NOVA SCOTIA COURT OF APPEAL
Citation: ***Campbell v. Campbell***, 2012 NSCA 86

Date: 20120822
Docket: CA 370421
Registry: Halifax

Between:

Peggy Maureen Campbell

Appellant

v.

Robert James Campbell

Respondent

Judges:	Oland, Fichaud and Farrar, JJ.A.
Appeal Heard:	June 6, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Farrar, J.A.; Oland and Fichaud, JJ.A. concurring.
Counsel:	Roseanne M. Skoke, for the appellant Timothy G. Daley, Q.C., for the respondent

Reasons for Judgment:

[1] Peggy Maureen Campbell appeals the Order of Chief Justice Joseph P. Kennedy dated November 1st, 2011. His reasons are contained in a decision dated April 12, 2011 (**Campbell v. Campbell**, 2011 NSSC 145) and an addendum to that decision dated July 14, 2011 (**Campbell v. Campbell**, 2011 NSSC 293). Ms. Campbell alleges numerous errors on the part of the trial judge relating to the division of matrimonial property, the determination of spousal support and the failure to find the parties' 20-year-old daughter a child of the marriage.

[2] For the reasons that follow I would dismiss the appeal with costs to the respondent in the amount of $1,000.

Facts

[3] The parties were married on December 9th, 1978. They have three children, the youngest of whom is Katelyn Dawn Campbell born March 21, 1990. At the time of the trial she was 20 years of age, unemployed and not attending any educational institution.

[4] During the marriage, Ms. Campbell was a stay at home mother and primarily responsible for raising the three children. She has a Grade 10 education, no specialized work training or experience. She has severe emphysema which prevents her from doing any physical work and, other than spousal support, her only source of income is a disability pension of $783 per month.

[5] Until May 18, 2007, when the business closed, Mr. Campbell worked as a manager at Trenton Works. During the marriage he was responsible for the family's finances.

[6] The parties separated in the summer of 2006. They entered into a Separation Agreement in November 2006. At the time of the negotiation and execution of the Separation Agreement, both parties were represented by legal counsel.

[7] The Separation Agreement provided that Mr. Campbell was to pay Ms. Campbell:

1. monthly spousal support of $1,400 plus 25.85% on any income he earned over $65,000.00;

2. monthly child support in the amount of $565 per month, based on an annual income of $65,000.00. The child support would also be increased consistent with the *Federal Child Support Guidelines* on any income above $65,000.00.

[8] The Separation Agreement also required an equal division of RRSPs held by the parties with each party receiving $43,127.01.

[9] At the time the Separation Agreement was negotiated and executed, both parties were aware that Mr. Campbell's mother held title to a property on the Concord Road in Pictou County from which Mr. Campbell had cut some wood and derived some income prior to separation. It was anticipated that on the death of Mr. Campbell's mother he would inherit the property. However, on the date of execution of the Separation Agreement he did not hold title to the property.

[10] The Separation Agreement contained a provision waiving any claims to property owned by the other parties other than those set out in the Agreement.

[11] Following the signing of the Separation Agreement, Mr. Campbell began paying child and spousal support obligations in accordance with the Agreement. Additional payments, as required by the Separation Agreement, were made in 2006 when his income exceeded $65,000.00.

[12] On May 18, 2007, Trenton Works terminated Mr. Campbell's employment. As a result, he received a severance package of $102,375.00. Ms. Campbell was given, through counsel, written notice of Mr. Campbell's termination of his employment along with the details of the severance package on November 15th, 2007. In that letter Mr. Campbell proposed to continue to pay child and spousal support for 18 months on the basis that the severance package represented pay in

lieu of notice of 18 months to him. The entire severance package was placed into RRSPs. In 2007 Mr. Campbell withdrew $59,172.56 and in 2008 $50,194.22 which represented the entire severance package plus an additional amount from his pre-existing RRSPs.

[13] In 2007 and 2008 Mr. Campbell paid child support in accordance with the Separation Agreement.

[14] Ms. Campbell did not object, at the time, to the manner in which he paid support in 2007 and 2008.

[15] The parties agreed at trial that there was an entitlement to a "top-up" amount on both the child and spousal support for 2007 and 2008. However, they disagreed on what income should be attributed to Mr. Campbell for those two years. The trial judge determined that Mr. Campbell owed a top-up of combined child support and spousal support for 2006, 2007 and 2008 of $5,333.23. This was based on an underpayment of child and spousal support of $146.63 for 2006; the remainder was an increase in spousal and child support based on his average income for 2007 and 2008 of $72,300.58.

[16] In December, 2008, Mr. Campbell informed Ms. Campbell that the Trenton Works funds had been exhausted and that she would receive her last payment from those funds on December 20, 2008. He made no further spousal or child support payments after December, 2008 until an Interim Consent Order was entered into by the parties on April 13, 2010, providing spousal support in the amount of $1400 for March and April of 2010 and then $400 per month from June, 2010. He continued to pay that amount until the decision in this matter. The trial judge ordered him to continue to pay spousal support in the amount of $400 per month based on his ability to be able to produce income at a level that would allow him to pay spousal support.

Issues

[17] Ms. Campbell raises a number of grounds of appeal. I will address the grounds of appeal under the following headings:

1. Disclosure

2. Separation Agreement

3. The Concord Road Property

4. RRSPs - $8,500

5. Severance Pay

6. Child of the Marriage

7. Consent Family Court Order

8. Maintenance – Spousal Support

9. Delay

Standard of Review

[18] The recent case of **Baker v. Baker**, 2012 NSCA 24, (a case which also considered a judicial departure from the terms of a separation agreement) confirmed the well-known standard of review relating to support orders and division of property; that is, we will not interfere unless the trial judge's reasons disclose an error in principle, a significant misapprehension of the evidence or unless the award is clearly wrong.

[19] With respect to the ground of appeal relating to disclosure, the test for interfering with the trial judge's decision is also well known. This Court will not interfere with the exercise of discretion by a trial judge unless wrong principles of law have been applied or where a patent injustice would result. (**Ameron International Corporation v. Sable Offshore Energy Inc.,** 2010 NSCA 107, ¶ 24). Although the test has been stated to be in relation to a judge's decision prior to trial when a motion for disclosure is often made, it is equally applicable when a motion is made at the commencement of trial, as it was here.

[20] Therefore, in reviewing the trial judge's decision and its addendum, we must be deferential.

1. Disclosure

[21] A motion for an order of production was made by trial counsel at the commencement of the hearing of this matter as follows:

> And I would like to make a motion that there be an order for production with respect to Mr. Campbell's financial situation at the time of July of 2006, and perhaps the proceeding (sic) year 2004, 2004 to the date of separation and thereafter.
>
> ... My client's instructions today, and that's why I'm putting it on the court record, is that she's not satisfied that she had received full disclosure with respect to the RRSP's and bank accounts.

[22] The motion for production did not ask for any information with respect to the real property known as the Concord Road property. The disclosure request only related to RRSPs and bank accounts.

[23] The trial judge ruled that he would hear the evidence and then rule on the motion, He said:

> Well ah, firstly, disclosure is of the essence of this thing and there will be full disclosure. And as to what people say, we're going to put people under oath and we will ah, we will ask them if there has been full disclosure. Then we'll hear that ah, that statement under oath that there hasn't been full disclosure then ah, let's get it done. Let's get it done. ...

[24] The essence of Ms. Campbell's position on the disclosure issue respecting RRSPs is that she simply does not believe the respondent. Her only factual basis for this is that he initially disclosed a lower RRSP figure and then, when she found further statements setting out the correct amount, he disclosed those additional funds. Mr. Campbell explained that he relied on information received from his bank which was inaccurate. On learning of the mistake he swore a Statement of

Property revealing the full amount of the RRSPs. This was done prior to the negotiation and settlement of the Separation Agreement.

[25] He also testified about withdrawing $8,500 from his RRSPs. It was his evidence that this withdrawal took place in 2006 after the Separation Agreement had been executed and the RRSPs had been divided. In other words, this was not undisclosed RRSPs as suggested by Ms. Campbell, rather it was part of his share of the divided RRSPs

[26] There was no evidence before the trial judge whatsoever that there may be any other RRSPs in the name of or under the control of the respondent. The court concluded in its addendum:

> [10] The Wife says that she now suspects that there was additional money available in RRSPs that was not disclosed to her. She did not provide any additional evidence to support this position. The Husband did state in an Affidavit that he had removed $8,500 from an RRSP in 2006, prior to the separation, but no explanation was given as to the use this money was put to.
>
> [11] There is not, before this Court, evidence that would support a change in the division of RRSPs as agreed to at separation.
>
> [12] There will be no revisiting of the division of the RRSPs under the Agreement.

[27] The trial judge considered the absence of evidence of any additional RRSPs and ruled accordingly. Although he was mistaken to suggest that the withdrawal was made prior to separation (which I will address more fully later), there was no basis to order further production.

[28] Ms. Campbell also argues that the trial judge erred in failing to order production with respect to the Concord Road property. As previously noted, the motion, at the commencement of trial, did not request disclosure relating to this

property. It was first raised in the Supplementary Brief filed by the appellant on October 15, 2010. She argued that the Mr. Campbell had deliberately concealed this asset by not taking title. It is unclear what disclosure she was seeking with respect to the Concord Road property. However, the evidence is clear that Ms. Campbell was aware of the property. In her affidavit of May 25, 2010 she says:

> To the best of my knowledge, it was in 1994, that the Applicant's mother gave him 28 acres of land located at Concord Road. **He took me to the property and we walked some of the boundaries of the property.** (Emphasis added)

[29] Ms. Campbell argued that she had a letter which she could not locate prior to the execution of the Separation Agreement which would provide evidence that the respondent "owned" the Concord property. That letter, attached to her affidavit sworn May 25, 2010, is a receipt for the removal of wood from the land. It is not evidence of Mr. Campbell's ownership of the property.

[30] Mr. Campbell's mother died on December 8, 2009. In his affidavit of June 8, 2010, he attaches the documents showing the Probate particulars. The land was deeded to him on March 26, 2010. He did not own it until well after the execution of the Separation Agreement and there is no evidence that he had any other type of interest in the property other than the hope that he would receive it as an inheritance. Nor is there any evidence he somehow concealed the property from the appellant.

[31] At trial the respondent testified that he believed he was going to receive the property as an inheritance but noted:

> Q. Was there anything, anything you would have agreed with, of your mother, side agreements or anything else that would have prevented your mother from changing her will and given that land to somebody else, one of your siblings or someone else?
>
> A. No.

[32] The trial court properly assessed the evidence respecting the Concord Road property and declined to order any production as no further production was required.

2. Separation Agreement

[33] The appellant argues that the trial judge erred in two ways in his consideration of the Separation Agreement by:

a. varying the amounts payable for spousal maintenance and child support;

b. failing to vary the Separation Agreement to include the Concord Road property as a matrimonial asset or an available equitable interest subject to division.

[34] I will address each of the alleged errors individually.

Spousal Maintenance and Child Support

[35] Ms. Campbell says that the trial judge erred in failing to undertake the analysis mandated by **Miglin v. Miglin**, 2003 SCC 24 the leading decision on the analysis of the treatment of domestic contracts by the courts. She says had he done the analysis he would not have varied the support provisions of the Separation Agreement by reducing spousal support from $1,400 to $400 per month and child support from $565 per month to nothing.

[36] Although **Miglin** was focused on child support, it speaks broadly to prenuptial, cohabitation and separation agreements between spouses. It sets out a two-stage process that governs a judicial departure from a separation agreement. At stage one the court examines circumstances to see if there is evidence to warrant a finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. At this point in the analysis the court is looking to see whether there are any circumstances of oppression, pressure or other vulnerabilities taking into account the circumstances and the conditions under

which the negotiations were held including whether there was professional assistance (**Miglin**, ¶80-81).

[37] If there are no vulnerabilities present, or they are compensated for by the assistance of legal counsel, the court then considers the agreement to determine whether it substantially complies with the objectives of the **Divorce Act**, R.S.C. 1985, c. 3 (2nd Supp.) (**Baker, supra**, ¶25).

[38] In this case, the stage one test, when applied, would not give rise to setting aside the Separation Agreement. Both parties were represented by counsel. There is no evidence of oppression, pressure or other vulnerabilities in the circumstances of its negotiation. (I will come back to the stage one test when addressing Ms. Campbell's argument on the Concord Road property.)

[39] **Miglin** then goes on to set out stage two of the test which is applicable to these particular circumstances. This part of the test, succinctly stated, is that the parties seeking to alter the separation agreement must show that in light of the new circumstances the terms of the agreement sought to be varied no longer reflect the parties' intentions at the time of execution nor does it reflect the objectives of the **Divorce Act**. In these circumstances it will be necessary to show that the conditions were not reasonably anticipated by the parties at the time of entering into the agreement and the agreement ought to be varied to reflect the changing circumstances (**Miglin**, ¶88).

[40] The appellant faults the trial judge for failing to do the analysis at stage two of the **Miglin** test in relation to spousal and child support. While the trial judge did not reference **Miglin** in his decision or its addendum, it was not seriously contested before him that the closure of Mr. Campbell's employer and his termination from employment was not contemplated at the time of entering into the original agreement.

[41] In her pre-hearing brief filed prior to the trial, when dealing with the issue of variation of spousal support, Ms. Campbell's counsel wrote:

> There has been a change in circumstances since the making of the Separation Agreement. The Petitioner father lost his job in 2007.

She continues in her brief and suggests that the amount of spousal support should be approximately $600 per month, an amount which is clearly at variance with the Separation Agreement:

> It is the Respondent mother's position that it is the Petitioner father's responsibility to help to continue to support her. She has managed to get a disability pension but at a minimum she needs the shortfall from the Petitioner father which is approximately $600 per month.

[42] In her Supplementary Brief, Ms. Campbell changes her position with respect to the quantum of spousal support but still suggests a change from the amount set out in the Separation Agreement:

> It is the Respondent wife's position that it is the Petitioner husband's responsibility to help to continue to support her. She has managed to get a disability pension but at a minimum she needs the shortfall from the Petitioner husband which is approximately $1100 per month or $700 per month if Katelyn continues to receive social assistance.

[43] With all due respect to the appellant's argument, whether Mr. Campbell's loss of his job was a change in circumstances which satisfied stage two of the **Miglin** analysis was never a real issue before the trial judge. The loss of his employment and the reduction in his income fundamentally changed Mr. Campbell's ability to pay support. It was not contemplated at the time of execution of the Separation Agreement. The change in circumstances satisfied stage two of the test.

[44] I would pause here to note that the child support was terminated not on the basis of a change in the circumstances of Mr. Campbell, but rather, a change in the circumstances of the child. I will discuss this in more detail when addressing the appellant's arguments under the heading "Child of the Marriage".

[45] In summary, I am satisfied that the trial judge did not err in failing to do the analysis under stage two of **Miglin**. It was implicitly, if not explicitly, acknowledged to him by Ms. Campbell that the change in circumstances were such that a variation in spousal support was warranted. Further, there was ample evidence before him upon which he could conclude that the circumstances

warranted an adjustment. As such it was open for him to vary the amount of spousal support provided in the Separation Agreement.

[46] I would dismiss this ground of appeal.

3. The Concord Road Property

[47] The appellant argues that the Concord Road property should be considered to be a matrimonial asset subject to division. There are a number of problems with this argument, not the least of which is the Separation Agreement. The relevant provisions of the Separation Agreement provide:

> 4. The parties have reached a comprehensive agreement with respect to division of assets and support for each other and the children, custody and access, the particulars of which are contained in this Agreement.
>
> 5 The parties intend for the provisions herein to represent a full and final comprehensive settlement of all outstanding issues. No provisions shall be varied unless the variation of that provision is specifically permitted by this Agreement.
>
> 6. The parties acknowledge they have fully disclosed to each other their respective assets, income and liabilities and they have each received independent legal advice in relation thereto.
>
> ...
>
> 38. The parties agree that the aforementioned division of assets is mutually satisfactory and shall be final and binding on the parties and their respective estates and shall not be varied.
>
> RELEASES
>
> 39. Except as provided herein, each of the parties hereto releases and discharges the other from any right, title, and interest or claim in or to the property of the other, whether such right, title, interest or claim is real, personal, legal, equitable or statutory. [Emphasis added]

...

> 43. The parties to this Agreement hereby confirm that the foregoing has been entered into without undue influence or fraud or coercion or misrepresentation whatsoever and that each has read the herein Agreement in its entirety and with full knowledge of the contents hereof and does hereinafter affix his or her respective signature voluntarily thereto.
>
> 44. Each party acknowledges that they have had independent legal advice.

[48] Ms. Campbell's argument is essentially this, the failure to disclose information with respect to the Concord Road property and RRSPs satisfy stage one of the **Miglin** test and, with respect to the division of matrimonial property, the Separation Agreement should be set aside.

[49] I have addressed the disclosure issue under the first ground of appeal where I found that the trial judge did not err in finding there was no requirement for further disclosure. I have also found there was no evidence of oppression, pressure or vulnerability in the circumstances of the negotiation of the Separation Agreement.

[50] It is clear Ms. Campbell knew the Concord Road property and Mr. Campbell's mother's intentions with respect to that property well in advance of the separation and knew about it at the time of the negotiation of the Seperation Agreement. The provisions of the Agreement govern the division of the property between the parties. Ms. Campbell has not shown that she was somehow misled with respect to the Concord Road property nor has she attempted to show that the Agreement does not comply substantially with the overall objectives of the **Divorce Act** (**Miglin**, ¶46).

[51] I see no merit in the appellant's argument on this issue and I would dismiss this ground of appeal.

4. RRSPs - $8,500

[52] Ms. Campbell argues that the trial judge erred in failing in make a decision with respect to $8,500 of RRSPs that Mr. Campbell withdrew prior to separation.

This argument stems from a portion of the trial judge's addendum to his decision where he states:

> [10] The Wife says that she now suspects that there was additional money available in RRSPs that was not disclosed to her. She did not provide any additional evidence to support this position. The Husband did state in an Affidavit that he had removed $8,500 from an RRSP in 2006, prior to separation, but no explanation was given as to the use this money was put to.

[53] Unfortunately, the trial judge misstated the evidence. Mr. Campbell did not say in an affidavit that he had removed $8,500 from RRSPs in 2006 prior to separation. He said, in an affidavit dated April 8, 2006, that he took money out of his RRSPs in the amount of $8,500 but he did not say it was before separation. The actual wording at ¶ 12 of the affidavit is as follows:

> 12. In 2006 I also took money out of my RRSP's in the amount of $8,500 which was not included as part of the income for spousal and child support.

[54] Mr. Campbell addressed the timing of the removal of the funds from his RRSP both in cross-examination and re-direct. He testified that the amounts were removed after the RRSPs were divided between him and Ms. Campbell and not before.

[55] In fact, the transcript of the trial evidence on this point shows that Mr. Campbell was closely questioned on this issue in cross-examination by Ms. Campbell's counsel. He was clear in his evidence that the funds were removed after the RRSPs were divided. There was no contradictory evidence offered to rebut his evidence, nor was there any statement by him in an affidavit, as suggested by the trial judge, that he had removed the funds prior to separation.

[56] There is absolutely no merit to the appellant's argument that this amount should be considered as matrimonial property to which Ms. Campbell is entitled to half.

5. Severance Pay

[57] Unfortunately, the respondent's employment with Trenton Works was terminated on May 18, 2007 when the business closed. He was paid a severance of $102,375 which consisted of $97,500 as pay in lieu of notice and $4,875 as the company contribution to his RRSP. The severance package represents 18 months pay in lieu of notice.

[58] The entire severance package was placed into his RRSP and subsequently withdrawn in 2007 and 2008.

[59] The appellant was made aware of the severance package by correspondence dated November 15, 2007. In that letter Mr. Campbell proposed to continue to pay child and spousal support for 18 months on the basis that the severance package represented 18 months' pay in lieu of notice to him.

[60] Although there was correspondence from Ms. Campbell's counsel in April 2008 discussing the treatment of the severance package as income or an asset, the issue was not pursued further and Ms. Campbell continued to receive the child and spousal support payments until December 2008.

[61] The appellant's argument on appeal and at trial on this point is somewhat difficult to follow. She appears to be suggesting that she should have received 50 percent of the severance package and, in addition, support payments in accordance with the Separation Agreement. In her post hearing brief she argues that not only should she receive a share of the severance package, the amounts of spousal support and child support should be calculated based on the amount of income Mr. Campbell showed on his income tax return in 2007 and 2008 relating to the severance package and RRSP withdrawals.

[62] With respect, this would be manifestly unfair. The trial judge heard evidence that, in the year of the receipt of the severance package, Mr. Campbell placed it all into RRSPs and then withdrew the funds in that year and the subsequent year. The trial judge correctly found that it would have amounted to double-dipping if the severance income and the RRSP income, which came from

the funds deposited from the severance package, was all brought into income in the same year.

[63] The trial judge, in the exercise of his discretion, determined that it would be improper, in these circumstances, to consider the severance and withdrawal of RRSP's as income for calculating support. At ¶ 54 he said:

> [54] I agree with the husband's submission that it would be improper to consider both the severance received in 2007 and the RRSP withdrawal taken that year as income for determining spousal and child support. Further I agree that having considered the severance as income, the portion of the 2008 RRSP withdrawal traceable to that payout should not be considered income in 2008.

[64] He then turned his attention to determining how he would calculate Mr. Campbell's income for 2007 and 2008 and concluded that the fairest way was to average his income for the two years:

> [58] The husband's severance package was meant to represent approximately 18 months of income in lieu of notice - he says, in effect, he was given his 2008 salary in 2007. He submits, therefore, that the fairest determination of his income for 2007 and 2008 is an average of the two years: $136,762.79 (2007) + $7, 838.38 (2008) = $144,601.17 ÷ 2 = $72,300.58.
>
> [59] I agree and will determine his income for purposes of spousal and child support on that basis.

[65] In **Dillon v. Dillon,** 2005 NSCA 166, this Court determined that the calculation of income for child support calculation purposes is fact dependant. In that case, the withdrawal of RRSPs that were contributed in the same year would amount to a double counting. Although the decision deals with calculation of income for the purposes of child support, its principles can be applied to the calculation of income for the purposes of spousal support. The court must determine what is fair under the particular circumstances of the case before it. In determining that the income should be averaged over the two years for the purposes of calculating spousal and child support was appropriate, the trial judge did not err in principle, misapprehend the evidence, nor is his decision clearly wrong (**Baker**, *supra*, ¶ 20).

[66] I would dismiss this ground of appeal.

6. Child of the Marriage

[67] Ms. Campbell argues that Katelyn remained a child of the marriage at the time of trial and that Mr. Campbell should have continued to pay child support after December 2008. The central question before the trial judge was whether Katelyn, at the relevant time, was unable to withdraw from her mother's charge or obtain the necessities of life by reason of "other cause". She was clearly not ill nor disabled and she had reached the age of majority.

[68] The trial judge in his reasons addressed the issue as follows:

> [41] The *Divorce Act* recognizes that child support can continue when the child:
>
> > 2 (1) (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; . . .
>
> [42] I do not find that this has been shown to be true of Katelyn.
>
> [43] I find that she is no longer a "child of the marriage" and has not been since November 28 of 2008.
>
> [44] She has not either attended school regularly or been employed since November of 2008.
>
> [45] I do not believe that there are no jobs available for those with Grade 11 education and would require evidence of both applications and rejections to conclude that Katelyn was unemployable.

[69] Katelyn did not give evidence. The trial judge was not satisfied, on the evidence presented, that she remained a child of the marriage as that term is defined in s. 2(1)(b) of the **Divorce Act**. Neither the record nor his reasons show any reversible error in making this finding. I would dismiss this ground of appeal.

7. Consent Family Court Order

[70] Again, it is difficult to understand the argument being made by the appellant on this issue, but I take the argument to be that the trial judge failed to recognize that the Consent Order was a without prejudice interim order and, therefore, not a variation of the Separation Agreement and that the trial judge erred by awarding spousal support in the same amount set out in the consent order.

[71] I have already determined that Mr. Campbell's loss of employment and subsequent reduction in income entitled the trial judge to vary the amounts of spousal and child support provided in the Separation Agreement. I do not take the trial judge's reasoning as considering the Consent Order a variation of the Seperation Agreement for the following reasons:

1. The trial judge refers to the consent order as a "consent interim order" in his decision (¶ 21);

2. Both parties made submissions on the appropriate amount payable for spousal support; Mr. Campbell argued that no amount should be payable; Ms. Campbell argued that it should be either $600 or $700 per month depending on the circumstances;

3. By reference to the case of **Bellemare v. Bellemare** (1990), 98 N.S.R. (2d) 140 (T.D.), the judge imputed an income to Mr. Campbell greater than the amount he was claiming he was able to earn;

4. The amount ordered for spousal support is greater than the amount which otherwise would have been ordered based on Mr. Campbell's reported income of approximately $11,500.

[72] Therefore, I do not accept the appellant's argument that the trial judge erred in considering the consent order as varying the terms of the Separation Agreement which lead him to award $400 in spousal support.

8. Maintenance – Spousal Support

[73] The appellant argues that the trial judge erred in failing to consider all of the husband's circumstances in determining spousal support.

[74] Again, with respect, the trial judge made no such error.

[75] The trial judge in his decision canvassed the employment prospects of the respondent, reviewed his age, his medical condition, his total income for 2010, the inheritance received from his mother's estate, and his background in the repair of small appliances, and concluded:

> [82] I find out in these circumstances the husband cannot afford to retire at 61 years of age.
>
> [83] I believe he could be employed in some low stress work at least on a part-time basis.
>
> [84] I refer to *Bellemare v. Bellemare*, 1990, CanLII 2605 (N.S.S.C.) in which Bateman, J. found that a spouse wanting to retire could, if properly motivated, continue to produce income at a level that would address spousal support obligations.

[76] The trial judge had evidence before him upon which he could make a determination of the appropriate amount of spousal support. His decision is entitled to deference. I would dismiss this ground of appeal.

9. Delay

[77] The trial judge's original decision was not rendered until approximately seven months after the original trial. His addendum was approximately ten months after the trial. The appellant simply says that the delay in issuing the decision was a concern because of the desperate financial circumstances she was in which impacted on her ability to provide for herself and her daughter, a circumstance the trial judge was aware of and indicated to the parties he would get his decision out quickly. Unfortunately, this did not occur and Ms. Campbell, quite appropriately,

raised her concerns about the delay on appeal. Although the delay in rendering the decision is unfortunate in these circumstances, it does not represent a basis for setting aside the trial judge's decision; nor do I take the appellant's submissions as suggesting that it does.

Conclusion

[78] I would dismiss the appeal with costs to the respondent in the amount of $1,000.

Farrar, J.A.

Concurred in:

Oland, J.A.

Fichaud, J.A.