

PROBATE COURT OF NOVA SCOTIA
Citation: *Haas v. Payne Estate*, 2015 NSSC 372

Date: 20151229
Docket: Hfx No. 439154
Probate No. H61003
Registry: Halifax

Between:

Martina Haas

Applicant

v.

The Estate of Alton Lee Payne

Respondent

Decision

Judge: The Honourable Justice Gerald R.P. Moir

Heard: September 10, 2015, in Halifax, Nova Scotia

Counsel: Sheree L. Conlon and Michael MacIsaac (articled clerk), for
the Applicant
Julia E. Cornish, Q.C. and Jennifer M. Kooren, for the
Respondent

Moir J.:

[1] *Introduction.* The late Mr. Alton Payne and Ms. Martina Haas were married. They separated and divorced. He agreed to pay spousal support.

[2] Ms. Hass filed a claim in Probate Court as a creditor of her late husband. She says the estate is obliged to continue making the support payments.

[3] The estate contests Ms. Hass' claim.

[4] *Issue.* I have to determine whether the support obligation continues. If it does continue, I also have to determine whether the proceeds of a life insurance policy paid to Ms. Hass are to be credited against the spousal support obligation.

[5] *Background to Agreement.* Mr. Payne and Ms. Hass were married in 1990. Mr. Payne was twenty-five. They had one child, a daughter born in 2000. They separated three and a half years later.

[6] Mr. Payne was earning just under \$200,000 before the separation. Ms. Hass worked for his company, and she resigned not long after the separation. Both agreed to the resignation. She was unemployed at the time of the separation agreement.

[7] The couple owned a home worth \$650,000 when they separated. The equity was about \$300,000. They also owned a building lot worth about \$60,000.

[8] Mr. Payne's investments included \$140,000 equity in newly acquired real estate, a \$15,000 interest in a cottage on Newfoundland, \$215,000 in stock, and about \$54,000 in an RRSP. His unsecured debts were modest.

[9] Ms. Haas had primary care of their daughter, and Mr. Payne exercised liberal access on weekdays, weekends, and holidays. The daughter attended the Sacred Heart School of Halifax, a private school with a substantial tuition.

Between separation and agreement, Mr. Payne paid child support in the *Guidelines* amount. When the agreement was made, the parties assumed that their daughter, who was ten at the time, would obtain a post-secondary education and remain dependant until she was in her early twenties.

[10] *Terms of Agreement.* Among other things, the agreement provides for Mr. Payne to pay child support and spousal support.

[11] A number of provisions in the agreement contemplate the death of a party. Clause 18 provides for guardianship of the daughter by the surviving parent "in the event of the death of one parent". Clause 48 provides for insurance on Mr. Payne's life "with the intention this life insurance will replace the support payments for the

child should the husband die while the child remains dependant”. In clauses 54 and 55, the parties agreed to execute wills. In the case of Ms. Haas, her will would pass the matrimonial home to the daughter. Mr. Payne’s will would make “adequate provisions for the child of the marriage”.

[12] The provisions about spousal support are in clauses 50 to 55. The obligation to pay spousal support is for a fixed term. Clause 52 provides for monthly payments of \$4,395 beginning on May 7, 2006. Clause 53(a) provides for the last payment to be made on July 7, 2018. Clause 53(b) reiterates finality:

The wife acknowledges and agrees that there shall be no spousal maintenance paid by or to the husband or the wife beyond July 7, 2018. Beyond this absolute termination date, each party releases and discharges all right and claims that each has or may have against the other for the payment of interim or permanent, periodic or lump sum, maintenance or support under the laws of any jurisdiction and in particular under the *Maintenance and Custody Act*, the *Testators’ Family Maintenance Act* and the *Divorce Act (1985)* of Canada or any similar or successor legislation thereto. It is further acknowledged there will be no variation of this provision in light of future changes, including changes which may be interpreted as radical, catastrophic, unforeseen at the time of the execution of the Agreement, and/or causally connected to the marriage and the roles adopted by the parties during the marriage. Future misfortunes, including those based upon financial consideration, disability, poor health or disease, will not result in variation of this paragraph.

Spousal support can be varied downward, but not upward: clauses 53(e) and (f).

[13] Unlike the child support provisions, there is no requirement for life insurance to secure spousal support if Mr. Payne dies.

[14] Clause 10(a) of the agreement provides, “This agreement binds the parties according to its terms, even if a provision is beyond the power of the Court to order.” Clause 63 provides, “This agreement shall bind the parties and their respective estates.”

[15] *Events After Agreement.* Mr. Payne married Ms. Holly Payne a little over a year before his sudden and unexpected death. He also made a will. Ms. Payne is the executor.

[16] The will leaves real property to Ms. Payne. The residue is split evenly between Ms. Payne and the daughter of Mr. Payne and Ms. Haas.

[17] I have been provided with some evidence about Mr. Payne, Ms. Haas, their daughter, and Ms. Payne after the separation agreement. I do not propose to review that evidence, other than to say that all parties appear to have conducted themselves with respect for one another. What parties do or say after contracting is relevant only to resolve an ambiguity and, even for that purpose, the evidence may be given little weight: Hall, *Canadian Contractual Interpretation Law* 2ed. at pages 82 to 85.

[18] *Effects of Agreement on Support After Death.* The estate refers me to the decision of Justice Hallett in *Black v. Black* (1981), 46 N.S.R. (2d) 361 (S.C.,

T.D.). The constitutional jurisdiction of Parliament to make laws about marriage and divorce permits the spousal support provisions of the *Divorce Act* “to the extent that maintenance was payable at law by the husband; that is, for his lifetime.”: para. 27. After death, periodic maintenance is the subject of provincial “legislation relating to the succession to property”, not the federal *Divorce Act*: also para. 27.

[19] “[T]he common law is clear; periodic maintenance payments cease on the death of the husband unless the wife either obtained an agreement from her husband to pay maintenance during her lifetime or obtained an order for secured maintenance from the Court”: para. 8.

[20] In *Black* the parties had made a separation agreement, which was incorporated into the corollary relief agreement. The agreement provided for further assurances from the parties or their estates (para. 1), but this “can add nothing to the scope of the covenants in the Agreement.”: para. 9. “It is simply a covenant made by the parties that ensures that the parties or their respective executors or administrators will give effect to the covenants as contained in the Agreement.”: also, para. 9. It “does not extend the scope of any particular covenants”: also, para. 9.

[21] Justice Hallett found nothing else in the agreement that extended spousal support beyond the life of the payor. He concluded para. 9 of *Black* by saying:

If the parties intended that the periodic maintenance payments were to continue for the lifetime of Mrs. Black, they would surely have used language that clearly stated that such was to be, as the common law is clear, periodic maintenance payments cease on the death of either spouse.

[22] In connection with an argument about a section of the *Divorce Act* authorizing rules of court for enforcement of orders “including their enforcement after death”, Justice Hallett reiterated at para. 30, “it is my opinion that unless he has bound himself contractually that periodic maintenance be paid by his estate following his death, his obligation to maintain his wife, be it while married or following divorce, terminates on his death.” He summarized his reasons this way at para. 32:

- (1) The words used in the Separation Agreement signed by Mr. and Mrs. Black do not disclose to me an intention that Mr. Black agreed to pay maintenance for the lifetime of Mrs. Black;
- (2) The Court has no jurisdiction under the *Divorce Act* to make an order making the payment of periodic maintenance binding on the estate of Mr. Black or payable to Mrs. Black during her lifetime.

Of course, the intention spoken of in (1) can be captured by express or implied terms. See, para. 10.

[23] The decision in *Black* was approved in *Carmichael v. Carmichael* (1992), 115 N.S.R. (2d) 45 (S.C., A.D.).

[24] The estate refers me to *McLeod v. McLeod*, 2013 BCCA 552 where, at para. 25, Justice Smith summarizes principles taken from case law about support obligations surviving death. This includes, “If the agreement or order provides a fixed term of support, the estate is bound by that agreement...”. The estate says that the authority underlying this statement is distinguishable because there was no provision for variation in that case.

[25] The underlying authority is *Brubacher v. Brubacher Estate*, [1997] O.J. 2466 (C.J., G.D.). Justice Herald reviewed authorities holding that support obligations do not survive the death of the paying spouse unless there is an agreement providing for that: paras. 10 to 15. However, Mr. Brubacher had been ordered to pay spousal support until June 1, 1999, and he died on March 21, 1997. So, “the temporal specificity of the order” distinguished it from the reviewed authorities. Contrary to the submission for the estate, power to vary does not appear to have been a consideration for Justice Herald.

[26] The state of the law in Nova Scotia on spousal support obligations surviving death is this. The *Divorce Act* does not authorize an award of monthly spousal

support that survives death of the paying spouse. However, the parties may expressly or implicitly agree to survival, such as in a separation agreement.

[27] Whether the parties have agreed for survival of spousal support obligations after the death of the paying spouse turns on principles of contractual interpretation. See, Hall, *Canadian Contractual Interpretation Law* 2ed., especially at pages 9 to 13, 21 to 24, and 33 to 35.

[28] *Interpretation of Agreement*. A clause binding a party's estate, such as clause 63 of the Payne and Haas separation agreement, cannot be equated to a covenant for further assurances that binds an estate, such as that in *Black*. Further assurances clauses that extend to estates require the estates to provide further documentation, such as a deed of matrimonial property, necessary to give effect to promises found in the agreement. Clause 63 goes much further than that. It expressly binds the estate to the promises themselves. The clause makes it clear that the estate is liable on all of the promises.

[29] Thus, clause 63 tends to indicate that the promises of spousal support survive death.

[30] That conclusion is clinched by clauses 53(a) and 53(b), which make Mr. Payne, and by operation of clause 63 his estate, liable to pay spousal support until July 7, 2018 and not until his earlier death.

[31] In combination, clauses 63, 53(a), and 53(b) make it express that the spousal support obligations do not expire until July 7, 2018.

[32] The picture becomes even more clear when these clauses are set in the context of their surrounding promises. The parties contemplated death as a possibility important to the future operation of the agreement: guardianship of their daughter, life insurance to secure child support, and requirements for their wills.

[33] The inclusion of life insurance for child support and the absence of life insurance for spousal support tell nothing against the survival of spousal support obligations. They show only that the parties negotiated security for one obligation and not another.

[34] The provisions allowing Mr. Payne to apply to a judge to vary spousal support downward do not imply the obligation expires on his death. There is no logical connection between the two concepts. Moreover, it may be that clauses

10(a) and 63 allow the estate to apply for variation based on the estate's income compared with the income referred to in clauses 53(e) and (f).

[35] In conclusion, the text of clauses 53(a), 53(b), and 63 expressly provide that spousal support is to be paid after Mr. Payne's death until 2018. That conclusion is reinforced when the text is read in context.

[36] *Life Insurance Payable to Ms. Haas.* Although the separation agreement did not require it, Mr. Payne maintained a \$150,000 insurance policy for the benefit of Ms. Haas. The estate argues this should be set off against the spousal support obligation. The agreement does not provide for such. The subject is, therefore, only relevant on a variation, assuming the separation agreement gives the estate a contractual right to seek variation by a court.

[37] *Amount of Claim.* Ms. Haas filed a claim against the estate for \$202,170 plus interest. This covers outstanding support payments and those to accrue until July of 2018. The estate argues that the amount has to be discounted for the tax differential between periodic support and lump sum maintenance, and to present value the future portion.

[38] Ms. Haas points out that the quantification satisfies probate practice, but the obligation is periodic. It can only be converted to a lump sum by agreement or, if

it exists, by a contractually founded application to vary. Tax advantage, discounting, and other relevant evidence would be considered on such an application.

[39] The terms for reduction of spousal support are such that a variation application would be restricted to future payments. I must make it clear that I am not deciding whether the estate can apply to a judge for a variation. Whether *Black* precludes an application under the *Divorce Act*, and whether the separation agreement affords a means to apply for a variation, are not raised on an application to determine a claim filed with Probate Court.

[40] *Conclusion.* I will grant an order that allows Ms. Haas' claim in the amount of periodic payments now due plus interest calculated from the due date of each payment. The order may declare that \$4,395 comes due on the seventh day of each subsequent month until and including July 7, 2018. The order may also declare that the future amounts may be capitalized, reduced, or extinguished by agreement or, if the estate establishes a contractual entitlement to seek variation by a judge, by order.

[41] The parties may make written representations on interest and costs.

Moir J.