IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *.L.L.L. v. L.A.B.*, 2007 NSSC 328

Date: 20071114
Docket: 1201-50331, SFHD-45078
Registry: Halifax

Between:

L. (L. L.)

Petitioner/Respondent

v.

B. (L. A.)

Respondent/Applicant

Judge: The Honourable Justice Beryl MacDonald

Heard: September 18, 19 and 20, 2007, in Halifax, Nova Scotia

Written Decision: November 14, 2007

Counsel: Lynn Reierson, for the Petitioner/Respondent
Ron Pizzo, for the Respondent/Applicant

By the Court:

[1] To protect the parties' privacy I have called the Applicant in this proceeding, the Father, and the Respondent, the Mother.

[2] This is a proceeding commenced by the Father in which he is seeking a variation to the Corollary Relief Judgment granted by Associate Chief Justice Michael Mac Donald, as he then was, (referred to as A.C. J. Mac Donald in the remainder of

this decision) following a protracted hearing about issues very similar to those before me in this application. The Father requests a termination of spousal support and a change to his child support payment obligations. The foundation for his request are the following:

- Two of the children are now attending university.
- One child remains in private school and it is necessary that she continue to attend.
- The Mother has received spousal support for 8 years and should be self supporting.
- He cannot afford to pay for the children's expenses without financial relief.

[3] The Corollary Relief Judgment is dated May 4, 2000. The Father's annual income at the time was determined to be $223,000.00 and the Mother's $10,500.00. The Father was to pay $3,245.00 per month for child support and $2,100.00 per month for spousal support, both to commence September 1, 1999. When A.C.J. Mac Donald made his decision none of the children were in university, the husband had just established his professional practice, husband had a substantial debt load and it was obvious the parties had lived well beyond their means for years primarily due to financial support received by the Father from his father.

[4] The parties oldest son is now 19 years of age. He attended Carleton University in Ottawa for the 2006/2007 term. He has chosen to attend Dalhousie University beginning September 2007. He is living with the Mother.

[5] The parties have a daughter who is 18 years of age. She is attending Memorial University in Newfoundland.

[6] The parties' youngest daughter is 16 years of age and she is attending private school. When the parties separated all three children were attending this private school. The Mother expected this to continue and expected the Father to pay for that expense. In his decision A.C. J. Mac Donald stated:

> [41] .....If the parties could reasonably afford it, I would very much like to see them continue there (private school). However, in light of their present dire financial circumstances (resulting from their enormous debt), I cannot justify this extraordinary expenditure of approximately $15,000.00 annually. It is simply a luxury that the parties cannot afford at this time. This cannot be considered a reasonable expense in the circumstance.

[7] The Mother chose, after this decision, to continue the children's enrollment in private school. She did so with the financial assistance of her father who is now deceased. Once his financial support ended she found herself unable to pay the private school fee and her account went into arrears. As a result the school requested and had an expectation that the Father would pay. He did so but he did arrange for the school to collect the fees from the Mother so he could be repaid. She was sued by the school in Small Claims Court. Both of these decisions involved a manipulation of the other parent and they now, as have their children, suffered the consequences. The Mother

knew or should have known that she would not be able to sustain the long term enrollment of these children in private school. Both she and the Father should have made arrangements, after the decision of A.C. J. Mac Donald, when the school term ended, to ease the transition of their children into public school. This did not happen and the inevitable occurred. The Father was called upon to pay private school fees. He attempted to enforce that financial responsibility upon the Mother. Each now is resentful of the other and this is coloring their relationship with their children. The children appear to "blame" their Father for their financial hardship.

[8] Fortunately neither party is attempting to undue the past. Both agree there has been a material change sufficient to justify a variation of the Corollary Relief Judgment. Neither is seeking a retroactive calculation of child support. Both have recognized that to remove their youngest child from her school would cause her mental distress and this is not in her best interest. The question is can these parties afford to keep her in private school and contribute to the older children's university expenses?

[9] The parties' older children deserve to be educated. Normally they would contribute toward their education and their parents would only be called upon to make up the difference. Case law across the country supports the proposition that children should make reasonable contributions towards their post-secondary

educational expenses. This requires an examination of the child's ability to do so, the source from which the contribution is to be made and the amount to be contributed. The decisions do not reflect any unanimity about whether a child must apply for a student loan and thus be supported by his or her parent only to the extent of his or her " financial deficit" after application of the amount received from the loan program. The differences appear to arise as a result of the "means of the parents". Children of affluent parents are generally not expected to incur debt in their pursuit of post-secondary education. Children of most middle class and other families generally must incur debt. Their parents do not have the means to personally finance their children's education. Justice Rogers said in *R.J.C. v. R.J.J. (2006) B.C.S.C. 1422 (S.C.) at para 20:*

> Middle class parents are obligated to make some sacrifice to put their children through school and through university if that is the children's wish. This is not an obligation that requires the parents to risk foreclosure by taking on more debt than they could ever possibly repay or to sell capital assets if their estates are modest but it is an obligation that requires them to make some reasonable adjustments in their lifestyle. So, for example, if it means that they can contribute to their child's post -secondary tuition by not taking a vacation, or by not buying an expensive recreational vehicle, or by simply making some reasonable reduction in their luxury consumption, then those are sacrifices they could and should make. It is wholly unreasonable for a separated spouse to assert that her or she should be allowed to pander to a personal lifestyle preference at the cost of their child's university education. That said, there are, of course, circumstances in which it is patent that parents of modest means simply cannot afford to underwrite a bachelor's degree. In those cases it would be unreasonable for one to require the other to contribute to university expenses.

[10] The Mother suggests the Father, as a professional who arranges his practice through corporate structures, has sufficient economic means to cover all the

children's expenses while continuing to pay spousal support. The Father disagrees. He does not take any more income from his practice than he did when the parties divorced . He has received professional advice not to withdraw more income from his corporation and there is a recommendation that he consider withdrawing less. His debt situation has not changed appreciably. Some old debt has been paid off and new debt incurred some of which relates to the children's private school and university expenses.

[11] I am satisfied the corporate structures through which the Father derives his income have been recommended to him by his advisors, whose advice he has followed. They were not created to reduce his responsibility to pay either child or spousal support. There are valid economic and estate planning reasons for their existence.

[12] For those who derive income from partnership, sole proprietorship, or from corporate entities personal income is not necessarily what he or she reports on line 150 of an income tax return. Sections 16 to 20 of the guidelines describe how income may be calculated in such circumstances.

[13] Section 19 of the guidelines does permit a court to impute income in appropriate circumstances which include when a spouse is intentionally under employed or unemployed; when it appears that income has been diverted; and when a

spouse unreasonably deducts expenses from income. If a spouse is deducting expenses from income, the

> "reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act".

[14] There has been no suggestion that the Father is under employed but this has been raised in respect to the Mother's employment.

[15] The Mother requests income be imputed to the Father because:

- His Corporation holds a life insurance policy payable in the event of the Father's death which has accrued a cash surrender value that could be cashed out to provide the Father with additional income or be rearranged to reduce premium payments to provide additional income.
- The Father's Corporation purchased a building which increased debt without financial benefit.
- All or some portion of the wages paid by the Corporation to the Father's wife should be added to his income.
- The Father would not be able to support his present lifestyle unless he had additional income available.

[16] The Mother argues that the premium payments by the Father's Corporation and its purchase of a building are a diversion of income and are an unreasonable deduction from his income. It is unclear whether the provisions of Section 19 apply to

expenses of a corporate entity in light of the provisions of Section 18. Section 19 would appear most appropriate for the calculation of income for those who operate a business through a sole proprietorships or in a partnership. Section 18 directs how a court is to determine the income of a person who is a shareholder, director or officer of a corporation. It provides primarily a means by which retained earnings of a corporation can be examined to determine whether it is reasonable they remain in the corporation or be imputed in whole or in part to the shareholder, officer or director. I do not interpret this section to permit the imputing of income because the corporation has made an expense decision with which others may disagree. The suggestion is that I may do so pursuant to section 19. I am not satisfied that this is so although it does appear courts have utilized this section to question corporate decisions. Because I do not need to rely on this argument in reaching my decision I leave this question open for future submissions in other cases.

[17] The evidence before me is that the retained earnings of this Corporation are required. Neither party disagrees with this conclusion. This Corporation has little cash and its advisors have recommended that the Father take less income rather than more.

[18] The suggestion that the Father's Corporation could rearrange the terms of the life insurance policy it holds in the event of his death is unreasonable. First of all it

appears that even if he wanted to rearrange this policy he could not. It has been assigned by the Corporation to its major creditor, the Royal Bank. I do not accept the conspiracy theory put forward by the Mother that this assignment was taken by the Bank at the Father's request to place this asset beyond his control in this proceeding. There were sound financial reasons for the Bank's request and those are outlined in its letter of February 12, 2007 attached to Tab 8 in Exhibit 1. Secondly I find there are valid economic reasons for the payment of the high premium and retaining the full cash surrender value. The purchase of this policy was recommended to the Father when he began operating his professional practice. It was purchased in August 1998. The Father's practice is capital intensive. He has several employees. He has considerable debt. He has a young child of his second marriage. His practice, as it is presently constructed, would be difficult to sell. The market for his services is declining. Were he to die his estate would have considerable winding-up expense. I do not find the cash surrender value nor the premiums paid to be excessive.

[19] The purchase of a building by the Corporation was made for a future investment purpose which, if successful, will provide some income security to the Father. If I have any role in examining these decisions I find my examination is only for the purpose of determining whether the investment had a reasonable business purpose. This investment does.

[20] The Father's wife is employed by his Corporation. The income she receives is commensurate with income earned by others with her education, training and skill. I am satisfied she does work the actual hours required to earn her income.

[21] In respect to the Father's lifestyle I find that it is maintained through the largesse of his father and the contribution of his wife's income to which I have determined she is entitled. It may not have been useful for the Father's father to have provided so much financial assistance. While not explicitly stated, it is apparent the Mother believes the Father should and could get his father to provide the money needed to pay all of what she seeks. This belief has no doubt further fueled her resentment towards the Father. However, this resentment may be understandable if, as it appears, the Father's father is prepared to build the Father a very expensive home, purchase a BMW for him to drive, permit the Father sufficient money to purchase works of art but not provide funds to assist his grandchildren with their educational expenses. On the other hand the Father no doubt believes that the Mother receives sufficient money to pay the children's expenses and that if she does not she should have done more to find remunerative employment. Had the Mother not made some of the choices she did, such as continuing to live in a very expensive house and commencing renovations that caused damage and further great expense, she may have had greater capacity to contribute to her children's educational expense.

Unfortunately the unresolved resentments between these parties leave their children in financial difficulty. With neither parent sympatric toward the other's financial challenges they have been unable to discuss their children's needs and each seeks to force his or her view through unilateral action and court proceedings.

[22] The Father's financial advisor has determined his 2006 income to be $225,548. There is evidence before me that his income since A.C. J. Mac Donald's decision has been in this range. The Mother's expert who reviewed the Father's financial information did not take issue with this income analysis. He did raise suggestions about how the Father might be able to withdraw additional income from the Corporation. I have already discussed those suggestions and I have dismissed them. I accept the Father's income at $225,548 for all purposes relating to this proceeding.

[23] The Mother's income has been essentially insignificant. Her personal income tax returns show the following:

- 2004 - $13,716.25
- 2005 - $ 8,898.34
- 2006 - $ 3,390.19

[24] Her present partner also has limited income as reported on his tax returns:

- 2004 - $13,919.43
- 2005 - $14,495.00

- 2006 - $11,944.73

[25] Both the Mother and her present partner receive their income from real estate sales. They had worked for various companies as agents but essentially they are and have been self employed. It is obvious from their incomes that they are not making a living wage. They have a young son and they live in a very expensive residence. Their total monthly expenses are $ 12,255.00 per month inclusive of amounts to cover educational and recreational expenses for the children born of the Mother's marriage to the Father. When these are excluded their monthly expenses are $9,527.00. The Father's present support obligations provide $5,345.00 per month. In 2006 this would have provided this family with a combined monthly revenue of $6,628.00 per month, clearly an insufficient amount to meet their expenses. This family is, understandably, increasing its debt yearly. I am satisfied that a close analysis of their situation could result in some "add back" to income for certain deductions they are able to make but such an exercise will not substantially increase their disposable income. They both either need to find a way to quickly become financially successful in the real estate business or look for alternate employment. They need to realistically evaluate what they have been doing and make change. The Father will not be injecting cash into their household forever.

[26] I will not impute any income to the Mother at this time. Her present education, training and skills do not suggest any immediate other employment although one could suggest a full time retail position as a clerk may have provided more income than she has been earning as a real estate agent. Both she and her partner are predicting that they will earn more this coming year. His financial statement filed August 30, 2007 suggests he will earn $45,000.00 net income. The Mother's financial statement filed the same date projects her net income to be $27,000.00. In her testimony she was less clear about her income but I intend to rely on her sworn statement of financial information. It is her document and it has been recently prepared. It is not appropriate for her to attempt to contradict her own document without an explanation why her projections made just weeks before this hearing are incorrect. I set the Mother's income at $27,000.00. For the purpose of Section 7 analysis, her spousal support is to be included and would provide yearly income of $52,000.00. The combined monthly incomes of the Mother and her present partner, with spousal support but without the child support paid by the Father, would be $11,833.00 sufficient to pay their basic living expenses of $9,527.00.

[27] The jurisdiction to vary a Corollary Relief Judgment is governed by section 17 of the ***Divorce Act*** . This application involves a variation to both child and spousal support. Child support is to be considered a priority but in circumstances such as this

a clear line cannot be drawn. For instance spousal support provides a tax deduction and may in certain circumstances be utilized to provide more money to a family than does child support alone. In this case I also am aware that A.C. J. Mac Donald awarded less by way of spousal support than he considered was deserved. He said:

> [50] In light of all the above, I find that (the Mother) is entitled to ongoing periodic spousal support in an amount that will reflect all her above-noted contributions. While I am not directing an indefinite equalization of incomes, her award should nonetheless acknowledge her contributions that directly enhanced (the Father's) career while her own career was sacrificed.
>
> [51] The difficulty at the present time is that with his debt load and child support obligations, the (Father) has limited means with which to pay spousal support. But for these obligations, my award would be significantly higher.....

[28] The child support guidelines require table support for children 18 and under but permit an exercise of discretion for the support of a child who has reached the age of majority which in this province is 19. In this case discretion may also be exercised because the Father's income is over $150,000.00. In this family only one child is 19 years of age. He is attending university but is living with his mother. Another child is under 19 but not living with her mother full time because she is attending Memorial University. The youngest child is living with her mother but in a situation where I have become convinced her private schooling should be maintained. I have reviewed a number of possible scenarios based upon these facts and the parties circumstances. The one I have chosen results from a review of all of the evidence before me and in particular from an analysis of the parties expenses

relative to their incomes. Section 7 and Section 3 do admit of a review of the parents and child's "means" .

[29] I have already commented upon the Mother's income and expenses. In reviewing the Father's expenses I accept the method by which his counsel has calculated his disposable income. The figures are shown below:

Line 150 Income	$245,547.72
Less:	
Dividend Tax Gross Up	($25,000.00)
Imputed Income for personal use of vehicle	($17,450.96)
Actual Available Cash	$203,096.76
Income Tax Paid	($57,150.78)
Spousal Support	($25,200.00)
Child Support	($38,946.00)
Insurance (child support &Blue Cross)	($4,644.00)
Debt Payments	($47,365.00)
Total Remaining	$29,790.98

The Father's debt must be paid so that he can continue to receive assistance from his Bank. While he may be able to rearrange payment schedules I am satisfied he cannot ignore this debt. If the Bank does not continue to look upon him favourable his ability to continue to finance his professional business may suffer and therefore he may become unable to earn his present level of income.

[30] If the Father paid, in addition to table guideline support, his youngest daughter's fees for private school, his oldest son's tuition and book expenses and his middle daughter's tuition, books, and residence fees at a suggested total yearly amount of $28,600.00 he will have $1,190.98 remaining to contribute to all of his personal living expenses. Clearly he cannot afford to pay all of these educational expenses. If the Father paid spousal support at $25,200, table guideline support for three children at $38,946 and his daughter's private school fees and expenses at $9,600.00 he would have income remaining of $20,190. When A.C. J. Mac Donald rendered his decision the Father's remaining disposable income was $24,400.00. I find it is appropriate for the Father to pay the table guideline amount for three children and to pay his daughter's private school fee. Since the amount to be paid for table guideline child support has not changed he will continue to make these payments to the Mother through the Maintenance Enforcement Program as he has in the past. The required payment for his daughter's private school fee is to be paid directly to the school.

[31] The Father does not have any remaining financial ability to contribute directly to university tuition, room and board, and textbook purchases required by the children who are attending university. He does have the capacity to guarantee the loans they require to pay these expenses and if his children are to have this

opportunity he will need to continue this support. However, I do not consider it appropriate that I order him to do so. He may find other means to assist them.

[32] The Mother will be receiving child support to enable her to provide a residence for the children when they are living with her, to provide them with other necessities including clothing and transportation to and from university, to pay recreational fees not included in the fee paid to the private school by the Father for the youngest daughter, and to pay all other expenses associated with their care aside from the direct expense of their university education. However, she will be receiving table guideline support for one daughter who is not living with her the majority of the year and for her son whose personal support requirements for food, transportation, clothing and personal supplies cannot reasonably be suggested to require the sum of $12,982.00, one-third of the total child support payment. I recognize a portion of this amount is assigned to shelter cost but I consider it appropriate that the Mother from her own income and spousal support contribute toward some of his direct university expenses. If I need to categorize this payment I consider it to be her contribution to her children's Section 7 expenses for their education.

[33] The Mother shall pay the sum of $6,000.00 directly to the University on behalf of her oldest daughter, or upon any loan incurred by her daughter for University expenses, $3,000.00 on or before September 1, and $3,000.00 on or before February

1, in every year of her daughter's attendance at University including the 2007/2008 term and $3,000.00 per year directly to the University on behalf of her son, or upon any loan incurred by her son for University expenses, on or before February 1 in every year of her son's attendance at University including the 2007/2008 term. She is to provide a copy of the receipt for these payments to the Father.

[34] The Father has requested a termination of spousal support. He has been paying this support for 8 years after a marriage of 10 years. The wife has had significant time to become self-supporting. She has a new partner. After considering the comments of A.C. J. Mac Donald, the principles enunciated in *Moge v. Moge [1992] 3 S.C.R. 813* and *Bracklow v. Bracklow [1999] 1 S.C.R. 420,* and the submissions of counsel acting on behalf of the Mother, this spousal support shall continue until August 1, 2011 when the last payment of spousal support shall be made and the order for spousal support shall terminate.

[35] In concluding her submissions counsel for the Mother requested that I determine whether the Mother is entitled to an immediate cost award in the amount of $4,000.00 to compensate the Mother for costs incurred to defend herself against the Father's action taken in New Brunswick to vary the provisions of the Corollary Relief Judgement. That action was not being pursued provisionally, as was required, and the Mother found it necessary to hire counsel to ensure the New Brunswick Court

would not take on a jurisdiction it did not have. At a pre trial conference with Justice Campbell, the Mother understood there was a ruling that these costs would not be treated as costs in the cause, as was understood by the Father, but would be the subject of a stand alone award with the only issue being the quantum. I have reviewed a transcript of the pre trail and reproduce the relevant portion below:

> **MS. REIERSON**: Or maybe we can have an agreement that that cost application is not *res judicata* because it isn't *res judicata* as it relates to the withdrawal of the New Brunswick application.
>
> **THE COURT:** True.
>
> **MS. REIERSON:** And have a clear agreement that that issue is to remain on the table and be argued.
>
> **THE COURT:** All right, if you'll agree with that, that seems…
>
> **MS. REIERSON:** I just don't want it to disappear. This is $4,000 to her.
>
> **THE COURT:** Well I think the $4,000 figure is not cast in stone. I think what's happening is, there can be a cost impact associated with the father's application to change the process and start fresh. In other words, if you were here making that motion today, I might very well, and probably would, say to Dr. Bourget that yes, he can have his new

process but he needs to pay some costs for having gone that way. I wouldn’t necessarily be relating that to the $4,000 spent in New Brunswick, however, because that has been dealt with by another judge. I might happen to come up with the same number but it wouldn't be because that's the amount of money spent in New Brunswick. So would you agree to that, Mr. Pizzo, that the question of costs that should arise from the doctor's request to reestablish a new process is alive?

MR. PIZZO: I would agree to but I will also at the same time try to first talk to my client to see if I can make some kind of offer to try to resolve this.

THE COURT: So it will become a dead issue if that. All right, well I'll also note in the brief then that the parties have agreed that the question of costs associated with – the question of costs payable by Dr. Bourget arising from the fact that he has decided to change – he's decided to abandon the New Brunswick provisional process and start the process afresh is a live issue for argument. Parties will make an effort to settle that before the settlement conference and if not it remains – however I – and in light of that I will note in the memo as well that you two have by consent now on the basis of that, agreed that the matter can be started

> fresh and that Mr. Pizzo will formalize his variation application. There is nothing in this exchange that suggests anything other than the issue of costs arising from the aborted New Brunswick proceeding remains "a live issue" at this hearing. This does not prevent an argument to suggest these costs should be "in the cause" and not treated separately.

As is apparent from this excerpt no prohibition was placed upon the Father's opportunity to argue that the costs incurred as a result of the New Brunswick action should be costs "in the cause".

[36] Written submissions about all cost issues are to be provided to this court by the Father with a copy to the Mother on or before December 5, 2007. The Mother's submissions are to be provided to this court with a copy to the Father, within 10 days of the receipt of the Father's submissions. If the Mother has raised an issue in her submissions not considered in the Father's submissions he may file a further submission addressing those issues within 5 days of receiving the Mother's submissions.

[37] Counsel for the Father is requested to prepare the order reflecting this decision.

Beryl MacDonald, J.