because of her concerns for the children, the petitioner, as well as the children, were hoping that the respondent would assume a meaningful role in the children's lives.

[4] The parties lived together for a few months prior to their actual marriage. The petitioner and the children moved into the respondent's home, a cabin on Madeline Lake outside of Yellowknife. The family moved out of this home in 1992, and together the parties bought a house on Morrison Drive in Yellowknife. The Madeline Lake property was eventually sold in 1993 and the proceeds used to pay down the debt on the Morrison Drive property.

[5] The parties had maintained independent financial lives up to the marriage. The petitioner was employed in a managerial position with the Government of the Northwest Territories. The respondent was employed as a news editor with the Canadian Broadcasting Corporation. Their respective incomes were similar. Prior to the marriage, the respondent had arranged to take a six month leave of absence from his employment. He had developed an interest in dogsledding and other outdoor activities and he wanted to use his leave to develop these pursuits and assess his long-term career aspirations. The petitioner knew this and supported him in his plans. The leave commenced in the spring of 1989 (prior to the marriage) and lasted until the fall of 1989. The respondent then returned to work full-time at the CBC until late March of 1990 at which time he quit that employment. His permanent departure from the CBC was discussed with the petitioner. She was sympathetic and supportive of his desire to pursue other endeavours.

[6] In 1990 the respondent started up his own business, known as "Qimmiq Adventures", providing recreational outfitting services and dogsled trips to tourists. He also obtained various contracts to provide what I will call generally "executive director" services to several organizations as well as constituency assistance to a member of the territorial legislature. He also had some short-term employment with a Yellowknife school board. This combination of private business, contract work and

employment lasted throughout the course of the marriage until late 1993 when he returned to full-time employment.

[7] The petitioner was initially supportive of the respondent's efforts in running his own business. She was concerned, however, about the overall financial situation of the family unit. She continued her full-time employment with the government.

Unfortunately, she developed a serious and debilitating illness in 1991 which forced her to go on sick leave and then long-term disability for much of 1992 and 1993. She was hospitalized for lengthy periods. She returned to full-time employment in January of 1994.

[8] The respondent, after leaving his employment at CBC, devoted much of his time as well as a significant amount of the family financial resources to the Qimmiq enterprise. On paper, that business venture ran at a loss. In reality, it was marginal at best. Some of the business expenses, however, were for items (such as fuel and vehicles) that were used by the family while they were living at the Madeline Lake property. Overall, the respondent's net income dropped significantly from the level he enjoyed during his CBC employment.

[9] The parties pooled their finances for most of the marriage. The petitioner converted her bank accounts to joint accounts. All of the income earned by both of them went into these accounts and all expenses were paid out of them. The respondent opened an account for Qimmiq, but many of the expenses for that venture were either paid out of the joint accounts or went on personal credit cards. There was a great deal of mixing of income and expenses between the Qimmiq account and the family joint accounts. I think it is fair to say that, in the petitioner's view, far more was going out of the family accounts to cover Qimmiq expenses than was coming in to help cover family expenses. The account used to pay expenses was frequently overdrawn. This became a source of great friction between the parties. In 1993 the petitioner opened a separate account, with just herself having signing authority, so as to try to accumulate some savings. She felt she could not set aside any savings for the future with the respondent having access to the joint accounts.

[10] With respect to the personal aspects of the family relationship, things went well in the early part of the marriage. In the beginning, everyone worked toward developing the family as a unit. The respondent involved himself in family activities and did things on his own with the children. The main child-caring and household management functions were still maintained by the petitioner, however, notwithstanding her continuing employment. Within a year or so, though, problems started to develop. The respondent withdrew from his relationship with the children. He did not like them and they did not particularly like him either. The situation regressed to the point where there was no communication between the children and the respondent. Instead there was resentment and anger on all sides. The relationship between the parties became strained as a result of these developments. They tried to address their growing difficulties by attending

counselling sessions in 1990 and 1991, but things continued to deteriorate. As the petitioner said, "The relationship never jelled into a family unit."

[11] The parties separated on February 1, 1994. The respondent moved out of the matrimonial home. The petitioner and the children continued to reside in the home until shortly before it was sold in 1996. The proceeds from the sale have been held in trust. The respondent has had no contact with the children since the separation.

Child Support

[12] The petitioner seeks an order compelling the respondent to pay child support. This claim requires an analysis of two related issues: (1) Are the children still to be classified as "children of the marriage" as that term is used in the *Divorce Act* (Canada)? and, (2) Did the respondent stand in the place of a parent to the children and, if he did once, does he now still?

[13] The Act provides that the court may order a spouse to support a "child of the marriage". That term is defined in section 2(1) of the Act:

> "child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
> (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

The definition is further extended by section 2(2) of the Act:

> (2) For the purposes of the definition "child of the marriage" in subsection (1), a child of two spouses or former spouses includes
>
> (a) any child for whom they both stand in the place of parents; and
> (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

So the Act contemplates support obligations being imposed on step-parents, as well as biological parents, but subject to the criteria set out in the definition.

[14] The definition refers to "the material time". In my opinion that time is now, at the time when the support claim is under consideration: *Harrington v. Harrington* (1981), 22 R.F.L.(2d) 40 (Ont.C.A.). Thus the criteria in section 2(1), those being the age of the child and inability to withdraw from the parents' charge, must be considered as of the present.

[15] Both children, Aaron and Saro, are now over the age of majority (that being 19 years in this jurisdiction). Both, however, are in full-time attendance in post secondary education programmes. They are both in the second year of four-year undergraduate programmes at a university. They do not live with the petitioner. The petitioner presented a summary of the anticipated total costs of the children's education (undergraduate and post-graduate). Some of the education costs are paid from an education trust fund that the petitioner established in May 1989, and some from the territorial student assistance programme.

[16] Unfortunately these bare details, and estimates, were all the information I was provided respecting the children's circumstances. I was not told of their living arrangements, their actual current expenses, their sources of income if any, or how expenses are currently covered. The petitioner left her employment in March 1996, and since then has worked overseas in volunteer service. I was left to assume that the petitioner was paying the children's expenses yet no clear evidence was presented on this point.

[17] The onus of proving that a child satisfies the statutory criteria in the definition is on the person claiming the support order: *Whitton v. Whitton* (1989), 21 R.F.L.(3d) 261 (Ont.C.A.). While one can make general assumptions that the costs of university education are high, there is still a need for evidence establishing the fact that the child is truly incapable because of that to withdraw from the parent's charge. It may not take much evidence to establish this fact, but there is a need for at least some evidence. Some of the factors that should be addressed are: (a) the children's ability or inability to attend university without financial assistance from their parents; (b) their ability to provide for themselves or at least to pay part of their expenses; (c) the availability of other resources to fund their expenses; (d) the reasonableness of their education plans; and, (e) generally the condition, means and other circumstances of each child: see *Janzen v. Janzen* (1981), 21 R.F.L.(2d) 316 (B.C.C.A.); *Law v.* Law (1986), 2 R.F.L.(3d) 458 (Ont.H.C.J.); and *Bradley v. Zaba* (1996), 18 R.F.L.(4th) 1 (Sask.C.A.).

[18] As a general rule, a child over the age of majority who is in full-time attendance at an education institution will be treated as a dependent entitled to support. This applies even if the child is not living with the parent who is claiming support. There has been a general acceptance of education pursuits as "cause" for inability to withdraw from the parents' charge. In this jurisdiction there have been numerous cases where support for adult children attending university was ordered and cases where it was not. The point is that these types of cases are fact-specific. Hence the need for evidence.

[19] Respondent's counsel submitted that this claim should be dismissed purely on the basis of there being insufficient evidence to make a finding that Aaron and Saro are "children of the marriage" within the meaning of the Act. I think this case comes close to that result, but I prefer to approach this issue from a different perspective. I am prepared to assume, for the sake of argument, that Aaron and Saro are incapable of withdrawing from their mother's charge. But, even if I assume that, I still do not find any ongoing liability on the part of the respondent to contribute to their support.

[20] The Act speaks of children for whom a spouse stands in the place of a parent (what used to be called "*in loco parentis*" in law). The mere fact that the spouse is married to the natural parent of the children is not determinative of this status. As many of the cases have said, there must be a settled intention by the spouse to treat the children as his. In *Andrews v. Andrews* (1992), 38 R.F.L.(3d) 200 (Sask.C.A.), Vancise J.A. wrote (at page 207):

> There is an element of intention required. The alternate parent has voluntarily, through his actions, placed himself in the position which a parent would occupy for the provision of support and guidance, and has assumed that obligation. *In loco parentis* indicates an intention on the part of the parent to fulfill the obligation and duty of the lawful parent of the child.

This approach was also accepted by the Alberta Court of Appeal in *Theriault v. Theriault* (1994), 2 R.F.L.(4th) 157, per Kerans J.A. (at page 162);

> Our society values parenthood as a vital adjunct to the upbringing of children. Adequate performance of that office is a duty imposed by law whenever our society judges that it is fair to impose it. In the case of the natural parent, the biological contribution towards the new life warrants the imposition of the duty. In the case of a step-parent, it is the voluntary assumption of that role...Once a person has made at least a permanent or indefinite unconditional commitment to stand in the place of a parent, the power granted to the courts

> by the *Divorce Act, 1985* to order support is triggered, and that jurisdiction is not necessarily lost by a subsequent disavowal of the child by the step-parent.

This principle was affirmed by de Weerdt J. of this court in *Laraque v. Allooloo*, [1993] N.W.T.R. 124 (at page 133):

> ...it is well settled law that it takes a properly informed and deliberate intention to assume parental obligations for support of a child on an ongoing basis, to bring the *in loco parentis* status in law into being.

[21] In this case, the petitioner certainly hoped that the respondent would become a "father" figure for the children. They never had someone in that role before in their lives so it was obviously a very significant concern for the petitioner. There were great expectations on the part of the children. In the early stage of the marriage the respondent tried to play a parental role for the children. He involved himself in their lives. They lived in the home that he brought into the marriage. His income, such as it was, contributed to their support. I have no difficulty concluding that in that early stage he stood in the place of a parent to Aaron and Saro.

[22] The relationship between the children and the respondent changed, however, during the course of the marriage. It is undisputed that there developed a sense of resentment and alienation as between the children and the respondent. He ceased to be involved in their activities. He still contributed to their support in a monetary way, but in an emotional sense he ceased to be a part of their lives. Since the separation he has played no part in their lives. He has had no contact with them and they have made no effort to contact him. In my view the parental role assumed by the respondent early in the marriage ceased to exist by the end of the marriage. This is not a situation where the non-biological parent has unilaterally abandoned his parental role (as in so many of the cases on this point); this is a situation where the relationship, as the petitioner put it, "never jelled into a family unit".

[23] In *Andrews*, Vancise J.A. set out a procedure for determining whether support should be paid by a step-parent. In the event of a post-separation claim against a parent who stood *in loco parentis*, he wrote (at page 215) that the court should:

> ...examine the relationship between the parent *in loco parentis* and the children since the separation or divorce, where no prior order for support has been made, to determine whether it is just and reasonable to make such an order considering such elements as the

> parental role which existed, the parental role after the separation, the contact between such parent and the child or children, and, where appropriate, the wishes of the children...

[24] In my opinion, while the respondent assumed a parental role early in the marriage, that role dissipated during the marriage and ceased to exist completely by the end of the marriage. The respondent has played no role in the children's lives since then. There never was a parental relationship with the children that could be said to be independent of the husband-wife relationship. Even if the respondent stood *in loco parentis* at some point in the past, he does no longer.

[25] The petitioner's counsel submitted, however, that the respondent's obligation to support the children continues because of his role in the establishment of their education trust fund. Counsel argued that the parties clearly contemplated that the children would go to university and the trust fund is an indicator of the respondent's commitment to the children's education. Therefore the children remain as charges until they finish their education.

[26] Again, for sake of argument, I am prepared to accept the proposition that plans of parents, formulated jointly by them during marriage, as to the future education of their children are a factor to consider in determining whether support should be ordered. I am also prepared to accept that a person may create an express future obligation independent of any "parental" obligation. But neither of these assumptions changes the result in this case.

[27] The education trust fund was established just prior to the parties' marriage. The evidence clearly indicates that the fund was the petitioner's plan; she made the arrangements, and the only reason the respondent signed the plan application form was because the salesman suggested it (since the parties were planning to be married). The respondent contributed to the plan indirectly by the fact that contributions were paid out of the joint family accounts. The funds in those accounts came from his and the petitioner's earnings. But there is nothing in this arrangement to suggest either an indefinite commitment or an express obligation to support the children until the completion of their studies. The fund is not claimed by either party as a family asset and it has now been accessed for the purpose it was established, to help defray the education expenses of the children.

[28] The claim for child support is therefore dismissed.

Matrimonial Property Division

[29] These proceedings were commenced in 1995. In her pleadings the petitioner sought an unequal division of all family assets while the respondent proposed an equal division. They maintained these respective positions at trial.

[30] When these proceedings were commenced, the matrimonial property law in this jurisdiction was found in the *Matrimonial Property Act*, R.S.N.W.T. 1988, c.M-6. On November 1, 1998, that statute was replaced by the *Family Law Act*, S.N.W.T. 1997, c.18 (the "*FLA*"). This is the first case to come to trial under this new legislation. The new Act applies to marriages that took place before or after the date it came into force (section 34).

[31] I say "new legislation" advisedly since Part III of the *FLA* (the part dealing with property division) is modelled on Part I of the *Family Law Act, 1986* of Ontario. Therefore while this legislation may be "new" to this jurisdiction, there is already a vast body of case law dealing with this legislation.

[32] The *FLA* introduces a different approach to the issue of property division in this jurisdiction. The *Matrimonial Property Act* vested almost complete discretion in the court. It provided that a judge may make any order that he or she considered fair and equitable with respect to matrimonial property. The judge had to take into account the respective contributions of the spouses whether in the form of money, services, prudent management, caring for the home and family, or in any other form. But, as noted by our Court of Appeal in *Chapman v. Chapman*, [1993] N.W.T.R. 355, the emphasis was on what the judge considered fair and equitable. It was essentially a legislated form of the constructive trust doctrine.

[33] The *FLA*, on the other hand, creates a regime whereby assets are to be divided equally, regardless of contribution, as a matter of course. The definition of "property" in the Act includes all conceivable types of property. The impact of this legislation was explained by Lorne H. Wolfson, in his article "Survey of Family Property Law Across Canada", in Corbin & Wolfson, eds., *Best of Money & Family Law* (1998), at page 6, as follows: "...the general rule is that all property acquired during the course of the marriage is subject to equalization in the event of a marriage breakdown. The only exceptions to this general rule are based upon the method of acquisition (for example, gifts, inheritances, insurance proceeds, personal injury awards) rather than the use to which the property has been put (that is, "family" versus "non-family" use)." This type of legislation is what is called a "total deferred community of property regime". It differs

from a "pure community of property regime" (where all property is owned jointly) and a "partial deferred community of property regime" (where a distinction is drawn between "family" and "non-family" assets). Quebec is an example of the former and British Columbia of the latter. It should also be noted that the *FLA* allows the spouses to exempt any or all of their assets from this regime by executing a valid domestic contract (section 35(2) of *FLA*).

[34] The "process" for division was described by Cory J. in *Rawluk v. Rawluk*, [1991] 1 S.C.R.70 (at page 90), when discussing the Ontario statute:

> Sections 4 and 5 of the *Family Law Act, 1986*, create a two-step property division process that emphasizes the distinction between the determination of legal and equitable ownership and the equalization of net family property. These sections require a court first to determine individual "ownership piles" and then to equalize the spouses' assets by ordering the spouse with the larger ownership pile to pay money to the spouse with the smaller pile.

Sections 4 and 5 referred to in this quote are essentially the same as sections 33, 35 and 36 of the *FLA*.

[35] The *FLA* does not create a share in ownership of property as such but a share in property value through an equalizing transfer of money. It is a debtor-creditor statute, not a true property statute. It provides for the payment of money so as to equalize the value of the assets for each spouse: *Berdette v. Berdette* (1991), 3 O.R.(3d) 513 (C.A.), leave to appeal to S.C.C. refused (1991), 85 D.L.R.(4th) viii (note).

[36] The policy behind the legislation emphasizes principles of partnership during marriage and self-sufficiency following its termination: *Caratun v. Caratun* (1993), 10 O.R.(3d) 385 (C.A.), leave to appeal to S.C.C. refused (1993), 46 R.F.L.(3d) 314 (note). This policy is recognized in the preamble to the *FLA*:

> Whereas it is desirable to encourage and strengthen the role of the family;
>
> And whereas it is necessary for that purpose to recognize the equal position of spouses as individuals within a family and to recognize the spousal relationship as a form of partnership;
>
> And whereas in support of such recognition it is necessary to provide in law for the timely, orderly and equitable settlement of the affairs of the spouses on the breakdown of the

> spousal relationship, and to provide for other mutual obligations of spouses, including the equitable sharing by parents of responsibility for their children;

[37] The preamble speaks of the "timely, orderly and equitable" settlement of the affairs of the spouses. Clearly one of the purposes of this statutory regime is to provide more certain results with respect to property division by limiting the discretion of judges to make awards based on their subjective approach to the concept of fairness. This limit on discretion is well illustrated by a comment from the judgment of Galligan J.A., writing for the Ontario Court of Appeal, in the *Berdette* case (noted above):

> The particular result arrived at in this case is not one which accords with my sense of what is fair. But that, I think is not the issue. The issue, as I see it, is whether the result is a correct one in accordance with the law laid down by the legislature when it enacted the *FLA*.

[38] The Act requires a determination of the "net family property" of each spouse. This is the value of all of the property (except for specifically excluded property) that a spouse owns on separation (the "valuation date"), after deducting the spouse's debts, other liabilities, and the net value of property that the spouse owned on the date of marriage (the "commencement date"): see subsections 35(1), (2) and (3). A spouse's net family property is essentially the increase in his or her net worth during the years of marriage. Since equalization is the rule, the onus of proving any deduction or exclusion from these calculations is on the spouse claiming it: s.35(4).

[39] It should be evident therefore that there is a great burden on both sides to fully and accurately disclose all assets to allocate a fair value to them. There is an express requirement for each party to file and serve a detailed statement of property: s.39.

[40] A spouse may apply to the court to determine any matter respecting that spouse's entitlement to an equal value of family property: s.38. The rules regulating the equalization of net family property values are found in s.36 of the Act. The relevant subsections for this action are the following:

> 36.(1) When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to an amount equal to one-half the difference in value between them.
>
> . . .

(6) The court may, on an application under section 38, vary the amount of a spouse's entitlement under this section or, in the circumstances described in subsections (1) and (3), award an amount as an entitlement to a spouse whose net family property is equal to or greater than the net family property of the other spouse, where the court is of the opinion that it would be unconscionable not to do so, having regard to

(a) a spouse's failure to disclose to the other spouse debts or other liabilities existing at the commencement date;

(b) the fact that debts or other liabilities claimed in reduction of a spouse's net family property were incurred recklessly or in bad faith;

(c) a spouse's intentional or reckless depletion of his or her net family property;

(d) the fact that the amount a spouse would otherwise receive under subsection (1), (2) or (3) is disproportionately large in relation to the duration of the spousal relationship;

(e) the fact that one spouse has incurred a disproportionately larger amount of debts or other liabilities for the support of the family than the other spouse;

(f) a written agreement between the spouses that is not a domestic contract;

(g) the needs of the children of a spouse and the financial responsibility related to the care and upbringing of the children;

(h) a substantial change, occurring after the valuation date, in the net family property of either spouse and the circumstances of the change;

(i) a substantial decrease, occurring after the commencement date, in the value of property claimed in reduction of a spouse's net family property under paragraph 35(1)(b) or a substantial loss on the disposition of such property after the commencement date, and the circumstances of the decrease or loss; or

(j) any other circumstance relating to the

(i) acquisition, disposition, preservation, maintenance, improvement or use of property, or

> (ii) the acquisition, maintenance or disposition of debts or other liabilities.
>
> (7) The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the spousal relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the variation of this entitlement, or to the award of a different entitlement, by the court under subsection (6).

[41] Subsection (7) repeats the policy underpinnings of the equalization regime. The purpose of section 36 as a whole, that is to say, the purpose of the presumptive rule of equalization, is to recognize the partnership aspects of marriage, both economically and and in non-economic terms, such as household management and child care. There is an inherent assumption of equal contributions. Any variation from the rule of equalization can only be made on the basis of the criteria set out in subsection (6).

[42] Subsection (6) says that a judge may order an unequal division where, based on one or more of the factors set out in clauses (a) through (j), it would be "unconscionable" not to do so. One can only assume that the choice of this word was a deliberate one. It is the same one used in Ontario. It can be compared to some other jurisdictions, such as Alberta and British Columbia, where terms such as "unfair" and "inequitable" are used.

[43] The "unconscionable" criterion sets a high standard. As noted by Jennings J. in *Merklinger v. Merklinger* (1992), 11 O.R.(3d) 233 (Gen.Div.), affirmed at (1996), 30 O.R.(3d) 575 (C.A.):

> Section 5(6) of the *Family Law Act, 1986* permits me to order an unequal allocation of value if to do otherwise would be unconscionable. The legislature deliberately chose to strictly define the severity of the result of the application of s.5(1) which must pertain before there can be any judicial intervention. The result must be more than hardship, more than unfair, more than inequitable. There are not too many words left in common parlance that can be used to describe a result more severe than unconscionable.

Subsections 5(1) and (6) noted above are the Ontario equivalents to our subsections 36(1) and (6).

[44] Jennings J. used the term "outrageous" to describe the unconscionability of an equalization order in the *Merklinger* case. Some other common terms that have been used in the case law are "shocking" (*Kelly v. Kelly* (1986), 50 R.F.L. (2d) 360), and "shockingly unfair" (*Magee v. Magee* (1987), 6 R.F.L.(3d) 453), and "repugnant to anyone's sense of justice" (*Wachtel v. Wachtel* [1973], 1 All E.R. 829 per Lord Denning). Whatever term is used as a substitute expression, it is clear that by stipulating "unconscionable" the legislature intended a much stricter test than merely "unfair" or "inequitable".

[45] Since the rule is equalization, any claim to a departure from that rule would have to be an exceptional case. The onus is on the spouse claiming more than an equal share to prove his or her entitlement: *Reynolds v. Reynolds* (1995), 13 R.F.L.(4th) 179 (Ont.C.A.). That spouse must first bring his or her claim within one of the factors set out in subsection (6) and then must show that, as a result, it would be unconscionable not to order an unequal division.

[46] In his article, "What is Unconscionable", in Corbin & Wolfson, *op.cit*, Ontario practitioner David Melamed reviewed 45 Ontario cases, from 1989 to 1992, which dealt with claims of unconscionability. The claim succeeded in 18 of those cases. He summarized his conclusions as follows (at page 95):

> The fact that significantly more than one-half of the cases claiming unconscionability fail and that of those that did succeed, 13 of the 18 were in marriages of short duration leads to the conclusion that the threshold test is high and that judicial discretion is fettered in this area of property division. Below are what we conclude are some of the more certain results after more than five years of cases concerning unconscionability:
>
> - in order to make a finding of unconscionability, equalization would have to "shock the conscience of the court"; it is a high threshold test limiting judicial discretion;
>
> - marriages of less than five years will most often justify an unequal division of net family property, even when the short duration is a direct result of one spouse's conduct;
>
> - as a general rule, marital misconduct is not a relevant consideration, except where it can be shown to have economic consequences for the spouse and/or family;
>
> - post-separation events, including decreases in property values after valuation date, are arguably not factors to be considered in [section 36(6)];

- failure to support a spouse and/or family, removal of money from the joint account, reckless spending and accumulation of debt, and substantially disparate contributions *may* compel a court to award unequal division where particularly egregious;

- property gifted from one spouse to another remains the property of the latter, and such gifts cannot form the basis of unconscionability; and

- predicting the results of an unconscionable split when it does occur is all but impossible.

[47] Mr. Melamed's comment with respect to marriages of short duration, specifically marriages of less than five years, must be approached with caution. The Ontario statute, in subsection 5(6)(c), identifies as a factor the fact that the amount a spouse would receive in an equalization payment is "disproportionately large in relation to a period of cohabitation that is less than five years". The Northwest Territories statute does not refer to any period of cohabitation. Subsection 36(6)(d) merely states that the amount would be "disproportionately large in relation to the duration of the spousal relationship". There is no particular reference point to determine what may be a short or long duration for a marriage. Obviously it is a relative concept, perhaps relative simply to the amount of money at stake.

[48] The other conclusion drawn by Mr. Melamed that should be considered with some care is that relating to post-separation events. Some courts have taken post-separation expenditures into account under subsection 36(6)(j) as a circumstance relating to the "acquisition, disposition, preservation, maintenance, improvement or use of property": see, for example, *Hoar v. Hoar* (1993), 45 R.F.L.(3d) 105 (Ont.C.A.). A post-separation increase in value of an asset may be accounted for through the imposition of a constructive trust, as in the *Rawluk* case (noted previously). Mr. Melamed is accurate in saying, however, that post-separation decreases in value have not been considered as factors justifying an unequal division (although arguably such an occurrence may fit into s.36(6)(h) of the Act).

[49] In the present case both parties put forward their respective calculations as to the spouses' net family property based on itemized valuations of assets held at the commencement date (the date of marriage) and at the valuation date (the date of separation). The major asset was, of course, the former matrimonial home. The proceeds from its sale in 1996 have been held in trust and it is this fund from which any equalization payment, or otherwise, will be made. Generally speaking, however, the

parties agree with respect to much of their individual valuations. The points of disagreement will be reviewed by me.

[50] I will set out what I find to be the "commencement date" valuations for each party:

Item	**Petitioner**	**Respondent**
R.R.S.P.	$ 15,222.68	$ 11,600.00
Bank account	9,774.00	
Canada Savings Bonds	22,200.00	
Vehicle	5,000.00	2,000.00
Furniture & effects	12,500.00	5,000.00
Tools		200.00
Canoes & kayak		1,000.00
Camping gear		300.00
Art & books		1,250.00
Madeline Lake property	4,500.00	21,875.00
Commencement date totals:	$69,196.68	$43,225.00

[51] A number of these items require explanation.

[52] The entry for the petitioner's bank account is the amount that was actually on deposit according to the petitioner's testimony. In her calculations, however, she used a higher figure ($14,580.18) since she added back into this item amounts that she had paid out, prior to marriage, for the Madeline Lake property. At the trial, the petitioner provided a list of payments made between March 8 and July 5, 1989, totalling $9,105.66. She testified that, of these, she was certain that one expenditure of $4,500.00 was made on that property. Of the rest the best she could say was that some were probably made for the property. I accept the evidence as to the payment of $4,500.00, but reject the rest as too vague.

[53] I have not put this figure back into the petitioner's bank account because, in my view, it is conceptually inappropriate to do so (although in effect my analysis will result in no difference). The amount for the bank account should be what was in the account. I have, however, allocated this $4,500.00 as representing an "ownership" share in the Madeline Lake property. The basis on which I do this is that of a constructive trust.

[54] In the previously noted *Rawluk* case, a majority of the Supreme Court of Canada held that legislation such as the *FLA* is not an exhaustive code for the division of the value of assets. The remedial constructive trust is still available as a remedy where strict application of the legislation would result in unjust enrichment for one spouse. This decision has not been free from criticism. Many commentators support the strong opinion expressed by the minority in *Rawluk* that the constructive trust, being a remedial device, should not be applied where a statute provides a similar remedy. Some commentators have called the *Rawluk* decision an "aberration" which has been, if not expressly, indirectly overruled by subsequent constructive trust decisions from the Supreme Court of Canada: see J.G. McLeod & A.A. Mamo, *Annual Review of Family Law* (1993), at pages 170-171. Whatever the merits of this debate, the constructive trust doctrine has been used to allocate an ownership interest in premarital property as well as with respect to assets that have increased in value after the statutory "valuation date". What is important to note, however, is that a constructive trust claim affects ownership interests -- it is a property claim -- and not reallocation of equalization amounts (see *Rawluk* and *Berdette*).

[55] In this instance the funds advanced by the petitioner, prior to marriage, on the respondent's home (the home that became the family home) were a direct contribution to its improvement or maintenance. Thus a constructive trust is available to compensate for an actual contribution to the property. It is not being used to adjust the equalization payment nor is it some type of double recovery for spousal services (since this property was eventually sold and the proceeds used to buy the Morrison Drive property which the spouses share equally). It is a recognition of an actual financial contribution prior to the statutory "commencement date". The petitioner's contribution was the conferral of a benefit on the respondent resulting in a corresponding deprivation to the petitioner. There is no juristic reason why the respondent should take the sole benefit of the "commencement date" value for this property without some recognition of the petitioner's contribution. In this case one could probably also classify the petitioner's premarital financial contribution as a resulting trust (something expressly preserved by s.46 of the *FLA*) as well as a constructive trust.

[56] This leads me into a discussion of the amount allocated for the respondent's interest in the Madeline Lake property. The amount I have listed is the value of the property when the respondent purchased it in 1986 ($75,000.00) less the outstanding debt as of the commencement date ($53,125.00). The respondent submitted that the gross value should be higher than the original purchase price. The property was sold in 1992 for $90,000.00. There is an increase of $15,000.00 in value between 1986 and 1992. Therefore, it was submitted, the difference should be attributed equally per year resulting in a value of $82,500.00 in 1989. This was said to be a fair, if somewhat arbitrary, method since there is no appraisal or other evidence with respect to the fair market value in 1989.

[57] In my opinion, based on the evidence in this case, the respondent's approach is too arbitrary to be reliable. It requires speculation as to market conditions. As the petitioner's counsel argued, since there is no evidence of value for 1989, we have to take the best evidence available and that, in this case, is the purchase value. I agree; especially in light of the evidence that a great deal of effort was put in by both parties after the marriage to renovate and improve the property. Much, if not most, of the increase in value could easily have come about as a result of these post-commencement date efforts. There are no provisions in the statute defining "value" or stipulating what method of valuation is to be used. The usual benchmark is fair market value. But, just as the Act places the onus of proof with respect to any exclusion or exemption on the party claiming it, it seems to me that the onus of establishing a particular value for an asset is also on the party claiming that value.

[58] It should be noted that one, and perhaps the only, significant difference between the Ontario statute and the Northwest Territories one is that in Ontario the commencement date value of property excludes a matrimonial home. There is no such exclusion in our *FLA*. In Ontario it seems the legislature has made an explicit decision to remove the matrimonial home from the equalization process altogether on the premise that it will always be divided equally. This distinction between the two statutes seems somewhat puzzling since in other respects the matrimonial home is treated in the same manner in both (see Part II of the Ontario *Family Law Act* and Part IV of the territorial *FLA*). It may be, however, that the inclusion of a matrimonial home for commencement date purposes results in fairer treatment for the spouse who brings the home into the marriage (see the criticisms levelled at the Ontario approach by Professor McLeod in his annotation to *Cassidy v. Cassidy* (1996), 17 R.F.L.(4th) 403).

[59] The petitioner also claimed credit for a payment of $5,300.00 in September 1989, which was used to retire a loan from the respondent's mother to the respondent to help

him purchase the Madeline Lake property. The petitioner testified that this was money that came from her bank account. On this point I agree with the respondent's

counsel that this payment should not be treated as a separate item since there is no clear and unequivocal evidence that the funds, even though they came from the petitioner's account, were solely from the petitioner. There was some evidence showing that the respondent deposited his earnings from the summer of 1989 (earned as a guide during his leave of absence from CBC) into her accounts. It was also around this time that the accounts became joint accounts. In any event, by then the parties were functioning as an economic unit. There is no basis in the legislation or otherwise to segregate this specific expenditure.

[60] I will now list what I find, on the evidence, to be the "valuation date" amounts for each party:

Item	**Petitioner**	**Respondent**
Family home	$ 70,658.50	$ 70,658.50
R.R.S.P.	15,000.00	7,767.72
Bank accounts	1,500.00	1,500.00
Stocks		1,500.00
Vehicle	10,000.00	3,000.00
Furniture & effects	10,000.00	1,000.00
Snowmobile		1,500.00
Camping gear		1,200.00
Tools		400.00
Canoes & kayak		700.00
Qimmiq		
Valuation Date Totals:	$107,158.50	$ 89,376.22

[61] These figures result in "net family property" values for each party as follows:

	Petitioner	**Respondent**
(a) Valuation Date:	$107,158.50	$ 89,376.22
(b) Commencement date	69.196.68	43,225.00
Net Family Property:	$ 37,961.82	$ 46,151.22
		(37,961.82)
(c) Difference		$ 8,189.40

[62] The difference between the respective "net family property" values would result in an equalization payment from the respondent to the petitioner of $4,094.70 (being one-half the difference). This figure, however, may be adjusted to take into account post-separation expenses incurred by both parties. They agree that some adjustment should be made, just not how or how much. The other issue that must be considered is the petitioner's claim for an unequal division.

[63] Before turning to post-separation expenditures, I will explain two items from the valuation date lists. Most of the items are either the figures proposed by the parties or what I consider to be reasonable allocations based on the evidence. The two items requiring some explanation are those respecting bank accounts and the family home.

[64] The bank account figures are from the joint accounts at the time of separation. The evidence revealed, however, that a few months prior to separation the petitioner opened a separate savings account. There were no records available for this account. The petitioner testified, however, that there was some money in it at separation but could not recall how much. The bank records for the joint account, however, reveal that, in January of 1994, one month prior to the separation, there were two withdrawals, one by cheque and one by cash, totalling $10,000.00. There was also a deposit of $6,124.00. Neither party could recall what those withdrawals were for or even who made them. Neither one could recall where the deposit came from. The petitioner testified that by January she had removed the respondent from the joint accounts.

[65] The respondent's counsel argued that I should attribute $10,000.00 to the petitioner as part of her valuation date assets. It was submitted that the petitioner had failed to make complete disclosure of her bank records and, since it is reasonable to conclude that she had sole control of the bank account in January, the unaccounted for $10,000.00 was likely taken by her. The petitioner's counsel argued in response that this was not a non-disclosure issue. She did not have the records; and, since there is no evidence as to what happened with the 1994 withdrawals, it would be dangerous to make any attribution to either party.

[66] I think it is fair to say that, in most circumstances, an unexplained disposition of assets could lead to some sort of attribution to the party who is in the best position to explain it. As I said before, the legislation places a heavy burden on each party to make full and candid disclosure of all assets. In this case, however, there are simply too many gaps in the evidence for me to safely draw any conclusions. All I would be doing is speculating. Even though the petitioner may have been the sole signatory to the account by January, that does not necessarily mean that the withdrawals could not have been made either by the respondent or for his benefit. I would need some evidence on bank practices for that. I also note that the respondent made a $6,000.00 R.R.S.P. deposit for the 1993 taxation year, something he could have done at any time up until the end of February 1994, and there is no explanation as to where these funds came from. They may be tied in to the January withdrawals. But, all of this is speculation. Hence, I refuse to make any attribution of these amounts.

[67] On the subject of disclosure, one item not identified by either party in their valuations is a pension. I gather the petitioner has a pension vested from her government employment but no valuation was done of it. The respondent had his pension rolled out when he left his employment with the CBC but again no details were provided. There was a suggestion that it was in part of his R.R.S.P. holdings but, in the absence of particulars, I am unable to draw any conclusions. Pensions are an asset under the *FLA* and should be accounted for in these cases.

[68] The family home listed in the valuation date calculations is the Morrison Drive property occupied at the time of separation. I have used the net proceeds realized on the sale of the property in 1996. As with the Madeline Lake property, there was no appraisal of the value of the Morrison Drive home at the actual date which should be used (here the "valuation date"). The sale price is therefore the best evidence as to its value. The parties agreed that this value should be used for valuation purposes with post-separation expenditures treated as a separate item and then factored in to how the available cash is distributed (since the sale proceeds have been kept in trust since 1996). The value I used

is $141,317.00 representing the amount in trust as of July 25, 1996. I have divided it in half (this property was in joint names) and allocated one-half to each spouse. This appears to be the appropriate method even though one spouse remained in occupation (as per the *Hoar* case noted previously).

[69] The trust fund has over $143,000.00 on deposit now due to interest earned on the sale proceeds. Whatever interest has been earned should simply be divided in half for the benefit of both spouses. I will not deal with the interest further, and for purposes of equalization I will simply assume that there is one cash fund of $141,317.00 available.

[70] With respect to post-separation expenditures, the parties continued to jointly contribute to the mortgage on the home until December 1994. At that time the mortgage was renegotiated to provide for payments of $630.38 every two weeks. This resulted in mortgage payments due between December 1994 and June 1996, of $25,845.58 (82 weeks ÷2 x $630.38). Of that amount, the petitioner paid $24,900.01 while the respondent paid $945.57. The petitioner also paid $2,100.00 for maintenance, appraisal and insurance costs. However, she received $2,520.76 as rent for two months (when the premises were rented just before sale). A breakdown of respective receipts and contributions shows the following:

	Petitioner	**Respondent**	**Total**
Paid:	$24,900.01	$ 945.57	$25,845.58
	2,100.00		2,100.00
	$27,000.01	$ 945.57	$ 27,945.58
Received:	(2,520.76)		(2,520.76)
	$24,479.25	$ 945.57	$25,424.82

To equalize these expenditures, the respondent should pay to the petitioner the sum of $11,766.84 (½ of $25,424.82 less $945.57). All of the expenditures were made to preserve and maintain both parties' interest in the home.

[71] The respondent, however, claims a set-off for the expenses he incurred for alternate accommodation. His rent, from separation until sale of the family home, was

between $500.00 and $700.00 per month (approximately $19,000.00 over the full period). Generally speaking, when one spouse has sole use of joint property the other spouse is entitled to occupation rent. But, it is not simply a matter of taking what that other spouse's (in this case the respondent's) expenses were for alternate accommodation. The respondent left the home. It is not his expenses that are to be compensated, if at all, but the use of a joint asset (the home) by only one spouse (the petitioner). After all, if the respondent stayed in the home, he would have had to contribute his share to those expenses.

[72] There is no automatic entitlement to occupation rent nor is there a strict formula for calculating it. It is a discretionary item. There is nothing in the *FLA* mandating it. An award of occupation rent is usually made so that any accounting between the spouses has a reasonable relationship to the expenses of both spouses after the separation. At common law, where a joint owner in sole possession claimed for expenses such as taxes, mortgage, and repairs, he or she would not be allowed such a claim unless he or she was prepared to pay occupation rent. But there is no inviolate rule that occupation rent is to be awarded: *Vokey v. Vokey* (1995), 14 R.F.L.(4th) 422 (Nfld.C.A.). One of the typical ways in which it is accounted for, however, when awarded is as was done in *Irrsack v. Irrsack* (1977), 93 D.L.R.(3d) 139 (Ont.H.C.J.), affirmed on appeal and subsequently leave to appeal to S.C.C. denied (1980), 106 D.L.R.(3d) 705. The trial judge said (at page 143):

> The husband has had exclusive possession and use of the matrimonial home since July 28, 1976. Since I find that the wife is an equal joint owner thereof it follows that she is entitled to be compensated for the sole use and occupation by the husband which includes her half-interest. The equitable approach is to allow her one-half of the rent, to this date, that these premises would attract less one-half of the taxes and insurance for the same period.

[73] There is no objective figure for what the Morrison Drive property would have rented for from 1994 to 1996. We have, however, the sum of $2,520.76 which was received by the petitioner as rent for two months. Therefore, per month it was $1,260.38. One half of that would be $630.19. This is almost exactly what was paid on the mortgage every two weeks. This is as good a notional occupation rent as the evidence allows. Since this amount is in line with the respondent's monthly share of the mortgage paid by the petitioner then the two claims by and large offset each other. The respondent's estimate of his rental expense from the date of separation to the date of sale of the home exceeds what I calculated previously as the amount required to be paid by the respondent to the petitioner to equalize the allocation with respect to post-separation expenditures on the home. Any difference, however, is also offset by the fact that the

petitioner assumed general care for the home and sole responsibility for care of the children after separation (a responsibility to which the respondent made some financial contribution prior to separation). Therefore, I have concluded that the claim by the petitioner for post-separation expenditures is offset by the respondent's claim for occupation rent.

[74] I have treated these post-separation events as a separate item from the process of equalizing net family property values because that is how the parties treated it at trial. In my opinion, however, it could be brought into that process by reason of s.36(6)(j) of the *FLA* ("any other circumstance relating to the...preservation, maintenance, improvement or use of property"), subject though to the test of unconscionability. This leads me to the primary argument by the petitioner to support an unequal division.

[75] The petitioner's submission, stripped to its essentials, is that it would be unconscionable not to apportion the assets unequally in her favour because, having regard to the relatively short duration of the marriage, an equal division would result in a disproportionately large award to the respondent. The facts to support this submission are said to be the much greater overall financial contribution by the petitioner to the family unit during the years of cohabitation and the drain on the family finances by the respondent's business venture.

[76] In my respectful opinion, what petitioner's counsel is asking me to do is to apply the old law of calculating the respective contributions made by each spouse. That is exactly what the *FLA* is meant to avoid. The respondent may not have contributed as much to the family resources as the petitioner did, but he did contribute something both in work and money. Further, when one examines the respective valuations both at the commencement and the valuation dates, there is not a very significant difference (certainly not one that is so disproportionate as to be unconscionable). I also note that the major asset on valuation date is the family home, something to which the spouses contributed almost equally.

[77] The marriage was not long but then again it was not extremely brief. Both parties brought assets into the marriage and both contributed during the marriage. The fact that one spouse tried a business venture that was not very successful is not a striking factor. Otherwise, such a spouse would be penalized for any attempted venture. The policy underlying the *FLA* is meant to avoid detailed measurements of relative contributions by the spouses. The rule is equality and only if the high threshold test of unconscionability is met is that rule set aside.

[78] The petitioner's counsel also argued that the policy set out in s.36(7) is premised on the sharing of child care responsibilities. Since that premise is what justifies equalization, and since the facts in this case do not support that premise, then the court should be able to divide the value of assets unequally. In my opinion, one cannot say here that the respondent made no contribution to child care during the marriage. He did to some extent (financially at least) and for some period. And, as noted by his counsel, there is an inherent contradiction in the petitioner's argument that, on the one hand, the respondent played no part in child care yet, on the other hand, the respondent should still be liable for child support.

[79] In *LeBlanc v. LeBlanc* (1988), 12 R.F.L.(3d) 225 (S.C.C.), LaForest J. wrote (at page 233):

> While a court should, in the words of Galligan J. in *Silverstein v. Silverstein* (1978), 20 O.R.(2d) 239, 87 D.L.R.(3d) 116 (H.C.), "be loath to depart from [the] basic rule [of equal division]", it should nonetheless, as he indicates, exercise its power to do so "in clear cases where inequity would result, having regard to one or more of the statutory criteria set out in cls.(a) and (f)". This does not, as previously indicated, mean that a court should put itself in the position of making fine distinctions regarding the respective contributions of the spouses during a marriage. Nonetheless, where the property has been acquired exclusively or almost wholly through the efforts to one spouse and there has been no, or a negligible, contribution to child care, household management or financial provision by the other, then, in my view, there are circumstances relating to the acquisition, maintenance and improvement of property that entitle a court to exercise its discretion under s.7(f).

[80] In *LeBlanc* the court was dealing with the New Brunswick statute which, instead of "unconscionable", uses the term "inequitable". If, under that statute, a departure from the rule of equality requires evidence that the family assets were acquired exclusively or almost wholly through the efforts of one spouse, and the other spouse made no, or a negligible contribution, to child care or the family finances, then surely the requirements under the *FLA*, which uses the more onerous test of unconscionability, must be even harder to meet. In the case before me, the facts do not fit this profile (certainly not this extreme profile).

[81] In my opinion, considering all of the evidence, there is nothing in this case that would make it unconscionable to not award an unequal division. Indeed this is a highly typical case, one for which the rule of equal division is appropriate. I am sure that neither party feels this result is completely fair from their subjective perspective, but from my perspective it is in accordance with the mandates of the legislation.

[82] I therefore deny the claim for an unequal division and award an equalization payment, as noted previously, of $4,094.70 payable by the respondent to the petitioner.

Conclusions

[83] These conclusions will be directions for the disbursement of the proceeds held in trust.

[84] From the sum of $141,317.00, the sum of $74,753.20 (½ of $141,317.00 + $4,094.70) is to be paid to the petitioner. The sum of $66,563.80 is to be paid out to the respondent. Whatever is over and above the sum of $141,317.00 in the trust fund is to be divided equally as between the petitioner and respondent.

[85] Counsel requested an opportunity to make submissions as to costs. They should arrange a convenient date with the Clerk to attend before me in Chambers for those submissions.

J.Z. Vertes,
J.S.C.

Dated at Yellowknife, NT, this
15th day of February 1999

Counsel for the Petitioner: Austin F. Marshall
Counsel for the Respondent: Katherine R. Peterson, Q.C.

6101-02559

IN THE SUPREME COURT OF
THE NORTHWEST TERITORIES

BETWEEN:

CINDY LOUISE FAIR

Petitioner

- and -

PAUL EDMUND JONES

Respondent

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.Z. VERTES