NOVA SCOTIA COURT OF APPEAL
Citation: ***Pettigrew v. Pettigrew***, 2006 NSCA 98

Date: 20060804
Docket: CA 258209
Registry: Halifax

Between:

Kenneth Arthur Pettigrew

Appellant

v.

Marianne Pettigrew

Respondent

Judge(s):	Saunders, Oland & Hamilton, JJ.A.
Appeal Heard:	May 10, 2006, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, as per reasons for judgment of Hamilton, J.A.; Saunders and Oland, JJ.A. concurring
Counsel:	David A. Grant, for the appellant H. Heidi Foshay Kimball, for the respondent

Reasons for judgment:

[1] The appellant, Kenneth Arthur Pettigrew, appealed the unreported August 8, 2005 decision and the orders of Justice Margaret J. Stewart granting the parties a divorce, awarding the respondent, Marianne Pettigrew, spousal support (including retroactive), dividing matrimonial assets including Mr. Pettigrew's military pension and awarding costs.

[2] An interim order for spousal support had been issued before the trial in May 2004, which required Mr. Pettigrew to pay $1,000 monthly.

[3] Relevant facts are set out in the decision:

> The parties, at age 18 married on June 1, 1974 and separated 29 years later on September 7, 2003. After 20 years with the Department of National Defence, Mr. Pettigrew, a vehicle mechanical maintenance officer retired early from the services in September 1994 and by 1996/97 commenced a 7 year employment period in Saudi Arabia working for General Motors and later General Dynamics, as supervisor of vehicle maintenance. By the end of August 2004, he left his employment, as attacks on civilians had escalated. Contact was made with his present Australian employer some two months earlier in June. After vacationing in September and October and being interviewed in November, he commenced work for LeBlanc Communications in January 2005 upon receipt of necessary documentation.
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> During Mr. Pettigrew's military employment, the family moved some six times. After the children attended school, Ms. Pettigrew who had babysat and sold crafts, held various clerical positions for periods lasting three months to three years. By the time they separated in September 2003, she had not been employed in the workforce outside the home, since their move in 1995 to Nova Scotia, having lived with Mr. Pettigrew in Saudi Arabia for three years from 1999-2002, having been extremely involved in the construction and landscaping of the garage/workshop with upstairs living accommodations for their yet to be built matrimonial home and having been a care giver/overseer of her ill mother for a year before her death in 2003. Over a 10 month period from March 2003 to December 2003, she managed to complete a 24 month correspondence occupational therapist assistant course. With no response to her resumes, in March 2004 she obtained employment at a new business called Art Can Gallery, working a 30 hour week in sales and now, also as manager.

[4] The judge found that Ms. Pettigrew's income was $20,141 plus interest on her investments from the sale of matrimonial assets. This amount included employment income and employment insurance of $11,772 and her half of the divided pension. The judge found Mr. Pettigrew's income to be $110,000. She found Ms. Pettigrew was entitled to spousal support on both a compensatory and non compensatory basis, increased the amount of ongoing spousal support to $2,900 per month, ordered the monthly payments from Mr. Pettigrew's half of the divided pension be paid to Ms. Pettigrew as payment towards her monthly spousal support, and awarded Ms. Pettigrew a lump sum of $30,000 as retroactive spousal support.

[5] Mr. Pettigrew argued that the judge erred in finding that Ms. Pettigrew was entitled to spousal support, and in the alternative, that she erred in awarding too high an amount of spousal support. He argued that the judge erred by ordering that the monthly pension payments from his half of the divided pension be paid to Ms. Pettigrew because it amounted to the judge transferring 100% of his pension to her. He argued the judge erred in awarding Ms. Pettigrew a lump sum award of retroactive spousal support.

[6] It is important to state at the outset that it is not this court's function to retry the case as several of the appellant's arguments suggest should be done. This court is not to overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence or unless the award is clearly wrong. This standard of review is set out in **Hickey v. Hickey**, [1999] 2 S.C.R. 518 at 525:

> When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
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> 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.
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> (Authorities deleted)
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> 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.

Entitlement to Spousal Support

[7] The essence of the appellant's argument on entitlement was that the judge erred in awarding Ms. Pettigrew any amount of spousal support because she had no need. He argued that her income as determined by the judge, $20,141, plus income that her half of the matrimonial assets should generate, made her self-sufficient because this provided her with the level of income that a person who married "someone in the military would expect." If this argument were accepted, the effect would be that Ms. Pettigrew would not share in Mr. Pettigrew's current income which is in the range it has been for the last seven years. Rather she would be relegated to a standard of living which the couple shared over seven years ago when Mr. Pettigrew was in the military.

[8] I do not accept this argument. On the contrary, I am satisfied the judge did not err in determining that Ms. Pettigrew was entitled to a standard of living reflective of the appellant's present income which he is able to earn partly as a result of the responsibilities assumed by the respondent during the marriage. The cases referred to by the judge in her reasons support this entitlement:

> . . . [**Moge v. Moge,** [1992] 3 S.C.R. 813] established as a general principle, that marriage should be regarded as a joint [endeavour], the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim

> to equal standards of living upon its [dissolution]. She is entitled to share equally with her husband in the income stream which represents his development during the marriage."
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> . . .
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> The Alberta Court of Appeal in **Corbeil v Corbeil** [2001] A.J. No 1144 (C.A.) at para. 47 stated:
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> The right to support and its quantum will vary with each circumstance and with the abilities of the spouses to support themselves. Support includes consideration of such matters as need and standard of living, always keeping in mind the objective that, where practical, each spouse should become independent. Accordingly, quantum and duration of support will vary with the circumstances. For instance, in a long-term marriage, the payor spouse may have a better ability to pay and the payee spouse a less realistic chance of self-sufficiency, leading to a greater chance of long-term or indefinite maintenance in larger amounts, always subject to review if there is a further change of circumstances. Self-support is also a relative term. A long-term spouse who has enjoyed a high standard of living because of a high earning spouse need not work and live at minimum wage. There is no magic formula. Rather, maintenance is a matter of judicial discretion, taking into consideration those matters set out in the Divorce Act.

[9] The appellant has not satisfied me that the judge erred in determining that Ms. Pettigrew was entitled to spousal support. She considered the objectives and factors set out in s.15.2(6) and (4) of the **Divorce Act,** 1985, c. 3 (2nd Supp.), including the factor of self sufficiency. She correctly indicated that no single objective is paramount: **Moge v. Moge**, supra.

[10] She noted the high standard of living enjoyed by the parties during the six years prior to separation after Mr. Pettigrew had retired from the military:

> Ms. Pettigrew is entitled to spousal support both on compensatory and non compensatory basis. Over 29 years of marriage, she, now age 50, had developed an economic dependency on Mr. Pettigrew arising out of the way of life and the allocation of the responsibilities accepted by the couple during a long marriage. Ms. Pettigrew followed the military career of her husband for 20 years before his retirement in 1994, which entailed numerous moves both inside and outside the country, raised two children, abided by company policy not to reside with her husband when required, spent three years from 1999-2002 of his 7 years employment stint in Saudi Arabia with him, worked diligently at overseeing and constructing the beginnings of their family retirement property and basically

> focussed her life on and around his careers and the children to her economic detriment. They enjoyed a very high standard of living for the last six years preceding separation, vacationing extensively. Ms. Pettigrew did not worry about making ends meet. She has experienced financial hardship as a result of the marriage breakdown. The marriage has had a negative effect on Ms. Pettigrew's ability to earn income. One needs only compare her situation with that of her husband. It is unrealistic to expect that Ms. Pettigrew could now obtain employment that would provide her with remuneration at the level her husband enjoyed both in Saudi Arabia and now in Australia so that she could maintain the lifestyle the couple had while they lived together. She is entitled to support ideally at a level that will maintain the standard of living the parties established during the course of the long marriage. The Supreme Court of Canada in **Moge** established as a general principle, that marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its [dissolution]. She is entitled to share equally with her husband in the income stream which represents his development during the marriage.

[11] She then reviewed the financial information provided by the parties and made findings as to their respective incomes. In determining Mr. Pettigrew's income of $110,000 the judge thoroughly reviewed his financial situation as best she could with the incomplete financial information before her. She was very critical of his financial disclosure:

> I have strong concerns that Mr. Pettigrew is not being forthright about investment income sources, given the fact that he received $53,000.00 from cashing in RRSP funds, some $29,536.00 from the sale of the shore property and for five months he had disposable monthly income of approximately $7,5000.00-$8,500.00, as per interim hearing he was only depositing $500.00 or $750.00 into the account and at the same time, was attending to $960.00 or so loan payments by continuing to deposit his then monthly pension income of $1,130.00 into their joint account. For the remaining six months, he paid $1,000.00 per month spousal support and continued with the loan payments. Certainly at the May hearing, only a month away form his decision to leave, he had $18,000.00 in a Kentville account and some $4,600.00 in uncashed cheques.

[12] The judge correctly noted that she was abiding by the direction of the court in **Boston v Boston,** [2001] 2 S.C.R. 413 and avoiding the issue of double recovery by considering the appellant's income exclusive of pension and the respondent's income including her portion of the divided pension.

[13] The judge's reasons on the issue of the respondent's entitlement to spousal support disclose no error in principle, significant misapprehension of the evidence and are not clearly wrong.

Amount of Support

[14] Mr. Pettigrew argued the judge erred in setting the amount of spousal support too high. He argued she erred by applying the spousal support guidelines rather than assessing the evidence herself and applying the law. He argued she failed to consider his ability to pay and misapprehended the evidence as to his income.

[15] I am satisfied the judge did not err in her determination of the amount of spousal support. Her decision makes it clear that she thoroughly assessed the evidence, including that concerning Mr. Pettigrew's ability to pay, and the applicable law in determining the amount. Determinations of credibility are squarely within her discretion. I am not satisfied she misapprehended the evidence as to the appellant's income.

[16] She only referred to the guidelines as a "cross check":

> Application of the 2005 SSAG is a useful method of cross checking against proposals by the parties and against the court's own assessment made from the existing case law.
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> . . .
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> Therefore on the [basis] of the evidence before me and having considered the relevant factors under the **Divorce Act**, along with cross checking for bench mark purposes with SSAG, I find spousal support of $2,900.00 per month all inclusive, commencing May 1, 2005 to be [a] reasonable amount of support.

[17] The amount she ordered was less than the amount indicated by the guidelines.

[18] The appellant has not satisfied me that the judge erred in law, misapprehended the evidence or was clearly wrong in determining that the appellant should pay spousal support in the amount of $2,900 per month.

Securing Payment of Spousal Support

[19] Mr. Pettigrew's pension was divided equally with Ms. Pettigrew. In addition the judge ordered that 100% of the monthly income from Mr. Pettigrew's remaining half of the pension be paid to Ms. Pettigrew:

> 2. (a) Kenneth Arthur Pettigrew shall pay spousal support to Marianne Pettigrew in the amount of $2,900.00 per month, payable on the first day of each month, and commencing May 1, 2005.
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> (b) Kenneth Arthur Pettigrew's entire monthly Department of National Defence military pension shall be payable to Marianne Pettigrew (currently $1,125.00 per month) as payment towards her spousal support of $2,900.00 per month. Said payments to commence May 1, 2005, insofar as the jurisdiction of the Court allows, or alternatively it shall be [garnisheed] to the extent allowed.

[20] In her decision she wrote:

> Given that Mr. Pettigrew resides in Australia, Mr. Pettigrew's entire monthly military pension is ordered to be made payable to Ms. Pettigrew as payment towards her monthly support, insofar as the jurisdiction of the court allows or alternatively it shall be [garnisheed] to the extent allowed.

[21] The appellant argued that the judge erred in ordering 100% of the monthly pension payments from the half of the pension he retained to be paid to Ms. Pettigrew as she did. The focus of his argument on this issue was that the judge in effect had improperly transferred the whole of his pension to the respondent, an unjustified unequal division of matrimonial property. In addition he argued that the flexibility the judge ordered was an error, i.e., that his pension income would be paid to the extent the jurisdiction of the court allowed, or alternatively it would be garnisheed to the extent allowed. He indicated however that if spousal support was ordered and unpaid, the Director of Maintenance Enforcement has the discretion under the **Maintenance Enforcement Act**, S.N.S. 1994-95, c.6, s.1 to attach his monthly pension entitlement so he was not concerned with the judge's reference to garnishment.

[22] These arguments are without merit. Reading the judge's reasons as a whole and the orders issued pursuant to it, it is clear that she was not ordering that 100% of Mr. Pettigrew's pension be transferred to Ms. Pettigrew. In one order she

ordered 50% of his pension divided with Ms. Pettigrew. In the second order, she ordered that Mr. Pettigrew's monthly pension payments be paid to Ms. Pettigrew "as payment towards her spousal support of $2,900.00 per month. Said payments to commence May 1, 2005, insofar as the jurisdiction of the Court allows, or alternatively it shall be [garnisheed] to the extent allowed."

[23] Section 15.2(1) of the **Divorce Act,** R.S., 1985, c. 3 (2nd Supp.) authorizes an order which requires a spouse to secure payment of spousal support:

> Spousal support order
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> 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse 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 support of the other spouse.

[24] The judge's decision makes it clear she was concerned about how Ms. Pettigrew could enforce payment of the spousal support given that Mr. Pettigrew was living and working in Australia and that his only remaining Canadian asset was his pension plan. With this in mind she ordered the monthly pension payments from Mr. Pettigrew's remaining half of the pension to be paid to Ms. Pettigrew to the extent possible.

[25] The judge did not receive any evidence or argument concerning the provisions of the appellant's pension plan. In particular, there was no indication of any constraint on the amount that may be paid from the remaining half of the plan held by the appellant. See, for example, **Hooper v. Hooper** (2002), 213 D.L.R. (4th) 548, 159 O.A.C. Having decided that there was a need to secure the payment of spousal support, knowing there was only one asset of the appellant in Canada and in the absence of evidence or argument as to any restriction that may apply to the pension, she ordered that the monthly pension income from the appellant's remaining half of the pension be used for this purpose to the extent possible. In light of the evidence and argument presented to her, she did not make a reversible order in ordering as she did.

[26] I would dismiss this ground of appeal.

Lump Sum Award of Retroactive Spousal Support

[27] Finally, the appellant argued that the judge erred in awarding $30,000 to the respondent as retroactive spousal support. He conceded that the judge had jurisdiction to award retroactive spousal support but argued she should have shown deference to the interim order.

[28] The judge correctly stated that she had jurisdiction to make a lump sum retroactive award of spousal support despite the interim order for spousal support; **Beaver v. Beaver** [2002] N.S.J. No. 301, ¶ 3; **White v. White**, [1999] N.J. No. 72 (C.A.) at ¶ 18, or **Elliot v. Elliot** (1994), 15 O.R. (3d) 265 (C.A.) (leave to appeal to S.C.C. refused at [1993] S.C.C.A. No. 522) at ¶ 21).

[29] The law provides that making an order for retroactive spousal support in a case where an interim order has been made is the exception rather than the rule. **Hauff v Hauff** (1994), 95 Man. R. (2d) 83; **Elliott v. Elliott,** supra. In her decision the judge considered several factors supporting her conclusion that such an award was appropriate on the facts of this case. She noted that Ms. Pettigrew had to respond to her financial circumstances prior to trial by encroaching on capital, and that she had not unduly delayed her application for interim support, having made it within six months of separation. She noted:

> . . . Mr. Pettigrew did not contest that Ms. Pettigrew made requests for additional financial help; but, rather than responding waited until trial to elaborate and advise that had she used the over draft on the line of credit, he would have paid it and as he advised at the interim hearing, he was always monitoring the balance, making sure it had a credit balance so she could pay her expenses. He determined her needs were being meet. I am satisfied Ms. Pettigrew, given her exchanges with Mr. Pettigrew was left with more than a very distinct impression that there was no such flexibility and that an amount had been determined by Mr. Pettigrew and that savings were to be used with no suggestion it would be adjusted at a later date.

[30] The judge found fault with Mr. Pettigrew's failure to make adequate and timely disclosure of his financial particulars and noted her "strong concerns that Mr. Pettigrew [was] not being forthright about investment income sources. . . ." She found that Mr. Pettigrew had the ability to pay support. She summarized her reasons for the lump sum retroactive award of spousal support thus:

> Considering Mr. Pettigrew's ability to pay, the pattern of account deposits both pre and post separation, her economic dependency on same, her immediate efforts to address the issue of insufficient funds through written and oral requests, his reluctance to provide full financial particulars when requested and when he retained counsel, his failure to recognize any need for support beyond basics, her requirement to encroach on capital, the interim order only addressing the short term, I am satisfied these are appropriate circumstances to make an award of retroactive support.

[31] The judge took into account factors in regard to each of the parties including means, need, withholding information and inattentiveness to need in granting the lump sum retroactive award of spousal support that she did. The appellant has not satisfied me she erred in doing so.

[32] Accordingly, I would dismiss the appeal and order the appellant to pay costs to the respondent in the amount of $1,500 plus disbursements as agreed or taxed.

Hamilton, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.