NOVA SCOTIA COURT OF APPEAL
Citation: Rondeau v. Rondeau, 2011 NSCA 5

Date: 20110114
Docket: CA 323131
Registry: Halifax

Between:

Judith Karen Rondeau

Appellant

v.

Ronald Lorne Rondeau

Respondent

Judges:	Oland, Hamilton, Fichaud, JJ.A.
Appeal Heard:	November 16, 2010, in Halifax, Nova Scotia
Held:	Appeal is allowed with costs in the amount of $5,000, plus disbursements as agreed or taxed, payable by the respondent to the appellant, per reasons for judgment of Hamilton, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Tanya G. Nicholson, for the appellant M. Ann Levangie and Jeremy P. Smith (Articled Clerk), for the respondent

Reasons for judgment:

[1] The appellant, Judith Karen Rondeau, appeals from the decision and order of Justice J. E. Scanlan that reduced the amount of spousal support she receives from the respondent, Dr. Ronald Lorne Rondeau, failed to compensate her for lost medical and dental coverage and reduced the amount of life insurance Dr. Rondeau was required to maintain. I am satisfied the judge erred in finding there was a material change in the parties' circumstances as required by s.17(4.1) of the **Divorce Act,** R.S.C. 1985, c. 3 (2nd Supp.), and hence I would allow the appeal. The evidence before the judge indicated that Dr. Rondeau's present income is significantly higher than his income in 2003 when the amount of spousal support was originally set, despite his health issues. Ms. Rondeau's income, on the other hand, has barely increased.

[2] The parties married in June 1970. Ms. Rondeau supported the parties for the first six years of their marriage by teaching art in schools, while Dr. Rondeau obtained his masters and medical degrees. Once the first of their three children was born, Ms. Rondeau remained at home and looked after their children while Dr. Rondeau practised medicine. The parties separated after twenty-eight years of marriage, in November 1998. At that time, Ms. Rondeau was almost 52 years of age and had not worked outside the home for over 22 years. Dr. Rondeau was 50 and had supported the family financially since the children were born.

[3] The parties entered into a separation agreement that was incorporated into their March 25, 2003 corollary relief judgment. Both the separation agreement and the corollary relief judgment provided that Ms. Rondeau would be paid spousal support in the amount of $3,340 per month while Dr. Rondeau was paying child support, and that once Dr. Rondeau's obligation to pay child support ended (on the earliest of their youngest child's university graduation or June 15, 2005) Dr. Rondeau would pay spousal support in the amount of $4,000 per month, "until varied by agreement of the parties or a further order of the Supreme Court." A recital in the corollary relief judgment indicates that Dr. Rondeau's annual income at that time was $223,578.35 and Ms. Rondeau's income was made up solely of spousal support.

[4] The corollary relief judgment also incorporated the terms of the settlement agreement requiring Dr. Rondeau, (1) to maintain a $400,000 life insurance policy

and provide through the provisions of his will that his estate could honour his spousal support obligations, and (2) to maintain Ms. Rondeau on his medical and dental plan. In December 2005, he revised his will reducing the amount of life insurance available to Ms. Rondeau on his death, and in February 2008 he removed Ms. Rondeau from his medical and dental coverage.

[5] In October 2008, Dr. Rondeau applied to terminate or reduce spousal support. In his application he states that: Ms. Rondeau "has been supported long enough"; "My present financial obligations to the respondent do not allow me to meet my goals for the future: To pay off my present mortgage and car loans ($85,000.00), to pay off my line of credit and credit cards ($20,000.00), to pay off my income tax arrears ($50,000.00), to accumulate some capital in my RRSP's, to travel with my present wife..."; "I'm the one who worked thirty two years as a doctor, ruining my marriage and possibly my health and when I retire in five years what will I have to show for it?"; "A year ago, I offered to pay the respondent $3,000.00 per month in 2008, $2,000.00 per month in 2009 and $1,000.00 per month in 2010 and then discontinue payments after that. That's a $72,000.00 severance package (bringing her total support since leaving to over half a million dollars!)"

[6] In response to Dr. Rondeau's application, Ms. Rondeau sought an additional payment of $2,800 per year, to allow her to purchase a medical plan in her own name and to cover medical and dental procedures that are covered under Dr. Rondeau's plan, but not under the plan she can buy.

[7] The judge found there was a material change in circumstances since the corollary relief judgment was granted. He then reduced the amount of spousal support from $4,000 to $3,250 per month commencing September 1, 2009, to $2,500 per month commencing September 1, 2010, and to $2,000 per month commencing September 1, 2011. He also reduced the amount of life insurance Dr. Rondeau is required to maintain for Ms. Rondeau's benefit, to the effect there will be no life insurance coverage for her as of September 1, 2014. He also refused to order Dr. Rondeau to compensate Ms. Rondeau for her loss of coverage under his medical and dental plan.

[8] Given my conclusion that the judge erred in finding there was a material change in circumstances that allowed him to reconsider the spousal support payable by Dr. Rondeau, this is the only issue dealt with in these reasons.

[9] This court is not to interfere with an award of spousal support unless the judge has made an error in principle, a significant misapprehension of the evidence or unless the award is clearly wrong; **Hickey v. Hickey**, [1999] 2 SCR 518, ¶ 10 to 12; **MacLennan v. MacLennan**, 2003 NSCA 9, ¶ 9.

[10] Both parties acknowledge that the starting point for an application to vary spousal support is a determination of whether there has been a change in the condition, means, needs or other circumstances of either former spouse since the most recent spousal support order was made. It is only after there has been such a change that the judge may consider what effect the change should have on the existing spousal support order.

[11] This procedure is mandated by s. 17(4.1) of the **Divorce Act**:

> 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.

[12] Having such a threshold helps create certainty, autonomy and finality for ex-spouses. Following divorce, ex-spouses may move forward knowing the amount of spousal support will remain the same if the conditions, means, needs and other circumstances of the spouses that existed when it was set remain essentially the same.

[13] The Supreme Court of Canada in **Willick v. Willick**, [1994] 3 S.C.R. 670, ¶ 21 and later in **L.G. v. G.B.**, [1995] 3 S.C.R. 370, ¶ 73, set the standard for finding a change in circumstances with respect to spousal support:

> [21] In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting

> a change was known at the relevant time it cannot be relied on as the basis for variation. ...

[14] The judge's reasons suggest he found a change in circumstances on at least three bases: (1) the mere passage of time (having paid spousal support for nine years), (2) Dr. Rondeau's health problems, (3) his age, and perhaps on a fourth basis, Dr. Rondeau's wish to accumulate money for his retirement:

> [4] I indicated to Applicant's counsel that he did not have to address the issue of change of circumstances. That is because I am satisfied the threshold test has been met. **I suppose in many ways one could say the mere passage of time in some cases can, in and of itself, fulfill the requirements to show there is a change in circumstances sufficient to give the court jurisdiction to vary a Corollary Relief Judgment. It is not just the passage of time in this case.** There is something much bigger which has transpired in this case. Yes circumstances are different and the court has the jurisdiction to review the issue of the Corollary Relief Judgment as it relates to spousal support. **In this case, I referred already to Dr. Rondeau's health. It is clear to me that he has very substantial health problems.** . . .
>
> [5] **In addition, I consider Dr. Rondeau's age.** When counsel was referring to the **Malone** case, my recollection was, and it was verified by counsel, that the doctor in that case was much younger. He was 55 years old when he applied to vary spousal support. He was asking the court to consider planning for retirement. **In this case Dr. Rondeau is now 61 years old and his evidence is that many of his fellow practitioners, at that age, are already retired. . . . Dr. Rondeau says, yes he would like to be retired, but cannot afford it.** In this case it is more than just a matter of whether or not he would simply "like" to be retired. It is not clear to the court that he can continue to work indefinitely. The position of Respondent's counsel is well look, let's keep the maintenance where it is and let him work, and if and when he cannot work let's address the issue of spousal support at that time. Dr. Rondeau is not saying that he cannot work right now. **In fact he is still working, but he says, look I have paid maintenance for a very lengthy period of time. I have supported both Ms. Rondeau and my family for many, many years and I want to be able to plan for my retirement.** (Emphasis added)

[15] As set out previously, I am satisfied the judge erred in principle in finding a material change in circumstances. The mere passage of time, Dr. Rondeau's age of 61 at the time of the hearing, and his wish to save money for retirement, do not amount to such a change based on the record in this appeal.

[16] In **Rushton v. Rushton**, 2002 ABQB 1074, the court stated that neither the mere passage of time nor the normal process of aging amounted to a material change in circumstances:

> **27** Section 17(4.1) requires that there be a change in circumstances before a variation of a spousal support order can be made. This change of circumstances must be one that was not reasonably anticipated at the time the original order was made. Obviously the mere passage of time cannot suffice, as that would render the subsection meaningless. In addition, the normal process of aging, and the maturation of the family unit would not suffice as a change of circumstances, as such changes are universal.

[17] In **White v. White**, [2006] B.C.J. No. 1121, the court found that reducing debt, another rationale for variation argued by Dr. Rondeau, and saving for retirement are not material changes in circumstances:

> **74** While Dr. White is now 65 years that in and of itself does not justify either changing or eliminating the obligation to pay spousal support. The question is whether Dr. White's desires to reduce his work hours, reduce his debt and save for retirement are sufficient changes to justify varying or ending the spousal support.
>
> **75** I have concluded that Dr. White's desire to reduce his debt and save for retirement are not reasons that justify a change in the spousal support order as there is a requirement that the parties share the consequences of the marriage and its breakdown. To reduce spousal support to Mrs. White in order to allow Dr. White to save money and pay down the debts, does not meet the requirement as it shifts the economic consequences to Mrs. White.

[18] Also, in **Armstrong v. Armstrong**, [1992] O.J. No. 3094, the court states:

> 31 The applicant's counsel filed as an exhibit documentation confirming that the applicant's income will drop significantly when he retires at the age of 65, and begins to receive his pension. She argues, though not strenuously, that this is one ground on which the variation should be granted. I do not accept this argument: it is premature for the applicant to rely on an anticipated reduced level of income. Relying on the decision of McDonald v. McDonald 18 R.F.L. (3d) 389, it is clear that a payer's decision to plan for retirement cannot be used as a material change.

[19] See also **LeBlanc v. LeBlanc** (1995), 163 N.B.R. (2d) 192, ¶ 16 and 17.

[20] The other basis the judge relied on in finding there was a material change in circumstances was Dr. Rondeau's current health problems. Dr. Rondeau testified that on occasion his mental health, which he testified is brought on by the stress of his variation application, his poor relationship with his children, dealing with the death of patients, working in an environment requiring him to make life and death decisions and his current wife's medical condition, has caused him to lose some time from work. Health problems that result in a significant change in a party's income may amount to a material change in circumstances. The evidence in this case indicated that this is not the case here. The evidence before the judge showed that Dr. Rondeau's current income expectations are significantly higher than they were in 2003.

[21] The record discloses that Dr. Rondeau's income has been as follows:

Year	Income
2002	$182,059.50
2003	$223,578.35
2005	$301,092
2006	$348,355
2007	$259,811
2008	$301,302.25

[22] It also disclosed that the contract under which Dr. Rondeau has been and continues to work, together with his income from working in the emergency department of the Pugwash hospital and doing third party reports for insurance companies, workers' compensation and others, is expected to result in him having an income in the range of $300,000 per year. The following excerpt from Dr. Rondeau's testimony during cross-examination confirms this:

> Q. Okay. So it's certainly in the realm that your income would be . . . it's very conceivable that you would then have an income of approximately $300,000 (three hundred thousand dollars)?
>
> A. Yes.

> Q. Okay. Subject to any drastic changes in your health . . . or your working contract?
>
> A. M-hm
>
> Q. Okay. Would it be fair then to say, Dr. Rondeau, that your application before the Court is more focused on your future ability to pay spousal support than the current ability you have today sitting here?
>
> A. Yes.

[23] His testimony is supported by the advertisement placed on behalf of the Cumberland Health Authority searching for another doctor to provide services in the same geographic location where Dr. Rondeau practices, by the income figures contained in the April 9, 2009 letter to Dr. Rondeau from the Nova Scotia Department of Health, and by the wording of the contract he works under.

[24] Thus, with his present health problems, Dr. Rondeau's annual income is expected to be over $75,000 higher than it was in 2003. Ms. Rondeau's income has remained relatively unchanged.

[25] In the face of this evidence, that there has been a significant increase in Dr. Rondeau's income and virtually no change in Ms. Rondeau's income since the amount of spousal support was agreed to by the parties and incorporated into their corollary relief judgment, the judge erred in principle when he found there was a material change in circumstances that would justify a reduction in spousal support; **Kearney v. Kearney,** [1988] M.J. No. 95; **Tait v. Tait** (1994), 8 R.F.L. (4^{th}) 18, ¶ 18.

[26] There being no material change in circumstances, the judge erred in reducing the amount of Ms. Rondeau's spousal support. Dr. Rondeau shall therefore pay to Ms. Rondeau spousal support of $4,000 per month in accordance with the provisions of their corollary relief judgment.

[27] With respect to Dr. Rondeau's life insurance, Ms. Rondeau agreed before the judge that the amount of life insurance Dr. Rondeau should be required to maintain for her benefit be reduced to $133,000. I would order that the corollary relief

judgment be amended to provide that Dr. Rondeau maintain a life insurance policy in the amount of $133,000 and provide in his Will that this be for the purpose of binding his estate to honour his spousal support obligations.

[28] With respect to the unilateral removal of Ms. Rondeau from Dr. Rondeau's medical and dental plan, I would order Dr. Rondeau to pay Ms. Rondeau an additional $1,500 annually, commencing September 1, 2010, to allow her to buy her own plan. I would order that this amount be paid, in 12 equal installments of $125 each throughout each year, at the same time that the monthly spousal support is payable.

[29] While the evidence before the judge does not support a finding that there was a material change in circumstances at the time of the hearing, that is not to say there may not be such a change in the future, for instance if Dr. Rondeau's health results in a significant reduction in his income or when he retires.

[30] In **LeMoine v. LeMoine** (1997), 185 N.B.R. (2d) 173 (C.A.) Bastarache J.A., as he then was, states:

> **10** . . . I agree with the decision of the British Columbia Court of Appeal in Ross v. Ross (1994), 7 R.F.L. (4th) 146, at p. 150, where it was found that, generally, a supporting spouse cannot be required to continue working. It is only when a spouse is acting in bad faith in order to frustrate the right of a former spouse to support that the Court should look behind the decision to retire (see Vennels v. Vennels (1993), 45 R.F.L. (3d) 165, at p 175 (B.C.S.C.)). In this case, there is no evidence of bad faith."

[31] As Dr. Rondeau has not yet retired, or even suffered a material reduction of income toward retirement, the application of the **LeMoine** principle is premature. It is important to remember that determinations as to whether there has been a material change in circumstances are based on the facts as they exist or are known at the time of the application, not on speculation as to what may happen in the future; **Messier v. Delage**, [1983] 2 S.C.R. 401; **Casey v. Casey**, 2008 NSSC 56, ¶ 8; **Meade v. Meade**, [1990] N.S.J. No. 453; **Skelly v. Skelly**, [2007] BCSC 810; **LeBlanc v. LeBlanc** (1995), 163 N.B.R. (2d) 192.

[32] Dr. Rondeau is entitled to make a further application to vary if there is a material change in circumstances in the future.

[33] Accordingly, I would allow the appeal and order Dr. Rondeau to pay to Ms. Rondeau costs in the amount of $5,000 plus disbursements as agreed or taxed.

Hamilton,
J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.