NOVA SCOTIA COURT OF APPEAL
Citation: *Davey v. Davey*, 2003 NSCA 7

Date: 20030115
Docket: CA 185952
Registry: Halifax

Between:

Colin Francis Davey

Appellant

v.

Catherine Anne Davey

Respondent

Judges:	Roscoe, Cromwell, Saunders, JJ.A.
Appeal Heard:	January 15, 2003, in Halifax, Nova Scotia
Written Judgment:	January 17, 2003
Held:	Appeal is dismissed without costs as per oral reasons for judgment of Roscoe, J.A.; Cromwell and Saunders, JJ.A., concurring.
Counsel:	Karen MacDonald, for the Appellant John MacDonell and Joseph Burke, for the Respondent

Reasons for judgment:

[1] This is an appeal from an order of Justice R. James Williams of the Supreme Court of Nova Scotia (Family Division) (2002 NSSF 29, [2002] N.S.J. No. 286), varying the child and spousal support awarded to the respondent by the corollary relief judgment issued in September 1994. The order provides that the appellant pay spousal support in the monthly amount of $1,400.00 until the child of the marriage, now aged 11, graduates from high school. In addition, the trial judge fixed arrears of spousal support in the amount of $4,222.50 and arrears of child support in the amount of $10,135.29. By agreement of the parties, the child support order was terminated.

[2] The background to the applications before him was summarized by the trial judge as follows:

> Colin Francis Davey and Catherine Anne Davey were married December 29, 1989. Their daughter, Michelle, was born July 23, 1991. The Davey's separated March 1, 1993 and divorced September 23, 1994. Their Corollary Relief Judgment provided that Dr. Colin Davey pay spousal maintenance of $1,000 per month and child support of $1,000 per month. Dr. Colin Davey seeks to terminate both Orders. Catherine Davey seeks to retroactively adjust both the child and spousal support orders and to continue the spousal support order. Until shortly before the trial of this matter the parties also disagreed as to what their child care/custody arrangements should be. They have reached agreement upon this issue. They have also agreed that there will be no ongoing child support order.

[3] The agreement reached by the parties respecting custody is set out by Justice Williams in paragraph E16 of the decision: (Q.L. ¶ 18)

> 1. The parties would have joint custody of Michelle with shared decision-making with respect to Michelle's health, education, welfare and general upbringing.
>
> 2. In the event that Catherine Davey is hospitalized as a result of her condition, Colin Davey would have authority to make any decision which necessarily had to be made during the period of hospitalizations. "Hospitalization" refers only to situations where she is spending the night in hospital, and does not include day visits to hospital and does not include hospitalizations (whether overnight or otherwise) for reasons unrelated to her condition.
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> 3. With respect to access...

a. On Week One of a two week rotating schedule Dr. Davey would have Michelle from Tuesday afternoon at 3:30 when he picks Michelle up at school until Wednesday morning when he drops Michelle off at school. He would then have Michelle from Thursday at 3:30 in the afternoon until the following Monday when he drops Michelle off at school. On Week Two Dr. Davey would have the same Tuesday and Thursday periods, but Catherine Davey would pick Michelle up on Friday at 3:30 and would have Michelle with her until Dr. Davey picks up Michelle at school on Tuesday at 3:30. ...

b. The parties will have alternating Christmas...

c. A block period of access could be worked out for the summer vacation period.

d. On birthdays or other special times the day can be split or alternated.

4. Michelle would continue to attend her current school and upon completion of grade 6, will continue on to the same school as her classmates.

5. Dr. Davey will be designated as the school's primary contact. This designation is for communication purposes only and does not affect the shared decision-making with respect to education...

6. Neither parent is permitted to change Michelle's province of residence without the other's consent.

7. Dr. Davey will be responsible for transporting Michelle between the parties residences for the purpose of access (as long as Catherine Davey resides in Halifax-Dartmouth Metropolitan area).

[4] The respondent suffers from Bi-polar II Mood disorder with manic and depressive recurrent mood disorders and as a result has been hospitalized on numerous occasions. She is in receipt of a monthly disability pension of $692.50. The parties agreed before trial that the appellant’s income for 2000 was $184,906.38, that his ability to pay was not in issue, and that the respondent is medically unable to work.

[5] In his decision, Justice Williams reviewed in detail the chronology of the parties’ relationship, both before and after their marriage and separation, their education and work experiences, the respondent’s health problems, and

the record of the court proceedings and financial arrangements between them.

[6] With respect to the respondent's claim for retroactive child support, Justice Williams concluded that the respondent should receive a lump sum representing the difference between the amounts actually paid by the appellant and the table amounts for child support appropriate to the appellant's income as reported on his tax returns for the years, 1999, 2000 and 2001, in accordance with the Child Support Guidelines. The amount paid by the appellant for those years up to the time of trial was $9,265.09 less than the table amounts. The amount ordered to be paid was reduced to $7,735.77 to reflect the periods of time that the child stayed with the appellant due to her mother's hospitalization. In addition, the judge ordered that the appellant pay to the respondent an amount representing the income tax she paid on the child support for those three years, calculated to be $2,399.52. In arriving at this conclusion, Justice Williams relied on **L.S. v. E.P.** (1999), 50 R.F.L. (4th) 302 (B.C.C.A.) and considered the factors listed there, such as, that the appellant has the ability to pay and when he brought the application to vary, he stated his income to be $83,040 when it was, in fact, more than twice that amount.

[7] In determining that the respondent was entitled to arrears of spousal support, Justice Williams considered the circumstances in which they arose, that is, that the appellant understood that they had agreed to end the spousal support, and the fact that the respondent was definitely unable to support herself during the relevant period. The arrears of $9,000 were reduced to $4,222.50 to take into account half of the disability pension received by the appellant for that period.

[8] On the major issue of the respondent's entitlement to ongoing spousal support, the trial judge noted the respondent's medical condition, the length of the marriage (3 years), the period for which support had been paid (8 years), and quoted relevant passages of **Bracklow v. Bracklow** (1999), 44 R.F.L. (4th) 1, [1999] 1 S.C.R. 420. He then concluded as follows: (page 39 et seq., Q.L. ¶ 55)

> Catherine Davey is medically unable to work. I would not conclude that the cause or etiology of her illness is related to the marriage. It has, from time to time, been aggravated by stress related to her relationship with Mr. Davey, his conduct, and her worries and fears concerning her personal financial future and

Michelle's future care. I would not conclude that this represents a rationale for support beyond the fact that her illness means, in effect, that she has need.

I have considered the evidence of Dr. Duffy and the parties. I have concluded that Catherine Davey has made reasonable efforts to become self-sufficient. I have considered this a subjective test. Her illness clearly impacts upon her ability to become economically self-sufficient.

It was suggested by her counsel that Catherine Davey was forced to stay in Nova Scotia with Michelle - that she gave up employment in Vancouver - and that these geographic restraints serve as a rationale for support. The evidence before me suggests that Ms. Davey has had educational and employment opportunities here in Nova Scotia and that her illness has prevented her from completing these endeavors. There is no evidence from which I could conclude that Catherine Davey's illness would disappear or be managed significantly differently in a different locale.

Further, while Ms. Davey obviously has not wished to move from Nova Scotia without Michelle, it is Michelle who has had geographic limits put on her residence - not Ms. Davey. There was and is a reason for this. Catherine Davey has a profound mental illness that has from time to time effected her ability to care for Michelle and for that matter, herself. It is and has been vitally important to Michelle's welfare that Colin Davey be involved in her care on an ongoing basis.

There is, in my view, no compensatory or express contractual rationale for continuing Catherine Davey's entitlement to spousal support in these circumstances. If a rationale for ongoing support is to be found in these circumstances it lies in "basic social obligation", (the rationale for what has been referred to as non-compensatory support) or arises from the parties interdependence in providing parenting to Michelle.

While most often the basic social obligation model is referred to as being related to the length of marriage, it is not exclusively so. A basic social obligation model must include consideration of children.

Here, Catherine Davey has need. She is unable to work. The parties have entered into a joint custody arrangement that has Michelle in their shared care. This arrangement, by its nature, acknowledges the fact that both parents value the other's parental role with Michelle. They have agreed that there will be no child

support. Catherine Davey's income is $8,310/year ($692.50 x 12). An order that failed to provide for additional child support would, I conclude, force her to leave this community and effectively frustrate the custody agreement made by the parties. They, and I, have concluded that this agreement benefits Michelle. Colin Davey's income is more than $180,000 per year. Ability to pay is not an issue.

Section 17(7)b of the **Divorce Act**, 1985 provides that:

A variation order varying spousal support should ...

... (b) apportion between the spouses any financial consequences of the marriage arising from the care of the child over and above any obligation for the support of any child of the marriage ..."

Catherine Davey does not have the ability to support herself and continues (to the extent her illness allows her to), to co-parent Michelle pursuant to the parties' agreement. I conclude that her entitlement to spousal support should continue considering s.17(7)b, the basic social obligation arising from the marriage and the custodial arrangements agreed to by the parties.

Catherine Davey seeks spousal support that will provide her with a monthly income of $2,000/month. Her request is modest. Her monthly disability pension is $692.50; $2,000 minus $692.50 = $1,307.50.

Colin Davey's accountant estimates the cost of spousal support to Colin Davey to be:

Monthly Payment	Annual	Tax Saving	Net Cost	Net Monthly
$1,000 month	$12,000	$5,680.00	$6,319.20	$526.60
$1,500 month	$18,000	$8,521.20	$9,478.80	$789.90

> Colin Davey has submitted that he is entitled to have an end or termination date for the spousal support. This is not an unreasonable request. It will terminate the August after Michelle completes grade 12 and be subject to variation should circumstances change. I have concluded that the obligation to pay spousal support arises principally from the shared parenting arrangement and s.17(7)(b).
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> In the circumstances, I am satisfied that the appropriate quantum and Order of spousal support is $1,400 per month payable (effective) November 1, 2001, and continuing the first day of each month thereafter until and including August 1 of the year in which Michelle Davey completes Grade 12 (unless otherwise ordered by the Court). The (current) cost to Colin Davey will be under $750 per month (according to the figures filed by his accountant). This will leave Catherine Davey with an income of just over $25,000 per year. Her evidence indicated that she has the ability to work sporadically (at times) to supplement this to a limited degree.
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> Colin Davey shall provide Catherine Davey with post-dated cheques for a 12 month period by June 20th of each year, commencing June 20, 2002. The parties will exchange income tax returns for the previous year on or before June 20th of each year commencing June 20, 2002.

[9] The appellant submits that the trial judge erred in law in awarding ongoing spousal support, in ordering payment of arrears of child and spousal support, and in ordering the appellant to reimburse the respondent for income tax.

[10] The standard of review in matters involving variation of child and spousal support orders is as set out by the Supreme Court of Canada in **Hickey v. Hickey**, [1999] 2 S.C.R 518. On the issue of the approach to be taken by appellate courts in these matters, 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.
> ...
>
> [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.

[11] This reluctance to interfere with the exercise of discretion was reiterated in **Bracklow, supra,** at ¶ 53 where McLachlin, J., as she then was, stated:

> ...As stated in *Moge*, "At the end of the day ..., courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act" (p. 866).

[12] Earlier in her reasons in **Bracklow**, the approach that a trial judge should undertake when determining spousal support was confirmed to be as follows:

> ¶ 35 *Moge*, supra, sets out the method to be followed in determining a support dispute. The starting point is the objectives which the *Divorce Act* stipulates the support order should serve: (1) recognition of economic advantage or disadvantage arising from the marriage or its breakdown; (2) apportionment of the financial burden of child care; (3) relief of economic hardship arising from the breakdown of the marriage, and (4) promotion of the economic self-sufficiency of the spouses: s. 15.2(6). No single objective is paramount; all must be borne in mind. The objectives reflect the diverse dynamics of the many unique marital relationships.
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> ¶ 36 Against the background of these objectives the court must consider the factors set out in s. 15.2(4) of the *Divorce Act*. Generally, the court must look at the "condition, means, needs and other circumstances of each spouse". This balancing includes, but is not limited to, the length of cohabitation, the functions each spouse performed, and any order, agreement or arrangement relating to support. Depending on the circumstances, some factors may loom larger than others. In cases where the extent of the economic loss can be determined, compensatory factors may be paramount. On the other hand, "in cases where it is not possible to determine the extent of the economic loss of a disadvantaged spouse . . . the court will consider need and standard of living as the primary

> criteria together with the ability to pay of the other party": *Ross v. Ross* (1995), 168 N.B.R. (2d) 147 (N.B.C.A.), at p. 156, *per* Bastarache J.A. (as he then was). There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

[13] The appellant's primary argument is that given the length of time he has already maintained the respondent, coupled with the brief duration of cohabitation and marriage, and that since the respondent's inability to support herself is unrelated to her role within the marriage, the order for continuing spousal support is unreasonable and based on an error in principle requiring this court's intervention. The appellant's emphasis on the length of the marriage disregards all the other objectives and factors involved. Length of the marriage is only one factor. The trial judge properly considered it as such while also weighing it along with the other circumstances, including the respondent's illness and its aggravation by the stresses inherent in the marriage breakdown, her inability to be self-sufficient and the appellant's corresponding ability to pay support, and the financial consequences of co-parenting the child. The emphasis on the latter factor was entirely a matter within the judge's discretion and should be accorded significant deference.

[14] The orders for past child support and spousal support and for reimbursement of income tax are likewise matters within the trial judge's purview and given all the circumstances, the reasons disclose no error in principle or misapprehension of the evidence.

[15] Having reviewed the record, the reasons of the trial judge and considered the written and oral submissions of the parties, we are not persuaded that the trial judge made any error in law or fact that would permit appellate intervention in this case.

[16] The appeal is, accordingly, dismissed without costs. The appellant is ordered to pay the respondent's reasonable disbursements.

[17] We wish to commend Mr. MacDonnell for taking this case on a *pro bono* basis, thus fulfilling the highest tradition of the Bar in representing needy litigants without fee.

Roscoe, J.A.

Concurred in:

Cromwell, J.A.

Saunders, J.A.