NOVA SCOTIA COURT OF APPEAL
Citation: Kuszelewski v. Michaud, 2009 NSCA 118

Date: 20091124
Docket: CA 308191
Registry: Halifax

Between:

Raymond W. Kuszelewski

Appellant

v.

Joanne Michaud

Respondent

Judges:	Roscoe, Oland and Fichaud, J.J.A.
Appeal Heard:	November 16, 2009, in Halifax, Nova Scotia
Held:	Appeal is dismissed, per reasons for judgment of Roscoe, J.A.; Oland and Fichaud JJ.A. concurring.
Counsel:	The appellant, in person Angela Walker, for the respondent

Reasons for judgment:

[1] This is an appeal from an order made by Justice Lawrence O'Neil of the Supreme Court, Family Division, requiring that the appellant pay child support and spousal support. The decision under appeal is reported as 2008 NSSC 276. The appellant argues that the judge lacked jurisdiction to make the order, that he erred in ordering the payment of spousal support nine years after the parties' separation and that the order for costs was without merit.

Background Facts

[2] The parties commenced cohabitation in 1991. Ms. Michaud had a child from previous relationship born in 1990 and together the parties had a child born in 1992. They separated in 1998 but thereafter attempted reconciliation on more than one occasion. Ms. Michaud filed an application in the Family Court seeking custody, child support and spousal support on February 24, 1998. As a result of an agreement between the parties, an interim consent order was issued on March 2, 1998 which provided that Mr. Kuszelewski pay $800 a month in child support and $1,200 per month spousal support. The agreement signed by the parties provided that:

> These support provisions are intended to be interim only and may be reviewed and revised upon exchanging financial information. The issue of spousal support and the quantum of child support is open to be reviewed by a court of competent jurisdiction

[3] The March 2, 1998 order stated:

> All provisions of this order shall be reviewed by the court within six months of the date of this order or so soon thereafter as it pleases the court, and further it is understood that the provisions of this order shall not prejudice the positions of either party in any further proceedings.

[4] Subsequently, the parties attempted reconciliation. In October 2000 they signed an amended interim separation agreement by which they agreed to be bound by the terms of the March 2, 1998 order.

[5] Mr. Kuszelewski struggled with alcoholism. As a result for much of the time between October 2000 and February 2006 he was unemployed or working

sporadically. He made very few spousal or child support payments and Ms. Michaud did not attempt to finalize the 1998 order or take any other action to enforce it. Mr. Kuszelewski commenced employment as a staff lawyer with Newfoundland Legal Aid in February 2006 and then began paying support to Ms. Michaud, but on an irregular basis.

[6] In September 2007, Ms. Michaud filed an application to vary the child and spousal support. Since the only court order in place was the interim order, court administration advised her to file a Notice of Intention to proceed and a request for a trial date to have the original application set down for final hearing.

The decision under appeal

[7] Justice O'Neil found that he had jurisdiction to deal with the matter as a variation application pursuant to s. 37 of the **Maintenance and Custody Act**. Mr. Kuszelewski had argued that the March 2, 1998 order was void since there had not been a timely review of it. Justice O'Neil disagreed and found that the conduct of the parties was consistent with the March 1998 order remaining in effect. He determined that there was a proper basis for the variation application.

[8] Mr. Kuszelewski also argued that based on the doctrine of *laches*, Ms. Michaud had lost her entitlement to spousal support. Justice O'Neil dealt with that argument as follows:

> [20] The Applicant cannot be described as delaying the initiation of court action to deal with her claim for child and spousal support. She knew of the Respondent's struggle and recognized that his ability to meet the obligations he assumed in 2000 was limited. I accept that the Respondent reassured the Applicant after he commenced employment in Newfoundland that he was getting back on his feet and that he would begin to make full payments to her. In the circumstances, not bringing an application until the fall of 2007 reflected her belief that the Respondent would increase payments as his financial circumstances permitted. The Applicant did not sit on her rights.
>
> [21] This attitude is confirmed in an e-mail she forwarded to the Respondent and dealing with her purchase of airline tickets so the children could visit him in March 2007. She sought assurance that he repay her at the rate of "$200 a month and unless or until you can manage to pay a larger sum to pay it off", Tab 12, Exhibit #1.

> [22] The patience of the Applicant changed when the Respondent discontinued payments to the Applicant after May 30, 2007. The Applicant moved relatively quickly to have the matter placed before the courts.

[9] In his analysis of the merits of the spousal support claim, the trial judge considered the 13 factors set out in s. 4 of the **Maintenance and Custody Act** and relevant jurisprudence such as **Moge v. Moge** [1992] 3 S.C.R. 813 and **Bracklow v. Bracklow**, [1999] 1 S.C.R. 420. He concluded by stating:

> 27 I find that the Applicant and the Respondent agreed that the Respondent would support the Applicant following the parties separation. I also find that he was obligated to do so.
>
> 28 The Applicant had relocated to Nova Scotia to facilitate the Respondent's career opportunities. She was also supportive and helpful to the Respondent as he battled alcoholism and unemployment. When the relationship ended, she was left disadvantaged as a consequence. She was also left with primary responsibility for the parties two children. Her circumstances were further exacerbated by the inability of the Respondent to provide spousal and child support.
>
> 29 She was forced to live under very stressful financial pressures. Nevertheless, she continued to be supportive of the Applicant [sic] and interested in his welfare.
>
> 30 I find that an obligation for spousal support is founded on compensatory and non compensatory grounds. The parties also agreed that support would be paid to her.
>
> 31 This obligation has not been fulfilled. Its duration will be indefinite in duration, as is frequently the case when the payee spouse has the care of a dependant child(ren). The *Spousal Support Advisory Guidelines* (SSAG) also recommend an indefinite term to a spousal support order when dependant children are involved.

[10] The trial judge then considered whether it was appropriate to make retroactive awards of spousal and child support. Taking guidance from **D.B.S. v. S.R.G.** 2006 SCC 37, and decisions of this court which applied **D.B.S**., such as **Conrad v. Rafuse** 2002 NSCA 60 and **MacIsaac v. MacIsaac**, [1996] N.S.J. No. 185(Q.L.), he concluded that arrears of support arising prior to the appellant’s

recent employment in Newfoundland should be forgiven and that the amounts paid from February 2006 to May 2007 were, under the circumstances, sufficient to fulfill his obligations for both child and spousal support.

[11] For the period commencing June 2007, the trial judge ordered the appellant to pay monthly child support of $1,100 for the two children based on the Newfoundland child support guidelines. The support for the older child was conditional upon his attendance at a post secondary education institution.

[12] The trial judge ordered the appellant to pay $900 per month as spousal support and explained his reasoning as follows:

> 60 I accept that the Respondent ceased spousal support payments to the Applicant on May 30, 2007. I find that this was abrupt and unanticipated. The Applicant filed her application in September 2007. It could not have been a surprise for the Respondent. I will therefore assess the Respondent's spousal support obligation as unfulfilled since June 2007.
>
> 61 The Applicant's income is in the range of $21,823 and the Respondent's $81,475. The Applicant provided the court with calculations of spousal support based on the Spousal Support Advisory Guidelines (SSAG) based on the "with child support formula". The result is based on nine (9) years of "marriage". (For reasons already given, I conclude that the parties cohabitation was for seven (7) years, 1991-1998).
>
> 62 The range of spousal support recommended by the Applicant is $770 to $1,337 per month ($9,240 to $16,044 per year) for an indefinite period but with a maximum duration of 11 years from separation.
>
> 63 I am satisfied that spousal support of $900 per month is payable on an ongoing basis. This obligation is retroactive to June 25, 2007 and shall be payable on the 25th of each month. Arrears that have accrued to September 1, 2008 are payable at the rate of $500 per month beginning March 2009. The first payment of $900 will therefore be payable on or before September 25, 2008. In considering the duration of the spousal support obligation, I conclude the Respondent has met the obligation for the period February 2006-May 2007 inclusive. This represents sixteen (16) months. More than fifteen (15) months have passed since May 2007. This calculation represents more than two and one half years of spousal support payments. As a general rule, spousal support obligations are indeterminate when the payee has responsibility for children. I will therefore not fix a term for this order. However, if I am mistaken in that regard, I set a total duration of seven (7)

> years from February 1, 2006 as the maximum duration, this representing one year for each year of cohabitation.

[13] Finally, Justice O'Neil reviewed the relevant **Rules** and numerous decisions regarding costs in family matters, and concluded that the appellant should pay costs in the amount of $1,250, stating:

> 77 The Respondent disregarded a number of orders to disclose; raised an issue of conflict without advancing a substantive basis for it and then withdrew the claim. He repeatedly raised the issue of property and debt division, notwithstanding he declined to file the necessary pleadings to have that aspect of the parties relationship considered.
>
> 78 He was ordered to disclose by a notice dated October 18, 2007 and the direction of Justice Campbell flowing from the November 7, 2007 pre-trial. He was further directed to provide disclosure following the February 18, 2008 appearance. He finally provided tax returns for 2006 and 2007 on the day of the hearing, May 16, 2008.
>
> 79 For each of his failures to disclose, costs are assessed as $250 for a total of $750.
>
> 80 For his raising the issues of conflict and property division and for not pursuing these concerns diligently, whether to withdraw or advance the same, a total of $500 in costs is assessed. Total costs of $1,250 are assessed for these failings.
>
> 81 With respect to the merits of the hearing itself and its outcome, I find the parties success was divided. A substantial award against the Respondent has been made. However, a much larger claim was before the court.
>
> 82 No additional award of costs is made against either party.

Issues

[14] In his factum, the appellant states the issues as:

> 1 Does the Interim Consent Order of March 2nd 1998 form the proper legal basis of a variation application under s 37 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c.160;

> 2 Is the decision of the Learned Justice to award spousal support, on an application 9 years after the parties separation date of 1998, to begin before the date of the application to the court in 2007, from February. 2006 and continuing for seven years, wrong;
>
> 3 Does the Learned Justice have the jurisdiction to award costs on the basis of a [sic] matters not properly before him;

Standard of Review

[15] The standard of review on the first issue which questions whether the judge had jurisdiction to deal with the matter is correctness. (see **Nova Scotia (Maintenance Enforcement) v. Coolen**, 2009 NSCA 22 at ¶ 14; **Nova Scotia (Community Services) v. N.N.M.**, 2008 NSCA 69 at ¶ 37.)

[16] The standard of review for the second issue is, as set out in recently in **Ezurike v. Ezurike**, 2008 NSCA 82, where Bateman J.A., for the court, confirmed that this court is very deferential to trial judge's decisions involving spousal support:

> [6] The standard of review on corollary relief appeals was summarized by Cromwell, J.A. for this Court in **McLennan v. McLennan**, 2003 NSCA 9, 212 N.S.R. (2d) 116; [2003] N.S.J. No. 15 (Q.L.):
>
> > [9] In both support and division of property cases, a deferential standard of appellate review has been adopted: **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 (N.S.C.A.); **MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321; 436 A.P.R. 321 (C.A.); **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47; 461 A.P.R. 47 (C.A.). The determination of support and division of property requires the exercise of judicial discretion. Provided that the judge of first instance applies correct principles and does not make a palpable and overriding error of fact, the exercise of such discretion will not be interfered with on appeal unless its result is so clearly wrong as to amount to an injustice: **Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136; 231 A.P.R. 136 (C.A.) at 162; **Leblanc v. Leblanc**, [1988] 1 S.C.R. 217; 81 N.R. 299 at 223-24; **Elsom v. Elsom**, [1989] 1 S.C.R. 1367; 96 N.R. 165, at 1374-77; **Hickey v. Hickey**, [1999] 2 S.C.R. 518; 240 N.R. 312; 138 Man. R. (2d) 40; 202 W.A.C. 40 at paras. 10-13.

[17] As recently confirmed in **Go Travel Direct.Com Inc. v. Maritime Travel Inc**., 2009 NSCA 42 at ¶ 112 a trial judge's decision whether or not to award costs is clearly discretionary and will only be disturbed where wrong principles of law have been applied or the decision is so clearly wrong as to amount to a manifest injustice.

Analysis

1. Jurisdiction

[18] The appellant submits that the March 2, 1998 order required a review by the court within six months. In the absence of such a review, before September 2, 1998 or shortly thereafter, he says the order expired and as a result the trial judge had no jurisdiction to entertain an application to vary it. No authority is offered for this proposition.

[19] The appellant's argument is faulty for several reasons. First of all, he neglects to refer to the whole clause regarding review, which says:

> All provisions of this order shall be reviewed by the court within six months of the date of this order or so soon thereafter as it pleases the court, and further it is understood that the provisions of this order shall not prejudice the positions of either party in any further proceedings. [Emphasis added]

[20] The words of the order clearly provide for a review of its terms at some time after six months at the court's own discretion. The words "or so soon thereafter as it pleases the court" do not limit the time the court retains jurisdiction. It would be unreasonable to interpret these words to mean "as soon as practicable" or "as soon as possible" or "only if an application to review is filed within six months of the order", which was the interpretation the appellant suggested at the hearing in the Court of Appeal. In addition, in October 2000, which is more than a year after the appellant says the order expired, the parties agreed in writing to be bound by its terms.

[21] Secondly, the applicable legislation, the **Maintenance and Custody Act**, permits interim orders to be for an indefinite period of time:

> 3 (1) The court may, on application by either or both spouses or common-law partners, make an order requiring a spouse or common-law partner 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 maintenance of the other spouse or common-law partner.
>
> (2) Where an application is made pursuant to subsection (1), the court may, on application by either or both spouses or common-law partners, make an interim order requiring a spouse or common-law partner 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 maintenance of the other spouse or common-law partner, pending the determination of the application under subsection (1).
>
> (3) The court may make an order pursuant to subsection (1) or an interim order pursuant to subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as the court thinks fit and just.

[22] Section10 of the **Act** dealing with maintenance for children contains similar wording.

[23] The jurisdiction to vary support orders is set out in s. 37 of the **Act**:

> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.

[24] Section 32A(1) of the **Judicature Act** confers jurisdiction on the Supreme Court (Family Division) in relation to proceedings in numerous matters including:

> ...
>
> (d) rights to property in disputes among spouses or members of the same family;
>
> ...
>
> (h) alimony, maintenance and protection for spouses;
>
> (i) maintenance of children, including affiliation proceedings and agreements;

> ...
>
> (k) enforcement of alimony and maintenance orders, including reciprocal enforcement of those orders;
>
> ...
>
> (l) custody and access to children;
>
> ...
>
> (v) the interpretation, enforcement or variation of a marriage contract, cohabitation agreement, separation agreement or paternity agreement;
>
> (w) resulting trust or unjust enrichment involving persons who have cohabited including, but not limited to, relief by way of constructive trust or a monetary award;
>
> ...

[25] Furthermore, the pleadings filed by Ms. Michaud included her originating application and summons, dated February 24, 1998, along with her 2007 Notice of Intention to proceed and request for a trial date in relation to the originating summons, and an application to vary the March 1998 order. Justice O'Neil had the jurisdiction therefore to deal with the matter either as a continuation of the 1998 proceedings or as an application to vary the 1998 order. The appellant does not allege that there was no change in circumstances, which is a precondition to a variation application.

[26] The Supreme Court of Canada dealt with a similar issue in **Leskun v. Leskun** 2006 SCC 25. There the issue was whether the husband's application to discontinue payment of spousal support was a review pursuant to s. 15.2 or application to vary under s. 17 of the **Divorce Act**. The original order provided that the husband pay spousal support until further order of the court and provided that he was entitled to apply for an order reviewing both entitlement and quantum of spousal support (¶ 7). Justice Binnie, for the court, indicated that review orders are useful in cases where at the time of trial there is uncertainty regarding the length of time necessary to achieve self-sufficiency (¶ 36 - 38). He cautioned however, that

where possible, trial courts make permanent orders which are subject to change only on proof of changed circumstances (¶ 39). He concluded the analysis of that point as follows:

> 41 The appellant is correct that his application (though framed under both s. 15.2 and s. 17) is properly characterized as a review application. It was not necessary for him to demonstrate a change in circumstances. Nevertheless, while certain financial issues had been resolved between the time of Collver J.'s trial decision and the date of the application to Morrison J., the respondent's failure to become self-sufficient had not changed.
>
> 42 This procedural point seems not to have been taken in the courts below, and in any event was not explicitly addressed in their reasons. In my view, whether the application is treated as brought under s. 15.2 (more favourable to the appellant) or under s. 17 (less favourable) it makes no difference to the outcome. His application does not rise or fall on the issue of onus. It fails on the facts.

[27] I agree with the respondent’s suggestion that whether the trial judge treated the matter as a continuation of the interim application or an application to vary the interim order, the result would have been the same in the circumstances of this case.

[28] I would therefore dismiss the first ground of appeal.

2. Spousal support

[29] The appellant submits that the trial judge erred by failing to consider the obligation of the respondent to assume responsibility for her own maintenance as required by s. 5 of the **Maintenance and Custody Act** and by failing to give proper weight to the fact that nine years had passed since the separation date.

[30] The **Act** provides:

> 5 A maintained spouse or common-law partner has an obligation to assume responsibility for his own maintenance unless, considering the ages of the spouses or common-law partners, the duration of the relationship, the nature of the needs of the maintained spouse or common-law partner and the origin of those needs, it would be unreasonable to require the maintained spouse or common-law partner to assume responsibility for his maintenance, and it would be reasonable to

> require the other spouse or common-law partner to continue to bear this responsibility.

[31] Although the trial judge did not specifically mention s. 5 of the **Act** or the requirement of the respondent to attempt self-sufficiency, his citation of **Snyder v. Pictou**, 2008 NSCA 19, **Moge**, and **Bracklow** are indicative of an implicit consideration of that necessity. As well, he quoted ¶ 31 of **Bracklow** which refers to the issue of self-sufficiency. His reference to the respondent's responsibility for childcare and her financial difficulties experienced as a result of the appellant's failure to contribute regularly to the support of the family following the separation, is also directed to the issue of self-sufficiency.

[32] The trial judge grappled with the difficulty presented by the time span between the date of separation and the date of the application. This is evident throughout the decision, for example, in his consideration of whether or not a retroactive award was warranted and whether to forgive the accumulation of several years of arrears. In determining that it was appropriate to order the payment of spousal support so many years after the separation, the judge also took into account the unfulfilled agreement between the parties and the efforts that Ms. Michaud made to assist the appellant in becoming reestablished by cosigning a loan with him, allowing him to board with her at various times, and not attempting to enforce the 1998 order during the times when he was not earning a sufficient income to comply with the order.

[33] The approach of the trial judge was consistent with this Court's decision in **Lu v. Sun**, 2005 NSCA 112, were Justice Hamilton wrote:

> 58 The father has not satisfied me that the trial judge erred in varying spousal support seven years after divorce. The mother's entitlement to spousal support had been established in the Corollary Relief Judgment. No spousal support was paid however because the parties agreed that the father's income at the time, under $30,000CDN, did not allow for the payment of spousal support in addition to $550 per month child support. The mother did not apply to vary spousal support until 2004 perhaps relying on the father's obligation to inform her of any improvement in his financial situation pursuant to the Corollary Relief Judgment. Had the father reported his increased income to the mother, the mother could have applied for increased spousal support earlier. To deny an increase now that the mother is aware of the father's increased income and has the ability to pay would reward him for failing to report his improved financial situation in accordance with the Corollary Relief Judgment. The judge was satisfied the mother's need for

> support continued despite her reasonable efforts to become self sufficient. In such circumstances, the judge did not err in varying spousal support seven years after the divorce.

[34] It was also appropriate in the circumstances of this case for the trial judge to rely on the *Spousal Support Advisory Guidelines*, to determine that the award should be indefinite as result of Ms. Michaud's continuing care of dependent children.

[35] Given the deferential standard of review required in these cases, the appellant has not persuaded me that the trial judge's decision to order the payment of $900 per month spousal support indefinitely requires intervention of this Court. I would dismiss the second ground of appeal.

3. Costs

[36] The appellant objects to a portion of the costs award. He submits that the trial judge erred in ordering that he pay $500 in costs for raising issues that were not pursued. At a pre-trial hearing the appellant indicated that he thought the respondent's counsel was in a conflict of interest and he indicated that he would be making an application to have her removed as counsel. No such application was made. Similarly the appellant stated at the pre-trial conference that he would be bringing a claim for a division of matrimonial property which he did not pursue at the trial.

[37] As indicated above, the standard of review on appeal of an order for costs is highly deferential. This court will not interfere with a trial judge's exercise of discretion to order costs to the successful party unless wrong principles of law have been applied or the decision is so clearly wrong as to amount to a manifest injustice. The appellant has not persuaded me that there is reason to interfere with Justice O'Neil's order for costs. I would dismiss this ground of appeal.

[38] The appeal should be dismissed with costs payable by the appellant to the respondent in the amount of $2,500 including disbursements.

Roscoe, J.A.

Concurring:

Oland, J.A.

Fichaud, J.A.