NOVA SCOTIA COURT OF APPEAL
Citation: ***MacLean v. Walsh***, 2003 NSCA127

Date: 20031128
Docket: CA195114
Registry: Halifax

Between:

Latisha Ann MacLean (Walsh)

Appellant

v.

James Robert Walsh

Respondent

Judges:	Glube, C.J.N.S.; Chipman and Hamilton, JJ.A.
Appeal Heard:	November 26, 2003, in Halifax, Nova Scotia
Held:	Appeal dismissed without costs, as per reasons of Hamilton, J.A.; Glube, C.J.N.S. and Chipman, J.A., concurring
Counsel:	Kathy A. Briand, for the appellant James R. Walsh, self-represented respondent

Reasons for judgment:

[1] At the conclusion of argument the court announced that this appeal was dismissed with reasons to follow. These are the reasons.

[2] Ms. MacLean appeals the January 30, 2003 decision of Justice Douglas L. MacLellan not to increase retroactively for eleven months the amount of child support paid to her by Mr. Walsh with respect to their son. Ms. MacLean is represented by counsel. Mr. Walsh represents himself.

[3] Ms. MacLean argues the trial judge erred by not following this court's decision in **Rafuse v. Conrad** (2002), 205 N.S.R. (2d) 46 in which this court upheld for the most part the trial judge's decision requiring payment of retroactive child support in the absence of blameworthy conduct by the non-custodial parent.

[4] Ms. MacLean has not satisfied us that the trial judge erred.

[5] **Rafuse** sets out in ¶ 12 the applicable standard of review:

> 12 The standard of review in matters of this nature is as set out by the Supreme Court of Canada in Hickey v. Hickey, [1999] 2 S.C.R 518, where it allowed an appeal from an appellate decision which had varied a decision of a motions judge to increase both spousal and child support on an application to vary. On the issue of the approach to be taken by appellate courts in reviewing spousal and child support orders and the principles for varying those orders, Justice L'Heureux-Dubé, for the Court stated:
>
> > [11] Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. These principles were stated by Morden J.A. of the Ontario Court of Appeal in Harrington v. Harrington (1981), 33 O.R. (2d) 150, at p. 154, and approved by the majority of this Court in Pelech v. Pelech, [1987] 1 S.C.R. 801, per Wilson J.; in Moge v. Moge, [1992] 3 S.C.R. 813, per L'Heureux-Dubé J.; and in Willick v. Willick, [1994] 3 S.C.R. 670, at p. 691, per Sopinka J., and at pp. 743-44, per L'Heureux-Dubé J.

> [12] There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently. (emphasis added)

[6] Thus the standard of review to be applied in this appeal is one of significant deference to the trial judge's exercise of discretion.

[7] **Rafuse** also sets out in ¶ 18 the policy concerns relating to the discretion to award retroactive maintenance and in ¶ 19 the factors that govern the discretion to award retroactive child support:

> 18 Based on the jurisprudence reviewed, Justice Rowles enumerates the policy concerns relating to the discretion to award retroactive maintenance, and includes a discussion of and authority for each of the following:
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> (i) equal treatment under the Divorce Act and Family Relations Act;
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> (ii) presumption that a previous court order is to be respected;
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> (iii) presumption against retroactive effect;
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> (iv) child maintenance is a right of the child, not of the parent;
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> (v) parents are jointly responsible for child support; and
>
> (vi) encourage negotiated settlement.
>
> 19 Following discussion of the policy considerations, Justice Rowles examines the factors that govern the discretion to award retroactive maintenance, summarizing:

> para 66 A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.
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> para 67 Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

[8] As indicated by this court's decision in **MacPhail v. MacPhail** (2002), 210 N.S.R. (2d) 269, **Rafuse** does not stand for the proposition that retroactive child support is always payable. The trial judge has to consider the factors governing retroactive child support and exercise his or her discretion.

[9] Here the trial judge noted that Mr. Walsh was paying child support in accordance with an outstanding order issued two years earlier at a time when Ms. MacLean was represented by counsel; that the outstanding order did not require Mr. Walsh to provide a copy of his tax return to Ms. MacLean annually; that Ms. MacLean knew Mr. Walsh obtained full time work after the outstanding order was issued and delayed in making an application for financial disclosure or to increase the amount of child support; that the retroactive payment sought of approximately $1,221 may not benefit their son since Ms. MacLean was receiving social assistance and testified she would report receipt of any retroactive payment of child support; that Mr. Walsh paid extra amounts to Ms. MacLean when she requested extra money for their son which

amounted to $40 to $60 per month; that when Ms. MacLean raised with Mr. Walsh her need for additional child support on a regular basis he checked the child support guidelines and agreed to pay her $10 more per month than the court later awarded; that Mr. Walsh was living with a new common law wife and her thirteen year old daughter; that his common law wife did not work outside the home and that no support was being received by his common law wife for her daughter.

[10] Considering the facts of this case in light of the principles and factors set out in **Rafuse**, we are satisfied the trial judge did not make an error of principle, misapprehend the evidence or exercise his discretion in such a way as to require intervention of this court.

[11] Accordingly we would dismiss the appeal without costs.

Hamilton, J. A.

Concurred in:

Glube, C.J.N.S.

Chipman, J.A.