Date: 20020620
Docket: CA 172939

NOVA SCOTIA COURT OF APPEAL
[Cite as: *Smith v. Smith, 2002 NSCA 78***]**

Bateman, Chipman and Flinn, JJ.A.

BETWEEN:

ELIZABETH FLORENCE SMITH

Appellant

- and -

DOUGLAS EDWARD SMITH

Respondent

REASONS FOR JUDGMENT

Counsel:	Richard G. Arab for the appellant Michele Cleary for the respondent
Appeal Heard:	May 14, 2002
Judgment Delivered:	June 20, 2002
THE COURT:	Appeal allowed in part per reasons for judgment of Flinn, J.A.; Chipman and Bateman, JJ.A. concurring.

FLINN, J.A.:

[1] The appellant and the respondent were divorced 30 years ago, in 1972. The Decree Nisi provided that the appellant have custody of the four children of the marriage, and that the respondent pay to the appellant, for the support and maintenance of herself and the infant children, $60.00 per week commencing March 17, 1972. The respondent has never made any of the payments provided for in the Decree Nisi.

[2] In 1976 the appellant obtained a judgment against the respondent, for the arrears of maintenance payments to that date, in the amount of $12,240.00. The judgment was registered in the Registry of Deeds for the County of Halifax. Ten years later, in 1986, the judgment was registered in the Registry of Deeds for the County of Guysborough because the appellant believed that the respondent owned real property in that county.

[3] On May 7, 1978 the appellant remarried, and her second husband adopted and supported three of the four children. The fourth child, by this time, was living on her own.

[4] In November 1998 the appellant made an application in the Supreme Court of Nova Scotia for an order, *inter alia*, fixing the arrears of maintenance owing from the respondent to the appellant for the period from the date of the Decree Nisi (March 17, 1972) to the date of the appellant's marriage to her second husband (May 7, 1978) together with interest to date.

[5] The chambers judge, Chief Justice Kennedy, dismissed the appellant's application.

[6] With respect to the arrears of maintenance from the date of the Decree Nisi (March 17, 1972) to the date of the judgment which the appellant had obtained against the respondent (February 24, 1976) the chambers judge said the following:

> I have no jurisdiction to revisit the fixing of arrears that were subject of the February 24, 1976 judgment. Those arrears have been determined by this Court in 1976. Judgment was granted at that time. Any attempt to execute on that judgment at this late date will have to be the subject of another application dealing with the specific issues involved.

[7] We are not persuaded that the chambers judge was wrong is so concluding.

[8] With respect to the arrears of maintenance, for the 27 l/3 month period, from the date of the judgment (February 24, 1976) to the date of the appellant's remarriage (May 7, 1978), the chambers judge referred to the appellant's

delay in bringing this application as "extraordinary. It is a delay of 22 - 24 years."

[9] The chambers judge then said:

> It is distressing to contemplate that Douglas Smith, who told the divorce hearing judge that he did not intend to pay maintenance and did not do so, should escape the sanction of this Court.
>
> Had the applicant made a real and consistent effort to collect, he would not have done so.
> This Court though, now is asked to fix arrears that no longer can be reasonably collected. (Emphasis added)

[10] The chambers judge then concluded:

> Despite the temptation to punish the respondent for his bold and persistent defiance of a court order, the practicality of this situation is that the applicant should have been able to successfully recover on the order years ago, within a reasonable time frame. Her failure to do so is not satisfactorily explained by the explanation given. Twenty-two years in the specific, is too late.

[11] In analyzing the decision of the chambers judge, with respect to this second aspect of the appellant's claim for arrears, the chambers judge was, obviously, distressed about permitting the respondent to escape liability for these arrears.

[12] The appellant testified that she was unable to make consistent and concerted efforts to enforce maintenance payments because she was intimidated by threats of bodily harm, made by the respondent, should she attempt to collect arrears. The respondent was a severe alcoholic during the marriage and for several years thereafter. Alcoholism was the cause of him losing his job at the Dockyard, and he has been, since 1985, on disability pension. The chambers judge accepted the appellant's evidence that the respondent did make threats against her as alleged.

[13] In that context, and in the context of the chambers judge referring to the stance which the respondent took before the divorce hearing judge — that he did not intend to pay maintenance — the chambers judge said "This Court though, now is asked to fix arrears that can no longer be reasonably collected."

[14] There was no finding by the chambers judge that the respondent did not have the ability to pay. It was clear from the evidence before the chambers judge that at the time of the hearing the respondent had a monthly pension

income of $1427.76. Further, counsel for the appellant made it clear to the chambers judge that the appellant intended to pursue an interest which the appellant alleges that the respondent has in real property now registered in the name of a female person with whom the respondent has been living for the past 25 years. On the evidence it was established that the respondent has the ability to pay something.

[15] Further, in his concluding paragraph, the chambers judge says that 22 years in the specific case is too late. While there is no doubt that 22 years is a long time for a claim to be lying dormant, the chambers judge does not say why, in this case, it was too late for the appellant to advance her claim. That is particularly relevant because:

(1) there was no evidence before the chambers judge concerning detrimental reliance. There was no evidence from the respondent that he relied to his detriment on the fact that he would not be called upon to account for these maintenance arrears;

(2) part of this claim relates to child maintenance, and the chambers judge dismissed the appellant's claim, as being too late, notwithstanding the comment in his decision that "I am satisfied that the defence of laches is not applicable to child maintenance cases."; and

(3) as I have noted, the chambers judge accepted the appellant's evidence concerning the threats made by the respondent should the appellant attempt to collect the arrears.

[16] Counsel for the respondent agreed at the hearing of this appeal that it was not an unfair reading of the decision of the chambers judge, as a whole, that had the chambers judge felt there was a reasonable chance that the appellant might collect some of this money, he would have made an order with respect to the arrears for the years 1976 to 1978.

[17] In my respectful opinion the chambers judge erred, in the circumstances of this case, in relying upon the fact that the arrears "no longer can be reasonably collected."

[18] Even though the appellant's claim for these maintenance arrears has been dormant for 22 years, there is in my view no inequity or injustice to the respondent if he is ordered to account for these arrears. The factors in this case which compel me to that conclusion are:

1. the stance which the respondent took at his divorce hearing that he would not pay maintenance;

2. the threats which the respondent made to the appellant if she attempted to collect arrears from him;

3. the evidence before the chambers judge that the respondent has the ability to pay something; and

4. the fact that the respondent led no evidence that he relied to his detriment on the fact that he would not be called upon to account for these arrears.

[19] I would, therefore, vary the decision and order of the chambers judge. I would order that the respondent pay to the appellant the sum of $7080.00 being arrears of maintenance for the 27 l/3 month period (rounded to 118 weeks) from February 24, 1976 to May 7, 1978 at the rate of $60.00 per week.

[20] Counsel for the appellant has requested pre-judgment interest, for the pre-judgment interest period, at a rate equal to the five per cent rate for post-judgment interest. While I have decided in these reasons that the appellant's claim for maintenance arrears is not defeated by laches, clearly, the appellant has been responsible, in part, for undue delay in advancing her claim. In such circumstances the court may, in its discretion, decline to award pre-judgment interest, or may reduce the rate of pre-judgment interest, or the period for which it is awarded (see s. 41(k)(iii) *Judicature Act*, R.S.N.S. 1989, c. 240). In this case I would exercise my discretion and award the appellant pre-judgment interest on $7,080.00 at 2.5% (not compounded) for the period from May 7, 1978 to the date of the order giving effect to these reasons.

[21] I would also set aside the order of the chambers judge requiring the appellant to pay to the respondent the costs of the hearing before him, and I would order the respondent to pay to the appellant her costs both here and below which I would fix at $2,000.00 plus disbursements, as taxed or agreed.

Flinn, J.A.

Concurred in:

Chipman, J.A.

Bateman, J.A.