Date: 19981006 Docket: C.A. 146455

NOVA SCOTIA COURT OF APPEAL
Cite as: Vint v. Vint, 1998 NSCA 168
Glube, C.J.N.S.; Pugsley and Cromwell, JJ.A.

BETWEEN:

NOREEN LILLIAN VINT	)	Stephen M. Robertson
	)	for the Appellant
Appellant	)	
	)	
- and -	)	
	)	Jillian A. Graham-Scanlan
	)	for the Respondent
DEXTER IAN VINT	)	
	)	
Respondent	)	Appeal Heard:
	)	October 6, 1998
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	)	
	)	Judgment Delivered:
	)	October 6, 1998
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THE COURT: Appeal allowed per oral reasons for judgment of Cromwell, J.A.; Glube and Pugsley, JJ.A. concurring.

CROMWELL, J.A.: (Orally)

The appellant, Noreen Vint, appeals the order of MacLellan, J. dismissing her claim for spousal support under the **Divorce Act**, R.S.C. 1985, c. 3.

The parties were married in February of 1972 and separated in December of 1995. The respondent, Mr. Vint, petitioned for divorce, custody and division of assets. No claim for child support was asserted. The appellant counterpetitioned for spousal support and joint custody. All issues, except child and spousal support, were settled.

MacLellan, J. found the following facts:

1. The respondent's income was "approximately" $15,500 in employment and employment insurance income and $4800 in rental income. This was said to be monthly income of "about" $1400 (the actual figure based on the yearly total would be $1691.66) and monthly expenses of "over $2,000, at least";

2. The appellant's income was approximately $7800;

3. The respondent had assumed responsibility for the one child of the marriage and was not receiving or seeking child support from the appellant;

4. The appellant was not making adequate attempts to become self sufficient and that she would probably require some retraining in order to achieve a higher income;

5. The respondent had no capacity to pay spousal support because of the responsibilities he has for his daughter;

6. Having regard to his finding respecting the appellant's efforts to attain self-sufficiency and his decision not to award spousal support, the trial judge found that it was not appropriate to order child support to be paid by the appellant.

The trial judge directed himself concerning the statutory considerations and objectives relating to spousal support and thought the two most relevant were 15.2(6) (b) and (d). These relate to the apportionment between the spouses of 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 and the promotion of the economic self-sufficiency of each spouse.

Although no child support was claimed, the trial judge stated that priority should be given to child support, that he should address it and that the table amount payable by the appellant would be $29.00 per month. As noted above, the judge declined to make such an order.

No appeal is taken from the refusal to order child support.

The scope of appellate review in a case like this one was stated in **MacIsaac v. MacIsaac** (1996), 150 N.S.R.(2d) 321 (C.A.) at 324-5. This Court does not have an independent discretion to decide the support question and should intervene only if persuaded that the trial judge erred in principle or his decision is otherwise clearly wrong.

The appellant submits that the trial judge erred in finding that the respondent has no ability to pay.

The manner in which this case was placed before the learned trial judge was most unsatisfactory. No evidence was placed before him about the respondent's expenses as of the time of hearing. The trial judge relied on the Statement of Financial Information sworn in October of 1996. The respondent was not cross-examined by the appellant's then counsel on these expenses. There was some evidence respecting the income of the respondent's spouse and about his living arrangements which demonstrated significant changes in his living arrangements since the Statement was sworn. There was no elaboration during the evidence of the impact on his expenses of these changes. New information concerning income was placed before the judge while he was in the midst of giving his reasons for judgment.

We have concluded that the appeal must be allowed. The evidence does not support the trial judge's finding that the respondent had no ability to pay. This was a long term marriage and the respondent was the primary wage-earner throughout. The appellant has a grade 7 education and worked at low paying jobs between 20 and 50% of the time during the marriage. The trial judge found the respondent's income to be in the range of $20,000 per year. At the time of the hearing, the respondent was living in his mother-in-law's house with his spouse who was earning $35,000. There was thus some evidence of ability to pay. The obviously out-dated Statement of Expenses did not provide an evidentiary basis for any conclusion about the respondent's current expenses. In the absence of current information about the respondent's expenses, we conclude that the learned trial judge was clearly wrong to find that the respondent had no ability to pay spousal support.

The appeal is allowed. The record does not allow us to set an appropriate amount for spousal support so a new hearing is directed. Having regard to s. 11(1)(b) of the **Divorce Act** and the fact that the issues of child and spousal support are inter-related, we would direct the judge on the new hearing to revisit the issue of the appellant's obligation to pay child support. We would hope that counsel will take more care on the rehearing to place the appropriate evidence before the Court.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Pugsley, J.A.

C.A. No. 146455

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

NOREEN LILLIAN VINT

Appellant

- and -

DEXTER IAN VINT

Respondent

REASONS FOR JUDGMENT BY:

CROMWELL, J.A.
(Orally)