IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Auclair v. Auclair, 2005 NSSC 261

Date: 20050930
Docket: 1201-46777
Registry: Halifax

Between:

Joseph Alexander Luc Auclair

Applicant/Respondent

v.

Linda Maureen Mary Auclair

Respondent/Petitioner

Judge: The Honourable Justice Moira C. Legere-Sers

Heard: September 16, 2005, in Halifax, Nova Scotia

Counsel: Kim A. Johnson, for the Applicant/Respondent
J. Brian Church, for the Respondent/Applicant

By the Court:

[1] The Applicant/Respondent, Joseph Auclair seeks to vary the Corollary Relief Judgement dated February 9, 1996. He seeks to terminate spousal and child support.

[2] The parties were married on May 14, 1976, having lived together from the summer of 1974 to the date of marriage. The parties separated in August, 1992. The Divorce decision was February 20, 1995. The Corollary Relief Judgment was entered into incorporating this decision on February 9, 1996. The period of cohabitation was approximately 18 years.

[3] The Respondent, Linda Auclair, entered the marriage with two children, subsequently adopted by Mr. Auclair. The parties had two additional children. At the time of the Divorce the two dependant children were 19 and 16 years old respectively. While the oldest child was working, she anticipated attending school in the future. There is a T2202A filed as an attachment for 2002 regarding the oldest child's enrollment in a Bachelor of Education program.

[4] The Corollary Relief Judgment granted the mother custody of the children with access to the Applicant father. He paid support from the date of separation. Subsequently, in the decision of February 20, 1995, the Court ordered Mr. Auclair to pay $1,300 per month (a combination of child and spousal support) commencing March, 1995.

[5] Mr. Auclair continued to pay this amount with no request for reductions up to and including December, 2004. Approximately seven years earlier, the oldest child moved out of the matrimonial home. In August, 2004, the youngest child moved out. He continued to pay child and spousal support at a time when the oldest child was 29 and the youngest was 25.

[6] This application was commenced on February 10, 2005. The triggering event for this application was his retirement. He lived up to and exceeded his obligations regarding child support.

[7] The Corollary Relief Judgment also required Mr. Auclair to maintain medical insurance coverage to the extent possible. This coverage is no longer in force.

[8] The Respondent also obtained one-half of the Applicant's pension and the right to one-half of his severance pay net of tax for the years of cohabitation commencing July 1, 1974 to and including August 15, 1992. The pension has been divided. The severance pay has not yet been calculated or paid.

[9] The Applicant was required to take out insurance for the life of the Court Order. Specifically, the Learned Trial Judge required the insurance clause to remain in effect the lesser of 10 years or so long as there is an Order in place.

[10] Each party received the equity after the disbursement of the proceeds of the matrimonial home. Each received net $10,000.

[11] The only clause in the Corollary Relief Judgment that looks to the issue of duration of support is the insurance clause. The Petitioner had requested a permanent spousal support order. The Learned Trial Judge responded by noting that the insurance would be in effect *the lesser of 10 years or so long as there is an order in place,* thereby implicitly contemplating, at the very least, a review, if not a termination of child and/or spousal support.

[12] Ten years from the date of the February, 1995 decision would be February, 2005. Ten years from the date of the Corollary Relief Judgment would be February, 2006. If the Learned Trial Judge had been projecting forward, at these dates the children would be 29 and 26 years old respectively.

[13] This is the second relationship producing children for the Respondent. She was born on July 19, 1947 and was 29 at the date of this marriage. She came into the marriage with two children. The husband was 24. At the date of separation, the wife was 45 and the husband was 40.

[14] At Divorce, in 1995 the husband declared earnings of $46,500. The Respondent worked for her brother in a pizza shop for approximately four years prior to separation. She declared earnings of $12,500. She had no medical health plan.

[15] I have no information as to her employment prior to the marriage in 1976 when she was 29. She acknowledges a grade 10 education and in her younger years, pre marriage, took some typing courses.

[16] The Respondent also commenced a common-law relationship mid 2003 with her current partner.

[17] In 1994 her earnings were 15,052. In 1992 the file indicates she worked for her brother, was laid off and was earning EI. After separation and for the last four years she has relied on spousal support and in the last two years the combination of spousal support, one-half her pension entitlement and her common-law partner to support her.

[18] For the 2004 year she shows earnings of $983 from a wholesale outlet for a total income including child support of $20,677. Her partner had a total income of $35,412.51 of which $20,810.64 was from employment. Their combined 2004 income was $56,089.

[19] In 2003 and 2002 the Respondent shows no earnings from employment. In 2003 her common-law partner had income of $18,163.35 of which $4,717 was earned income from employment.

[20] In 2001 the Applicant's earnings were $61,091; his 2002 earnings were $56,428; in 2003, $58,677; and in 2004, $59,534.

[21] For 2004 the Applicant had income of $59,534 reduced by spousal support $43,934, plus his wife's income of $32,304, for a total household income of $76,238.

[22] This year 2005, both he and his wife are living on retirement income. Currently, his income reduced by retirement and the division of pension credits is $32,208. His spouse earns pension income of $17,937.

Retraining :

[23] The Respondent has not provided evidence of any retraining efforts from 1992 to 2005 nor any applications for employment other than her work with her brother at the pizza store. There is income for a wholesaler in 2004. She admits to no job search or retraining whatsoever. She appears to be content to live in her current situation being substantial supported by both her former spouse and her current spouse.

[24] In her direct testimony she advises that last year she developed arthritis. Her family doctor referred her to a specialist. She admits that this ailment did not exist during the course of the marital relationship. Subsequently, in re-direct, she advises that her former husband knew that she had arthritis during the marital relationship. It appears this condition did not exhibit itself until well after the Divorce.

[25] The Respondent also admitted that she has twice applied to the Canada Pension Plan for a determination of disability and has been denied. I have no documentation supporting these applications nor the dismissals. She is making a further application to CPP. Attached to her affidavit is an almost illegible photocopy of an attending physician's statement apparently submitted for the purposes of proving to Canada Pension that she is unable to work. She advises that there are two other letters attached to her application to CPP (not filed nor tendered as exhibits in this proceeding) to bolster her claim with Canada Pension to received a disability payment. She has been advised to wait for a response during the three-month review process.

[26] The Respondent has other medical difficulties resulting in monthly cash expenditures. I have no medical documentation to support these but do not have difficulty with accepting her medical expenses.

[27] The Applicant has retired from the Armed Forces. His pension has been divided in half.

[28] He is remarried and his wife is scheduled to retire in June, 2005.

[29] While he continued to contribute the $1,300 to the Respondent up until December, 2004, he terminated the payments effective January, 2005. He did not make application prior to that time to reduce the payments and he did not reduce

the payments unilaterally nor make application to reduce the payments, when each of their two remaining dependant children reached independence in previous years for the oldest joint child and August, 2004 for the youngest child.

[30] This is the first application to vary. The Court must be satisfied that there is a change in the condition, means, needs or other circumstances of either former spouse. *(The Divorce Act, s. 17(4.1)*)

[31] There is a global change in circumstances which includes:

1. The children are no longer dependant;
2. The Applicant has retired and his income is reduced;
3. The Respondent has received one-half of his pension and will receive one half of his net severance pay;
4. The Applicant has remarried and his partner is retiring in June;
5. The Respondent is apparently leaving work for medical reasons recently incurred although not documented sufficiently in the evidence;
6. The Respondent has been living common-law since 2003.

[32] This is not a situation where the wife's remarriage or re-partnering is the sole change.

[33] I am satisfied that the Respondent has done nothing to retrain. I do not have evidence as to reasonable expectations should she attempt to retrain. On the issue of self-sufficiency, she has maintained the same job with her brother in the pizza store up until it was sold by her brother. There is little evidence of her employment save for a T-4 for a wholesaler in her 2004 income.

[34] I do not have any evidence of her pre-separation earnings, sufficient evidence of her premarital earnings, her skills, her attempts to retrain, her capabilities, in order to compare what one could reasonably expect of this Respondent in her particular circumstances.

[35] The Respondent also has a right to seek maintenance from her current partner should there be a dissolution of that partnership.

[36] I have insufficient evidence that the Respondent could be determined to be disabled and unable to obtain supplementary income from any source to assist her in addressing her living expenses. It would be incorrect of me to conclude that arthritis, on the face of it, causes total disability.

[37] This may be an issue that can be reviewed if she successfully convinces the Canada Pension Plan that she is disabled. They have more evidence of her alleged disability than do I.

[38] The Respondent has not provided evidence of any attempts at increasing her income beyond her employment with her brother for the 13 years following the separation.

[39] The alleged disability, if it exists, cannot be said to arise from the marital situation or during the marital situation. In fact, if I am to accept her evidence in direct, it came lately.

[40] The Respondent cannot claim her economic situation is solely as a result of her marriage to the Applicant. This is a second marriage which produced two of the four children.

[41] Some dependancy would arise out of the roles she assumed with the two children of her second union with the Applicant. There are other factors, including her traditional role for 18 years, that contributed to her economic situation. If being a homemaker can be said to contribute to dependancy, her homemaking responsibilities arose with the two children born of a previous union.

[42] Presumably, that was dealt with by the Learned Trial Judge at Divorce resulting in a spousal support award.

[43] This is not a situation where a court may be reluctant to interfere with the compensation structure inextricably tied to the total package on Divorce. There appears to be an admission from counsel that a reduction in spousal support is in order. The Respondent requests a reduction that produces an order with no termination.

[44] The Applicant indicates in his Affidavit evidence he was unaware that the Respondent continued to work for two years and lived in a common-law relationship.

[45] At Divorce, the husband was earning $46,500; the wife was earning $12,500. The husband was ordered to pay $15,600 over the course of the year. At the time she still had two dependant children, 16 and 19 years old.

[46] The wife is now 58 years old and the husband is 53 years old. The wife is partnered with an individual who is 63 years old, in the drywall business. He receives employment income, CPP benefits, other pensions and monies from his retirement income fund. In 2003 his line 150 income was $18,163.35. Of that, $4,717.36 was from employment income. In 2004 his total employment income was $20,810.64. Together with his CPP, other pensions and employment insurance he earned $35,412.51. His annual income varies with a base amount of pension income supplemented by any employment he obtains.

[47] Mr. Melanson was not present for the purposes of cross-examination nor to give direct testimony. Any speculation about his future income cannot be relied on in making my determination. I do note he is, however, 63 years old and approaching retirement himself. His retirement income without employment income in the year 2003 was a base of $13,445.99. Including EI insurance in 2004, his base income was $14,601.87 without his employment income. Without the employment income, of course, he likely would not receive EI.

[48] Mr. Auclair's income was reduced by $568.74 per month to account for his former spouse's share. When she received one-half of the pension, she invested in a mutual fund which she believes contains $63,000 and withdraws $316 per month to supplement her income.

[49] I have reviewed the expenses of both parties. Ms. Auclair's total expenditures add up to $2,373.08 a month. This includes $100 a month for vacations and $190 a month for entertainment. Mr. Auclair's share of expenses in his household is $2,400. He absorbs 60 percent, given the percentage salary in his household. In Ms. Auclair's household, although Mr. Melanson's income was $35,000 last year with her income considerably less, she testified she split the expenses 50/50.

[50] Mr. Auclair lives in a home he purchased with his wife. Ms. Auclair lives in the basement apartment in her adult child's home. She indicates that for the basement apartment she and her partner pay $300 in rent each.

[51] Mr. Auclair has more debt than Ms. Auclair including a mortgage on his home valued at $140,000 for $30,755; a credit line of $44,500; and numerous credit cards totalling approximately $2,200. The only debt listed for Ms. Auclair is a $300 debt for back payments on income tax. I do not have a Statement of Property for Ms. Auclair.

[52] In 2002, Ms. Auclair received from her Registered Retirement Income fund, $4,648.61 and $15,600 in alimony paid by Mr. Auclair for a total income of $20,248.61.

[53] In 2002, aside from her support payments, she again received $4,648 from her investment fund for a total of $20,249. In 2003, the total was $19,519 with no reported earnings. In 2004, there were T-4 earnings of $983 with total T-4 earnings of $20,677.

[54] Having chosen not to work towards self sufficiency and leaving her employment with her brother which was supplementary, at best, Ms. Auclair will receive an income from her trust, the division of pension and such other income as this Court orders. She may ultimately receive some income from Canada Pension. She seeks to have the support continued, acknowledging it must be reduced. She seeks retroactive support to cover the termination of spousal support from January, 2005 forward.

Considerations

[55] Section 15.2 (4) and (6) directs the court in these matters. At the Divorce hearing I am certain that the Learned Trial Judge considered section 15.1(5) in awarding spousal and child support. With that as a foundation, I review the objectives of a spousal award.

[56] The economic advantages in this marriage were fairly significant to the Respondent. The Applicant adopted her first two children and supported his

expanded family of six. The parties don't disagree that the Respondent assumed a traditional role.

[57] She was already apparently out of the marketplace and clearly has not contemplated seriously reentering the marketplace on her Divorce nor when the children attained an independence that did not require her at home. I wonder about the notion this second marriage economically disadvantaged the Respondent. If it did, it was not the primary cause for her disadvantage. It may simply have contributed to the disadvantage.

[58] As to 15.1(6)(d), while the original award contemplated a variation or a review (reference the security for maintenance clause), the Respondent has not evidenced any intent to become or move towards self sufficiency. On the contrary, since separation her primary source of income has been the spousal support award, now augmented by her share of his military pension for the period of their cohabitation.

[59] Their marriage, which included the adoption of her two children and two additional children, his as the primary provider and hers as the homemaker, did create an extended period of time when she removed herself from the market and preformed the role of primary caregiver. There is a disadvantage associated with that. This disadvantage could have been mitigated considerably had she assumed responsibility for attempting at least to move towards self sufficiency as much as can be reasonably expected, given her level of education and her marketable skills.

[60] In this situation, the Applicant cannot further address the economic disadvantages resulting form the marriage. He has been generous. He has not sought immediate reduction when the oldest child became independent. He did not seek immediate termination when the second child left in August, 2004.

[61] The economic hardship that exists now, 13 years later, arises more from the Respondent's total life circumstances, her early training or lack thereof, her choices after the Divorce and for the intervening 13 years.

[62] Her marketable skills include child care, retail, and given her employment experience that would provide only supplementary income. She is fortunate to have supplementary support with her common law partner.

[63] In weighing the income sources for the Respondent and measuring that in relation to her need, I am hampered by the fact that the Respondent has decided not to retrain nor to find alternate employment even to supplement her income. Self sufficiency from her earnings may not be possible without her current partner's support and perhaps CPP.

[64] At age 58 it is now difficult to imagine how much improvement in her income the Respondent can expect. It is still possible to supplement her income and thus assist in responding to her own needs. To a certain extent her income situation is self imposed.

[65] This is a medium length marriage in the mid, approaching long term range. The Respondent was already 29 with children at the commencement, having already made choices independent of the Applicant as it regards self sufficiency. She was 49 at the date of separation.

[66] The Respondent's budget is not overly excessive save for entertainment, holidays, gifts, et cetera. However, with or without spousal support at the $1,300 level she lives well above her means. The Applicant could not meet her financial needs with her current budget unless she obtained employment or had some other independent source of income.

[67] He certainly cannot meet her needs on his retirement.

[68] The future holds a number of financial possibilities. The Respondent may soon qualify for OAS, CPP or there is some hope she may qualify on her third application for CPP Disability. That will supplement her income. If she does not qualify for total disability, she ought to look to supplementing her income as much as possible.

[69] The Applicant is only 53 years of age. There is no suggestion he is unable to work and supplement his income. There is not much leeway in his budget.

[70] I conclude that the Learned Trial Judge contemplated the possibility of a termination of support as one option.

[71] The facts of the case at this time suggest the need for a significant reduction in spousal support and a review to allow the Respondent to address the possibility of income from other sources. The Respondent clearly has a need for support even though it is not entirely connected to the marriage.

[72] There was one final argument I will address. The facts of this case recognize the Respondent's limited circumstances which arise in part from factors outside of her relationship to the Applicant. It was suggested that it would be better to seek spousal support to address the deficiencies in the Respondent's financial circumstances rather than seek to have the government supplement her in accordance with a social assistance network.

[73] First, I don't know whether she would qualify. Second, it seems this advocates more on behalf of the collective interest, the government interest than for individual autonomy. It adopts a deep pockets approach which assumes that a payee spouse ought to seek compensation from former spouses in preference to government support.

[74] The right to support ought to arise from the implicit or explicit contract between two independent adults and the responsibilities that arise from that as prescribed by law.

[75] Protecting the public purse by seeking compensation from former partners does not promote autonomy in adult financial relationships. This argument projects the interests of a third party, the government or the collective, into a complex mix of rights and responsibilities between common-law or marriage partners without adequate foundation or justification.

[76] There is precedent for calling parents to supplement government support of adult dependant children. I have not been provided case law on the subject of calling former partners, no matter where in line they stand in sequence, to support former spouses as a preference to governmental support without adequate evidentiary foundation as to how that obligation arises. If this was intended to be a statement of public policy, I reject the validity of that argument in this case. The obligations of partners must arise from their circumstances in accordance with the law.

Conclusion

[77] The Applicant testified that his pension has been reduced by $568.74 a month. The Respondent's T-4 indicates she is receiving $4,094 from her invested portion of the pension. I have no evidence as to explain why she only receives $341 a month and whether there are other options available to her.

[78] She has now received one half of the pension related to their cohabitation and now will continue to receive spousal support pending further review. If she has the option of increasing her monthly payment and/or supplementing her income either by way of income or disability insurance she ought to consult with her financial advisor.

[79] She shall provide immediate notice to the Applicant should she receive other income.

[80] The Applicant paid child support longer than required without deduction. I decline to order retroactive spousal support before July, 2005. The effective date of this order is July 1, 2005.

[81] The Applicant ceased to pay when he started receiving his pension, reduced as it was by the Respondent's share. He made application to the court February 10, 2005. Child support should have ceased by no later than August, 2004. The Respondent continued to receive support at a level that contemplated dependant children.

[82] While the court does not sanction unilateral action by a payor spouse, there is an issue of fairness here that requires one acknowledge the overpayment of support, the lack of a voluntary reduction in child and spousal support, a reasonable assumption that the divison of pension funds may terminate a spousal support award in the proper circumstances. The circumstances of the Respodnent are aggravated by her own historical lack of earnings and failure to pursue self sufficiency.

[83] I am concerned about topping up a division of pension with a spousal support award where the only source of income from the Application is the

pension. However, it may be premature to consider termination without evidence of other income.

[84] The Applicant shall pay $300 per month effective July 1, 2005 for the support of the Respondent. The parties shall exchange income tax returns each June 1st. The Respondent will advise the Applicant within 48 hours of receipt of any information as to the success of her disability claim. If successful, she shall advise of the income she will receive from Canada Pension. If not, she will advise on a half yearly basis of her efforts to find employment.

[85] Upon receipt of any other government funds OAS, CPP the Respondent shall advise the Applicant and either party is entitled to a review.

[86] On a review the Respondent shall be required to show her efforts at supplementary employment, her household income and her statement of expenses and statement of property.

[87] Counsel for the Applicant shall draft the order.

J.