C.A. No. 129141

NOVA SCOTIA COURT OF APPEAL

Cite as: Keay v. Keay, 1997 NSCA 18
Hallett, Freeman and Roscoe, JJ.A.

BETWEEN:	)	
PATRICIA COLLEEN KEAY	)	Katherine A. Briand for the Appellant
Appellant	)	
- and -	)	
JOHN EDWARD KEAY	)	Milton J. Veniot, Q.C. for the Respondent
Respondent	)	
	)	Appeal Heard: January 20, 1997
	)	Judgment Delivered: January 29, 1997

THE COURT: The appeal is dismissed without costs as per reasons for judgment of Roscoe, J.A.; Hallett and Freeman, JJ.A., concurring.

ROSCOE, J.A.:

This is an appeal from a decision of Justice Douglas MacLellan of the Supreme Court confirming a recommendation made by Family Court Judge James Wilson that spousal support payable pursuant to the **Divorce Act** be terminated. The original

order, made in 1983, incorporated minutes of settlement which provided that Mr. Keay have custody of the three children of the marriage and that he pay Mrs. Keay support in the amount of $250.00 per week, indexed annually for inflation.

Judge Wilson, after hearing two days of evidence and reviewing the financial statements of Mr. Keay's company and of the parties, as well as their tax returns for several years, was satisfied that there had been a material change in the financial circumstances of Mr. Keay. He found that Mr. Keay's company was close to being bankrupt and that he had not been able to draw a salary for more than a year prior to the hearing. The company was repaying the loans owed to its principal shareholders, including the respondent, but was going deeper into debt as a result. He also found that although Mrs. Keay had taken several upgrading courses and had been employed at various undertakings she had not been sincere in attempts to promote her own self-sufficiency. After a careful analysis of the development of the law from the decisions of the Supreme Court of Canada in the **Caron**, **Richardson** and **Pelech** trilogy, [(1987), 7 R.F.L. (3d) 225 **et seq.**], to the recent decisions of the Supreme Court in **Moge v. Moge** (1992), 43 R.F.L. (3d) 345; **Willick v. Willick** (1994), 6 R.F.L.(4th) 161 and **B.(G.) v. G.(L.)** (1995), 15 R.F.L. (4th) 201, he concluded that Mr. Keay met the burden required by s. 17 of the **Divorce Act**. On the basis that Mr. Keay was without income and no longer able to pay support and that Mrs. Keay had more than adequate time, resources

and opportunity to attain self-sufficiency, Judge Wilson recommended the termination of the support order. He also decided that accumulated arrears due to an error in calculating the cost of living increases should be expunged.

Mrs. Keay's counsel filed a lengthy notice of objection, including argument, with the Supreme Court in which it was submitted that the Family Court judge erred in finding that the agreement was one providing indefinite support as opposed to a final agreement, in finding that there was a requirement for Mrs. Keay to take steps to promote

self-sufficiency, in finding that Mr. Keay suffered a negative economic impact from the marriage breakdown as a result of the custody arrangement, in finding that the changes in Mr. Keay's financial circumstances were material and unforeseen, by ignoring evidence of discussions between the parties respecting the cost of living increase calculations, by applying the wrong test for forgiveness of arrears, in accepting evidence of Mr. Keay regarding the value of assets transferred to Mrs. Keay at the time of the divorce and by failing to take into account evidence respecting Mr. Keay's accumulation of personal and business assets and the transfer of assets into his new wife's name.

Upon receipt of the notice of objection, Justice MacLellan obtained and reviewed the file from the Family Court which contained 90 pages of discovery transcript, 17 exhibits including numerous income tax returns of the parties, financial statements and statements of property of the parties and the respondent's new wife, the affidavits and pretrial memoranda filed by the parties and the 23 page decision of Judge Wilson. Justice MacLellan had a one hour telephone conference with counsel and a few days later wrote to counsel indicating that he would be confirming the recommendations of the Family Court judge. The only reason given was that the notice of objection was "simply an attempt to have the issues decided by the Family Court Judge retried and reargued...". After counsel for the appellant wrote asking for more extensive reasons why the matter was dealt with by telephone conference, Justice MacLellan responded by referring to Practice Memorandum No. 8 which he said provided that a notice of objection could be dismissed if it was, in his opinion, simply a request for a retrial or re-argument of the issues dealt with by the Family Court judge.

On the appeal, Mrs. Keay submits that the Supreme Court judge erred in law in applying the wrong tests to review the notice of objection and that he erred by conducting the review of the notice of objection **in camera**. The relief requested is that the matter be remitted to another judge of the Supreme Court "for an appropriate and full review."

The appellant relies on the decisions of this Court in **Gorman v. Gorman** (1994) 132 N.S.R. (2d) 396 and **Sperker v. Sperker** (1994), 131 N.S.R.(2d) 1 in which it was held that before a judge of the Supreme Court could adopt a recommendation to vary a support order, he had to be satisfied that there had been a change in the circumstances of the parties, and that there had to be some evidentiary basis for the decision. Although in **Gorman**, **supra**, the Supreme Court judge heard submissions from the parties, in person, in the courtroom, and had a copy of the recommendation of the Family Court judge, he did not have the benefit of reviewing the affidavits or the evidence tendered before the Family Court judge, nor any decision or reasons for the recommendation. In **Sperker**, **supra**, the Supreme Court judge reviewed the exhibits and legal memoranda filed in the Family Court and the detailed decision of the Family Court judge but did not have any affidavits nor did he give the parties the opportunity to make oral or written submissions. The **ratio** of **Gorman, supra,** and **Sperker, supra**, is that a judicial decision cannot be made in ignorance of the evidence.

After the decisions in **Gorman, supra,** and **Sperker, supra**, the Supreme Court judges amended **Civil Procedure Rule** 57.30 and issued a new Practice Memorandum providing directives for the procedure to be followed when a notice of objection is filed pursuant to **Rule** 57.30(9A). The portions of the Practice Memorandum relevant to this matter are:

> 2. Once a notice of objection has been filed, the following may help to avoid unnecessary delay and unnecessary appearances in court with the associated costs:
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> (a) (i) Typewritten transcripts should not be ordered or provided without consultation with a Judge of the Supreme Court. This consultation may take the form of a pre-trial conference, which can be arranged informally and on short notice. The judge may order that the cost of the transcript be borne by the party requesting it, or be shared between the parties.

(ii) Evidence from the Family Court hearing is taped and if any party wishes to obtain cassettes containing a record of all or any part of the evidence, these are available at minor expense by making a request to the Family Court concerned.

(b) A notice of objection should set out at length and in sufficient detail the basis for the objection. If there is a dispute as to the facts, an affidavit should be filed, setting out the position of the objector. The merits of the objection may be decided by the judge based upon the contents of the notice of objection and so the details provided should be sufficient to support the objection being made.

(c) As soon as a notice of objection is received by the Prothonotary the relevant file will be placed before a Judge of the Supreme Court. If that judge considers that the objection is without merit, either because the lack of merit appears on the face of the notice or the person objecting merely wishes to re-try or re-argue the issues dealt with by the Family Court Judge, the Judge of the Supreme Court may deal with the recommendation of the Family Court Judge without further notice to the parties. The judge may also choose to meet with counsel to obtain further information regarding the need for a hearing. The judge may request a transcript of the Family Court Judge's decision.

In this case, the Supreme Court judge followed the procedure set out in the Practice Memorandum and in my view had before him a sufficient evidentiary basis to satisfy himself of a change in circumstances, and that the change warranted a termination. He also heard submissions on the facts and the law from the parties during the telephone conference. Although she was alleging that the Family Court judge misconstrued or ignored evidence of the respondent's accountant, the appellant did not file a new affidavit with the Supreme Court as suggested by the Practice Memorandum to support her allegations; nor was a transcript of any part of the proceedings ordered.

The procedure allowed by **Rule** 57.30(7) to apply to the Family Court on a

variation application provides an alternative to having the application heard **ab initio** in the Supreme Court. The choice of forums allows the parties to take advantage of the possibility of less crowded dockets resulting in a speedier conclusion, possibly a more convenient location for the hearing since the Family Court sits in more sites around the province than does the Supreme Court, and other benefits such as fewer formalities, intake workers who may assist unrepresented parties and judges who are specialized in family law. The choice of forums however does not give the parties the automatic opportunity to have two complete hearings of the application. The notice of objection is a method designed by the judges through the rules and practice memo to provide an additional review in the event of an obvious error in law or an overriding error of fact. Because of the constitutional issues that prohibit a provincially appointed judge from making the order pursuant to the **Divorce Act**, the Supreme Court judge is the one who must be satisfied that the requirements of the **Act** are met, and he or she must have an evidentiary basis therefor. The Family Court judge's decision with reasons and the affidavits and exhibits from the Family Court should normally be sufficient to furnish the evidentiary basis required and should also, together with the submissions of counsel, be adequate to alert the Supreme Court judge to errors of law or any patent errors in the assessment of the evidence. If errors are apparent the Supreme Court is able to rehear the matter, or take whatever other action may be deemed appropriate as indicated in **Rule** 35.03. Any error of law made by the Family Court judge which is not corrected by the Supreme Court judge, may of course, be brought before the Appeal Court. Despite the wording of the Practice Memorandum, obviously if there is an error apparent from the record or the new affidavit or submissions, there will have to be "re-argument" of an issue and the Supreme Court judge should not simply rubber-stamp the recommendation.

Here the Supreme Court judge had an abundance of material before him, and while it may have been preferable for the telephone conference to have been tape-recorded

and for brief reasons to have been given, the appellant has not shown that he has committed any error in law by proceeding in the manner he did. The appeal was limited to matters of process and no appeal was taken to this Court relating to the merits of the variation decision. We have not been supplied with any transcript, affidavits or exhibits so that a review of the Family Court decision could be undertaken. I would dismiss the appeal without costs.

Roscoe, J.A.

Concurred in:

Hallett, J.A.

Freeman, J.A.