

GLUBE, C.J.N.S.:

FACTS

[1] Andrew G. Vermeulen (appellant) and Janet Francine Vermeulen (respondent) were married in 1983. In 1996, the couple commenced living separate and apart, but under the same roof. That continued until 1997 when Mr. Vermeulen moved into his own apartment. Ms. Vermeulen and the two children of the marriage, now 15 and 13, reside in the matrimonial home.

[2] At the time of their marriage, Mr. Vermeulen was a hog farmer with a Bachelor of Science in Agricultural Engineering. Ms. Vermeulen had grade 11 education and a one year commercial course. She worked as a Secretary at the Nova Scotia Agricultural College. Ms. Vermeulen left her employ in 1985 when she had her first child. In 1986, the parties moved from the Truro area to the Annapolis Valley to pursue vegetable farming with relatives and in 1988, the parties started their own business as a joint partnership farming operation called "Fran & Andy Vermeulen". Ms. Vermeulen did a variety of work for the partnership, including overseeing the marketing of the produce and some bookkeeping. In 1991, the partnership joined Kings Produce which took over the marketing function, eliminating the major role played by Ms. Vermeulen in the farming operation.

[3] Ms. Vermeulen decided to seek employment off the farm. She took a one year banking technology course at a community college and in 1992 commenced

part time work with the Royal Bank of Canada. She remains with the Bank in a part time permanent position earning \$18,000.00 a year.

[4] On December 31, 1996, Mr. Vermeulen gave notice to Ms. Vermeulen dissolving the farm partnership. He started farming as a sole proprietorship called "Andy's Lettuce Farm". He rented the jointly owned farm assets, including the land and equipment of the former partnership, on the understanding that he would service all of the debt payments relating to the assets. In 1997 the debt payments totaled \$54,256.00.

[5] On October 1, 1998, following a three day trial, Justice Hall rendered an oral decision dealing with all matters in issue. He granted the divorce, gave the parties joint custody of the children with primary care to the mother and specific access to the father. After imputing Mr. Vermeulen's income, the trial judge awarded both child and spousal support.

[6] Dealing with assets, Justice Hall stated:

. . . I am unable to establish the values of the assets that are to be divided because the court was not provided with appraisals or other reliable or independent evidence of the values of the different items of property. . . . I have tried to take a pragmatic approach in arriving at the division that I am going to order. I believe that counsel felt that they were approaching the matter pragmatically as well, in not incurring substantial costs for appraisals and so forth.

Later he stated:

At this time, from the information available, I am unable to determine whether the farm is in a deficit or surplus condition.

[7] He divided the assets as equally as possible in the circumstances. He gave Mr. Vermeulen the entire farm property, including the matrimonial home and all the debts against the property, and another piece of land. He divided the other assets which, among other things, included RRSP's, the contents of the home and the NISA accounts which were in each of their names. (NISA is a net income stabilization account provided by the Federal Government and the farmer together. Depending upon the farmer's gross sales volume, the farmer makes a contribution which is matched by the government and can be drawn upon to stabilize income in poor years.)

[8] Ms. Vermeulen was given exclusive possession of the matrimonial home for at least 6 months and "thereafter as the parties may agree" (decision of Justice Hall). Ms. Vermeulen and the children continue to reside in the matrimonial home which is part of the farm property.

[9] Justice Hall imputed \$30,000.00 income to Mr. Vermeulen under s. 19 of the **Federal Child Support Guidelines**. On that basis, he awarded child support for the two children in the amount of \$458.00 a month. In addition, he determined that Ms. Vermeulen required a total support payment of \$1,000.00 a month, and awarded spousal support of \$562.00 a month. However, as long as she resides in the matrimonial home and Mr. Vermeulen is making payments to the Farm Loan Board,

\$460.00 is attributed to the matrimonial home's share of that all inclusive debt and therefore she receives a net amount of \$102.00 for spousal support.

[10] Finally an award of \$10,000.00 was made to Ms. Vermeulen as a lump sum.

ISSUES

[11] At the time of the appeal hearing, in addition to seeking costs, the appellant advised there were three issues remaining to be decided:

1. Did the learned trial judge err in law in awarding the respondent \$10,000.00 as lump sum spousal support?
2. Did the learned trial judge err in law in imputing \$30,000.00 gross annual income to the appellant and awarding the respondent child support based on the imputed income?
3. Did the learned trial judge err in law in awarding the respondent periodic spousal support in the amount of \$562.00 per month when the evidence did not demonstrate the respondent's entitlement to spousal support, or to the quantum awarded?

1. **Lump Sum Award**

[12] Section 15.2(1) of the **Divorce Act** specifically allows payment of a lump sum for spousal support.

Spousal Support Orders

15.2(1) Spousal support order

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.

[13] A lump sum award may not be used to redistribute assets (see: **Johnson v. Johnson** (1974), 10 N.S.R. (2d) 624 (N.S.S.C.A.D.)). Among the situations where a lump sum award will be upheld, is where there is an immediate need and an ability to pay (see: **Hemming v. Hemming** (1983), 58 N.S.R. (2d) 65 (N.S.S.C.C.A.)).

Lump sum awards are appropriate to provide funds towards the purchase of a house in certain circumstances (**Johnson, supra**) and in some cases for retraining (see: **McGuigan v. McGuigan** (1991), 105 N.S.R. (2d) 170 (N.S.S.C.T.D.) and **Maclsaac v. Maclsaac** (1996), 150 N.S.R. (2d) 321 (C.A.)).

[14] In the trial evidence, Ms. Vermeulen indicated that if the house was sold she would have to look at very small rental accommodation. She had not looked at apartment rentals but thought they would cost \$500.00 to \$550.00 a month. When asked about purchasing a house, she believed that was the best alternative as the children had always lived in a house. She estimated she could afford a top price range of \$80,000.00 and that she would need to have \$5,000.00 for a down payment. She did not want to cash in part of her RRSP to provide money as a down

payment.

[15] It is acknowledged that the appellant's position has been to sell the matrimonial home to try to pay down the Farm Loan debt. However, it has not been his intention to force his family out and the court was advised that they are currently still in the matrimonial home.

[16] In his decision, in awarding a lump sum of \$10,000.00, Justice Hall stated:

... I have decided that a lump sum payment is appropriate in these circumstances because Mrs. Vermeulen, probably in the very near future, will have to establish herself in a new home for herself and the children. Furthermore, she is in the process of seeking to expand her career potential so as to obtain a greater income and become self sufficient. All of this will require money in the interim. Her liquid assets, including her RRSP's, are needed to provide some security for her in her retirement years. On the other hand, I am satisfied that Mr. Vermeulen has sufficient assets, for example the Shubenacadie land, and the borrowing capacity to provide the funds to pay the lump sum payment.

[17] As to the issue of seeking to expand her career potential, the evidence was that if Ms. Vermeulen took a certain training course through the Bank which might be available to her, she would be paid while training and would receive a substantial increase in pay. There was no evidence that she required money for retraining.

[18] As for the need for a down payment for a house, there is no evidence of an immediate need. Ms. Vermeulen has not seriously looked for accommodations to purchase, she does not have information on how much she would require to make a

purchase viable, there was no evidence that she could obtain the necessary mortgage money to complete a purchase, nor is there any information on what it would cost her to move. I would find that at this time, Ms. Vermeulen has not established an immediate need for a lump sum award. If and when she is in that position and can show a change in circumstances, she is entitled to apply for a variation as provided in the **Divorce Act**.

17(1) Order for variation, rescission or suspension

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses:

...

17(4.1) Factors for spousal support order

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[19] Although recognizing that a court of appeal is limited in its ability to interfere with the exercise of discretion by a trial judge (see: **Elsom v. Elsom** (1989), 20 R.F.L. (3d) 225 (S.C.C.)), I would find in this case the learned trial judge erred in law and misapprehended the facts by making a lump sum award at this time without the specifics required to determine the amount and without an immediate need being shown.

2. **Imputing Income**

[20] Under s. 15 of the **Child Support Guidelines**, “annual income” is determined by referring to sections 16 to 20. Section 16 provides:

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading “Total income” in the T1 General form issued by Revenue Canada and is adjusted in accordance with Schedule III.

(Schedule III deals with specific additions and reductions.)

[21] Section 19 deals with imputing income:

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

...

(d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

...

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

...

[22] Both parties refer to a paper written by Justice Colleen L. Kenny of the Court of Queen's Bench of Alberta, for the National Family Law Program at Whistler, British Columbia in June 1998, entitled “Income Under the Child Support Guidelines” in which she reviews the case law pursuant to s. 19 of the Guidelines and states, in part, at pp. A-391 and 392:

S. 19 sets out a number of situations where the Court may impute income to a spouse. The section is not exhaustive....

Income can also be imputed where income has been diverted, property is not reasonably utilized to generate income, a spouse has failed to provide income information, the spouse unreasonably deducts expenses from income, a spouse receives income from dividends or capital gains which are

taxed at a lower rate than employment or business income, or the spouse is a beneficiary under a trust and is in receipt of income from that trust.

There are many different fact situations where the Courts have imputed income and therefore it appears that the door is open for the argument in a variety of situations. Most commonly, however, income is imputed where a person is currently under-employed but shows a history of earning an income higher than they currently do.

[23] The appellant submits the figure to be used for income is the “total income” figure from Mr. Vermeulen’s 1997 Income Tax Return in the amount of \$9,723.00, as he withdrew \$30,000.00 from his NISA account and injected that as capital into his business. It is submitted that Ms. Vermeulen still has her \$30,000.00 share of NISA which she has converted into an RRSP.

[24] It is not disputed that by the Corollary Relief Judgment, each party was entitled to the NISA account in his or her name. Although in the past each party would withdraw an equal amount and inject it into the business, by the divorce judgment there is no obligation to continue that previous practice. What each party chooses to do with that account in their individual names is their own choice. The appellant chose to inject his into “Andy’s Lettuce Farm” whereas the respondent chose to convert hers into an RRSP. Although it is submitted that she could have gotten her money out with government matching the same way that Mr. Vermeulen did, that is of no concern to the court in dealing with this issue of imputing income.

[25] The appellant submits the trial judge failed to specify how he arrived at the amount of \$30,000.00 and that the farm is and was in a difficult financial state. In his

decision, Justice Hall stated:

Ms. Connors has suggested that the Court should impute income to Mr. Vermeulen under section 19 of the Federal Child Support Guidelines. She says that it is evident from the expenditures that Mr. Vermeulen has been assuming for the benefit of Mrs. Vermeulen and the children, combined with his own maintenance, his own living expenses, that his farm is providing to him either in cash or worth, an amount of \$30,000.00 per year. It seems very clear to me that certainly Mr. Vermeulen is the beneficiary of an income significantly greater than what shows on his income tax return and indeed on his financial statements. By that I am not suggesting any improper accounting or financial fandangling by Mr. Vermeulen. Simply put, it appears to me that he quite properly has been able to obtain certain benefits for himself from the fact that he is a self-employed person. I accept the proposition put forth by Ms. Connors as being realistic and appropriate and I, therefore, on the basis of the figures that she provided, which I am not going to repeat now, I am satisfied that Mr. Vermeulen is receiving the benefit of \$30,000.00 per year income and, under section 19, I direct that that amount of income be imputed to him.... [Emphasis added.]

[26] Counsel for the respondent submits that over the years, the parties had a certain standard of living by draws from their business. Raymond Bishop, C.A., accountant for Mr. Vermeulen, acknowledged in his testimony that draws from the farm operation covered the farmer's living expenses. Draws from the farm operation shown in an exhibit entitled Vermeulen Income Summary, 1991-97, excluding NISA contributions, go from a low of \$26,445.00 in 1992 to a high of \$51,616.00 in 1994. In 1995, the draw was \$39,234.00 even though the net income of the business in that year was a loss of over \$27,000.00. In 1997, the withdrawal was \$25,947.00. According to Mr. Bishop, \$4,112.00 of that amount was attributable to child support, a portion was for taxes and over \$2,000.00 was for legal fees. An amount of \$5,600.00 was allotted for the use of the family home, and was included in the rent paid by "Andy's Lettuce Farm", and Mr. Vermeulen paid \$4,000.00 for utilities. The latter was part of his draw.

[27] Mr. Vermeulen said his living expenses were \$21,955.00. The respondent argued that the \$5,600.00 and the \$4,000.00 should be added back in to reach an income to be imputed to Mr. Vermeulen of \$31,555.00. Even if the \$4,000.00 for utility payments was already included in the draw, counsel also reviewed other ways of imputing income in the vicinity of \$30,000.00. One was the use on the income tax statement of the optional inventory adjustment of over \$9,000.00 when there was no income to deduct it from. Another suggestion was adding back in the amortization or capital cost allowance to arrive at a figure of a net income of \$55,131.00, using a combination of figures from “Andy’s Lettuce Farm” and the former partnership (see: **Shaw v. Shaw** (1997), 120 Man.R. (2d) 310 and **O’Hara v. O’Hara** (1997) 33 R.F.L. (4th) 37 (Sask.)).

[28] In addition, the evidence of the manager of the Royal Bank Business Center shows that all the loans are current and regular payments continue to be made. Also since July of 1997, the four loans were reduced by \$26,448.00. There is other evidence which indicates payments were made for items other than providing support for his children and spouse.

[29] In my opinion, the decision of Justice Hall to impute the sum of \$30,000.00 as income is quite reasonable. It is one thing to deal with your income tax to provide the most favorable conclusion, but it is another matter if that affects the person’s apparent ability to make support payments. I would find that the learned trial Judge

could have legitimately referred to ss. 19(1) (d) and (g).

[30] I would find there is no error in law and would dismiss this ground of appeal.

3. Spousal Support

[31] Ms. Vermeulen is earning an income which would barely cover her own personal expenses. Facts may change with time and the provisions in the **Divorce Act** for variation accommodates changes in circumstances. However, decisions must be made on existing circumstances and not on what may occur in the future (**Messier v. Delage**, [1983] 2 S.C.R. 401).

[32] For a number of years, Ms. Vermeulen put aside her own career to participate in the business partnership with her husband. When her particular services were no longer required, she took the initiative to get training to go back to work. With the conclusion of this divorce, she should now consider herself to be in a position to try to improve her financial position by taking the additional training previously referred to, which would result in a substantial increase in income.

[33] Ms. Vermeulen participated in obtaining income for the marriage by performing duties with the partnership, and then by providing funds from off the farm employment. She spent her income in specific ways for the family, such as starting education funds for the children, purchasing her own clothes and furniture and

missing needed items for the home.

[34] Ms. Vermeulen identified a deficit of \$1,000.00 based on child support of \$368.00 a month and no spousal support. Although initially Mr. Vermeulen was paying the utilities, now they are paid by Ms. Vermeulen. Mr. Vermeulen continues to pay on the Farm Board Loan which includes the matrimonial home valued for rental purposes at \$460.00 per month.

[35] One of the difficulties in this case is the lack of specific financial information. Although Ms. Vermeulen filed her financial information in May 1998, it is difficult to know whether the proposed budget was based on her paying the utilities in the home at the present time, or if and when she moves into other premises. If the latter, then they are guesstimates which were not challenged at trial. If she is paying heat, water and electricity, etc., then her current budget is in a deficit position.

[36] There are certain items in Ms. Vermeulen's proposed budget which, clearly, have to be changed. Her \$1,000.00 deficit is based on child support of \$368.00 per month and the trial judge increased that amount by \$70.00. Her budget includes \$300.00 per month for legal costs, which Mr. Vermeulen is not required to pay. Ms. Vermeulen shows \$600.00 per month as rent/mortgage. With Mr. Vermeulen, at the present time, paying the Farm Loan Board payments (with the rent valued at \$460.00 per month), that figure should be eliminated, as long as Ms. Vermeulen is living in the matrimonial home.

[37] The appellant also submits that the \$45.00 per month for school supplies and the \$135.00 per month for children's activities allowance are included in the child support payment. The evidence with respect to these matters is far from clear, and cross-examination of the respondent did not add any clarity. Ms. Vermeulen says that she puts the children's allowances into a GIC building block for their education at \$10.50 each week, which I calculate to be \$91.00 per month. Without clearer evidence of these items, I would not be prepared to automatically deduct them from the respondent's proposed budget.

[38] Therefore, taking into account the increased monthly child support (\$70.00), and deducting the monthly expenses for rental/mortgage and legal fees (\$900.00), the appellant's proposed budget is \$2,177.29 per month. Her current income is \$2,098.73 per month.

[39] At the present time, Mr. Vermeulen shall continue paying the Farm Loan Board with the rent valued at \$460.00 a month on her proposed budget. He shall continue to pay to Ms. Vermeulen the amount of \$102.00 a month as cash spousal support.

[40] If and when Ms. Vermeulen prepares to move and accurate figures are known for the cost of accommodation, it may be appropriate for Mr. or Ms. Vermeulen to apply for a variation.

[41] In the meantime, based on the unchallenged financial information, there is no basis on which to change the decision of Justice Hall, who stated:

... I will order periodic spousal maintenance of \$562.00 per month. As long as Mrs. Vermeulen remains in the matrimonial home, the portion of the Farm Loan board payment attributable to the matrimonial home, which was calculated to be \$460.00 per month is to be credited against the spousal maintenance payment.

CONCLUSION

[42] I would allow the appeal on the lump sum award and dismiss the appeal on the second and third grounds of imputing income and spousal support.

[43] Success is divided. I would not award costs.

Glube, C.J.N.S.

Concurred in:

Pugsley, J.A.

Flinn, J.A.