

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Foster-Jacques v. Jacques, 2011 NSSC 43

Date: 20110202

Docket: HFD1201-64463

Registry: Halifax

Between:

Sharon J. Foster-Jacques

Petitioner

v.

Hector J. Jacques

Respondent

Judge:

The Honourable Justice Beryl A. MacDonald

Heard:

January 31, 2011, in Halifax, Nova Scotia

Counsel:

Gordon R. Kelly, for the petitioner

William L. Ryan, Q.C., for the respondent

By the Court:

[1] By motion dated October 20, 2010, Ms. Foster-Jacques requested interim spousal support in a divorce proceeding. She filed an affidavit on October 20, 2010, in support of her motion. Mr. Jacques, on January 12, 2011, filed a motion to have portions of Ms. Foster-Jacques' affidavit struck because they are improper and irrelevant to the issue of spousal support.

[2] On January 31, 2011, I heard the submissions of counsel for the parties in respect to this motion and I reserved my decision. The subject of Mr. Jacques' complaint are the paragraphs of Ms. Foster-Jacques' affidavit that relate primarily to Mr. Jacques' alleged infidelity during the parties' relationship. Counsel for Mr. Jacques argued this information is irrelevant because section 15.2 (5) of the *Divorce Act* directs that a court, in making a spousal support order,

“..... shall not take into consideration any misconduct of a spouse in relation to the marriage.”

[3] Counsel for Ms. Foster-Jacques argues that the effect spousal misconduct has had upon the other spouse is a relevant consideration.(*Leskun v Leskun*, [2006] 1 S.C.R. 920.)

[4] In *Leskun*, supra, the Supreme Court of Canada decided Ms. Leskun's failure to achieve self-sufficiency resulted, at least in part, from the emotional devastation she suffered as a result of misconduct by Mr. Leskun. Clearly facts in proof of misconduct were relevant to that case.

[5] Counsel for Mr. Jacques has argued that *Leskun*, supra, does not apply because self-sufficiency is not an issue on a motion for interim spousal support. This is because these motions are limited to a consideration of "need and ability to pay". The effect of martial infidelity upon the spouse is therefor irrelevant.

[6] The Supreme Court of Canada in *Moge v. Moge* (1992), 43 R.F.L. 345 (S.C.C.) and in *Bracklow v. Bracklow*, [1999] 1 SCR 420, confirmed that all four objectives set out in 15.2 (6) are to be considered in every case. No one objective has paramountcy. If any one objective is relevant upon the facts a spouse is entitled to receive support.

[7] The objectives to consider when examining a request for spousal support pursuant to the *Divorce Act* are found in s. 15.2(6):

An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage;

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.”

[8] The *Divorce Act* also requires a court:

15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including:

(a) the length of time the spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse

(my emphasis)

[9] In *LeBel v. Chartrand* 2007, CanLII 50876 (ON S.C.), the wife brought a motion for interim spousal support. The husband acknowledged entitlement, but disagreed about the quantum sought by the wife. The court addressed the argument that only need and ability to pay were relevant on a motion for interim support, stating:

[19] Under section 15.2 (2) of the Divorce Act, a court may make such interim order as is “reasonable for the support of the other spouse”, taking into account the “condition, means, needs and other circumstances of each spouse.” Respondents counsel submitted that the principles to be applied when awarding interim spousal support are the needs of the recipient and the ability of the other party to pay... I disagree. Those two factors do not exhaust the list of relevant considerations on a motion for interim spousal support. Sections 15.2(4) and (6) of the Divorce Act clearly specify the factors and objectives a court must take into account when considering such an application, and a court must consider all, not some, of the statutory factors and objectives.

[10] Need and ability to pay do not exhaust the list of relevant considerations on a motion for interim spousal support. Sections 15.2(4) and (6) of the *Divorce Act* clearly specify the factors and objectives a court must take into account when considering such an application. A court must consider all, not some, of the statutory factors and objectives.

[11] In *Fallis v Fallis* 2000 BCSC 1446, the Court considered the same question and said:

[21] Judge Boyd canvasses a number of cases from across the country and draws a number of conclusions on this issue. The conclusions which are germane to the case before me are as follows:

(a) Most courts agree that on an interim maintenance application the court should not engage in a “protracted analysis” of the consideration of a quantum of maintenance as would likely be the case in an application for permanent maintenance.

(b) On an interim application, the court will not scrutinize each spouse as to their ability to become economically self-sufficient with “the same degree of precision” as they would on an application for permanent maintenance.

(c) A full inquiry into the issue of support is neither discernible nor possible added interim stage in the proceeding.

(d) An applicant spouse must at least establish a prima facie case of entitlement before the question of quantum is the addressed.

(e) The analysis of the court must be in two stages. It first must address entitlement and by that the court must determine that there is a need for support and whether that need has a Genesis in the marriage. If the answer to that is yes, the court then addresses the issue of quantum.

[12] It is true that the entitlement and quantum analysis of the court on a motion for interim spousal support is not as complete as it would be on a final hearing, but it is a required analysis.

[13] In this case, as in *Leskun*, supra, the evidence of spousal misconduct is put forward as one of the reasons to explain why the spouse is not now and is unlikely to become self-sufficient. Evidence of misconduct is relevant for this purpose.

[14] Mr. Jacques' counsel suggests this purpose could have been achieved by a mere reference to the infidelity absent the extensive detail. I disagree. Detail is important to determine credibility. Detail provides the who, what, where, when and why factual foundation, a key ingredient in case presentation.

[15] Mr. Jacques' motion to strike is dismissed. Costs of the motion will be in the cause.

J.