

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Lilly v. Lilly, 2011 NSSC 61

Date: 20110209

Docket: 1201-063739

Registry: Halifax

Between:

Sheila Margaret Lilly

Petitioner

and

Bruce Maxim Lilly

Respondent

Judge: Justice Lawrence I. O’Neil

Heard: November 23 and 24, 2010, in Halifax, Nova Scotia

Counsel: Joseph M.J. Cooper, Q.C., for the Petitioner
Bruce M. Lilly, Self Represented

By the Court:

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Introduction

[1] The parties were married August 23, 1986 and separated March 28, 2008, but remained living in the same house until February 6, 2009. (For income tax purposes, the couple have used January 1, 2009 as a separation date). They have two sons, born January 18, 1991 and April 6, 1992. The younger son lives with his father and attends Dalhousie University. The older son lives on his own and works.

Litigation History

[2] The Petition for Divorce was filed by Ms. Lilly on July 6, 2009. A number of consent orders were subsequently issued:

Order dated September 30, 2009 pertaining to spousal support

Order dated September 30, 2009 pertaining to custody and child support

Order dated November 5, 2010 pertaining to child support, spousal support and RRSP contributions after February 6, 2009. The order provides for child support of \$300 per month to be paid by Ms. Lilly. It also provides that no application to retroactively vary the spousal support order will be made. Lastly, the order provides that RRSP contributions made after February 6, 2009 are not divisible and remain the sole property of the contributor.

Issues

[3] The parties have settled many issues. At the time of the hearing before me, the following matters remained for adjudication:

1. Should a divorce order issue?
2. Should Ms. Lilly's child support obligation be reduced to reflect a decrease in income flowing from her change in employment status?
3. To what extent is a \$12,000 tax refund for 2008, received by Mr. Lilly, shareable with Ms. Lilly?
4. Is Ms. Lilly entitled to spousal support? If so, what is the appropriate quantum and what is the appropriate duration?

- Issue One: Divorce

[4] I am satisfied that the details of the parties' marriage and separation are as put forth in the Petition for Divorce (Exhibit #1). The parties are long time residents of Nova Scotia and continue to reside here. The jurisdiction of the court is established. There are no bars to the issuance of the Divorce order and there is no prospect of reconciliation. A divorce order will therefore issue on the basis of a permanent breakdown of the marriage.

- Issue Two: Child Support

[5] On October 13, 2010, Ms. Lilly learned her employment was terminated as part of a company layoff effective November 3, 2010. She estimates that almost half of ING's office staff in Halifax were terminated at that time. She argues that because her income is no longer in the range of \$34,000 and is in fact much less, she should no longer be required to pay child support.

[6] Mr. Lilly asks that income be imputed to Ms. Lilly. He argues that she remains very employable given her skill level and experience. Ms. Lilly, herself, testified that she was capable of working full time and communicated confidence about her employability and prospects for finding work.

[7] She has a history of working a number of months each year. Most recently, the employment at ING began in October 2009 and ended November 3, 2010, a period of more than one year.

[8] Ms. Lilly received one week's vacation pay and two weeks pay as severance at the time of her termination. Her evidence on what her income will be from the employment insurance program is not helpful when determining what her income will be from this source. She estimates that employment insurance income will last thirteen weeks, at a rate of \$322 per week. It is unclear whether this is gross or net of taxes and deductions. These estimates, however, reflect her experience when she was last in receipt of employment insurance a couple of years ago. The employment insurance regulations identify a number of variables that determine one's eligibility for employment insurance, the quantum of income and the duration of income. The estimates provided by Ms. Lilly are not helpful because she could not tell the court how her income could be different.

[9] I am satisfied that Ms. Lilly was terminated from her employment as she testified to; that there is no basis for imputing income to her as provided by s.19 of the *Child Support Guidelines*, S.O.R./97-175, and that she has not had an opportunity to find a new job over the past few weeks. She is, however, an attractive prospective employee, given her education as a public affairs specialist, her training in the area of customer relations and her work history. There are many reasons to be optimistic that she will gain employment. She is forty-five years old and has time to get re-established in a career.

[10] I estimate her weekly income from employment insurance as \$400 per week, which on an annualized basis is \$20,800. Her child support obligation based on the tables is \$169 per month. Commencing December 15, 2010 her child support obligation will be reduced to this level. The December 2010 payment will be due on or before December 15, 2010.

[11] Given the uncertainty of Ms. Lilly's income, a review date will be set. I will say more on this subject.

- Issue Three: Tax Refund for 2008

[12] The parties agreed that they would equally share any tax refund associated with the joint filing of their 2008 income tax return. I am satisfied that the e-mail from Mr. Lilly to Ms. Lilly, dated April 23, 2009 correctly reflects the understanding and agreement between the parties. Each party's share of the refund was optimistically viewed to be \$12-\$1,400. However, this prospect was uncertain. The text of the April 23, 2009 e-mail is as follows (Exhibit D of Exhibit 4 at p.9):

Subject: Income Tax

Date: Thu, 23 Apr 2009 13:49:00 - 0300

From: Bruce.Lilly@aliant.ca

To: Sheila200865@live.com

you mentioned last week that you would provide the information for income tax (all T slips and any other tax slips). I can file, but without your information, it won't be accurate, therefore delaying the refund. I am planning on doing mine this weekend so if you could please confirm if you are providing your

information, that would be good for both of us. Assuming the refund is similar to last year, we can likely expect about 1200-1400 each I would guess, but the stock was not rolled to RSP this year (we split the cash) and you drew unemployment, so I don't know how that will affect things. I had a receipt mailed over a month ago for the RSP from Great West Life from last year (approx. \$11,900) which is a joint RSP that will give us most of the refund, and I haven't received it, so if you have it, that has to be filed with my tax info, since I will need to claim that to get our maximum refund. Also, if you have any other pieces of mail, perhaps you could return those as well, as I mentioned before, I don't seem to be getting regular mail delivery.

This information has also been requested from your lawyer, and legally you have to provide it in time for me to meet the deadline for income tax, which is April 30th (next Thursday). It might be cheaper for you to provide it to me directly but that's your call.

[13] The confusion or disagreement before the court arises from the fact that on February 28, 2009, Mr. Lilly contributed an additional \$30,000 to his RRSP. This resulted in an additional \$12,000 tax refund to Mr. Lilly for the tax year 2008.

[14] It appeared that Ms. Lilly's initial position was that one half of this refund was hers. However, after the trial, the court was told that all she wanted was the \$12-\$1,400 she felt the parties had agreed upon.

[15] I have concluded that the parties agreed to equally share the tax refund due them before factoring in the \$30,000 RRSP contribution. I find that they did in fact share that portion of the refund as agreed. The parties clearly agreed that Ms. Lilly would not benefit from the post separation \$30,000 contribution to the RRSP account by Mr. Lilly. The consent order dated November 5, 2010 addressed the issue of ownership of RRSP contributions made post separation. I am satisfied the e-mails exchanged between the parties and their oral evidence confirms the refund attributable to the \$30,000 contribution is solely for the benefit of Mr. Lilly.

[16] I note that the \$30,000 contribution was made February 28, 2009 and claimed on the parties' 2008 tax return.

- Issue Four: Spousal Support

[17] At trial, Mr. Lilly challenged Ms. Lilly's entitlement to spousal support. The pre-trial memorandum, herein, provided that only quantum and duration were in issue. Mr. Cooper, Q.C., on behalf of Ms. Lilly, did not object to this apparent change in position.

[18] For the reasons that follow, I am satisfied that Ms. Lilly's entitlement to spousal support is established.

- Entitlement

[19] The *Divorce Act*, R.S.C. 1985 s.3 (2nd Supp.) provides:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

(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.

...

Objectives of spousal support order

(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 spouses arising from the marriage or its breakdown;

(b) apportion between the 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 spouses arising from the breakdown of the marriage; and

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

[20] The *Divorce Act*, s. 17(7) outlines the same objectives of a variation order, varying a spousal support order as exist for an initial spousal support order.

[21] The two often cited cases on entitlement to spousal support are *Moge v. Moge* [1992] S.C.J. No. 107 and *Bracklow v. Bracklow* [1999] S.C.J. No. 14. The decision in *Moge, supra*, is often described as finding the basis for spousal support to be one of compensating the receiving spouse for that spouse's economic disadvantage flowing from the marriage. The *Bracklow* decision *supra* is cited as establishing the non-compensatory approach which focuses on the concept of mutual obligation and need. *Bracklow, supra*, also introduced a contractual basis for ordering spousal support. The result is that the current body of law is more of an assessment of "needs" and "means". The real debate is frequently about amount and duration of spousal support.

[22] The Supreme Court of Canada in *Bracklow* (1999), 1 S.C.R. 420 commented on how a marriage breakdown changes the presumption of mutual support that exists during marriage. In *Bracklow* Justice McLachlin, as she then was, introduced the court's judgment with the following:

I. Introduction

1. What duty does a healthy spouse owe a sick one when the marriage collapses? It is now well-settled law that spouses must compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union. But what happens when a divorce - through no consequence of sacrifices, but simply through economic hardship - leaves one former spouse self-sufficient and the other, perhaps due to the onset of a debilitating illness, incapable of self-support? Must the healthy spouse continue to support the sick spouse? Or can he or she move on, free of obligation? That is the question posed by this appeal. It is a difficult issue. It is also an important issue, given the trend in our society toward shorter marriages and successive relationships.

[23] On behalf of the court, she answered the various questions. She stated *inter alia*:

19 In analysing the respective obligations of husbands and wives, it is critical to distinguish between the roles of the spouses during marriage and the different roles that are assumed upon marriage breakdown.

21 When a marriage breaks down, however, the situation changes. The presumption of mutual support that existed during the marriage no longer applies. Such a presumption would be incompatible with the diverse post-marital scenarios that may arise in modern society and the liberty many claim to start their lives anew after marriage breakdown. This is reflected in the Divorce Act and the provincial support statutes, which require the court to determine issues of support by reference to a variety of objectives and factors.

32 Both the mutual obligation model and the independent, clean-break model represent important realities and address significant policy concerns and social values. The federal and provincial legislatures, through their respective statutes, have acknowledged both models. Neither theory alone is capable of achieving a just law of spousal support. The importance of the policy objectives served by both models is beyond dispute. It is critical to recognize and encourage the self-sufficiency and independence of each spouse. It is equally vital to recognize that divorced people may move on to other relationships and acquire new obligations which they may not be able to meet if they are obliged to maintain full financial burdens from previous relationships. On the other hand, it is also important to recognize that sometimes the goals of actual independence are impeded by patterns of marital dependence, that too often self-sufficiency at the

time of marriage termination is an impossible aspiration, and that marriage is an economic partnership that is built upon a premise (albeit rebuttable) of mutual support. The real question in such cases is whether the state should automatically bear the costs of these realities, or whether the family, including former spouses, should be asked to contribute to the need, means permitting. Some suggest it would be better if the state automatically picked up the costs of such cases: Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*, at p. 234, n. 172. However, as will be seen, Parliament and the legislatures have decreed otherwise by requiring courts to consider not only compensatory factors, but the "needs" and "means" of the parties. It is not a question of either one model or the other. It is rather a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court.

- Nature of the Parties' Marriage

[24] I am satisfied that this couple's decisions about the role each played in the management of the household responsibilities and the generation of income were pragmatic in nature. Mr. Lilly helped out at home after work and on the week ends by assisting with household chores and in caring for the children. He was also involved in the sporting activities of the children.

[25] Ms. Lilly worked outside the home for approximately five years after the parties married. Thereafter, she remained at home to care for the children during their pre school years. After the children began school, she would work outside the home for months at a time each year. The court's conclusion is that the parties did not make a decision one way or the other about the arrangement. This marriage was more "modern" than "traditional" if one must resort to a label to describe it.

[26] Mr. Lilly testified that he wanted Ms. Lilly fully employed but she resisted. Ms. Lilly disagreed with this characterization of her motivation to work outside the home after the children began school. In total, she worked at 6-7 positions during the parties' marriage and she performed at a high level. It is my conclusion that in the context of a marriage that was working, neither party really pressed their point of view on this issue. Ms. Lilly worked as much as she wanted outside the home and Mr. Lilly acquiesced. The result was an outcome they must mutually accept responsibility for.

[27] In any case, today Ms. Lilly is employable and as stated, has the potential to be a valuable employee.

[28] I find that Mr. Lilly's obligation to pay spousal support has a non-compensatory basis. These parties lived as mutually dependent partners implicitly accepting a responsibility to support each other.

- Position of the Parties/*Spousal Support Guidelines*

[29] Mr. Lilly disputes Ms. Lilly's entitlement to spousal support. He does, however, make a submission on the issue of quantum and duration should the court reject his position on entitlement.

[30] He submitted "Divorcemate" calculations that reflect the application of the *Spousal Support Advisory Guidelines*. His calculations assume his income to be \$91,298 and Ms. Lilly's income to be \$34,000. He also credits himself with the payment of \$8,000 in post secondary expenses for the younger child.

[31] He uses 22 years as the length of the marriage and concludes the range of spousal support is \$1,086 to \$1,448 for an indefinite period. This range reflects a sharing of the parties' net disposal income of between 34.3% to 37.2%.

[32] In contrast, Mr. Cooper, Q.C., on behalf of Ms. Lilly, submitted "Childview" calculations that apply the *Spousal Support Advisory Guidelines* and if done correctly, identify spousal support in the range of \$2,183 - \$2,922. He uses 22 years as the term of the marriage. However, he identifies Mr. Lilly's annual income as \$109,000 and Ms. Lilly's annual income as \$2,093. (The figure of \$2,093 is Ms. Lilly's projected employment insurance income over the anticipated 13 weeks of eligibility (13 x \$322/wk)).

[33] I am satisfied that at this time, the most accurate income figures to factor into the *Spousal Support Advisory Guidelines* are an income of \$20,800 for Ms. Lilly and \$91,298 for Mr. Lilly. I accept Mr. Lilly's evidence that his bonus income will be down significantly based on current corporate reports. In addition, some of the income attributed to him is not a contribution to his cash flow. It consists of \$2,000/year for club membership and medical benefits *for example. In the case of Ms. Lilly, I have annualized her employment insurance income to reflect her employment insurance income at the time of the hearing.

[34] Mr. Lilly's income has been reduced by his contribution to the younger son's education, which cost I conclude to be \$8,000. Ms. Lilly is not contributing to this expense. This expense has a grossed up cost of \$12,000. Consequently, Mr. Lilly's income for spousal support purposes is reduced to reflect his available income. The new number is approximately \$79,702.

[35] The parties share of their net disposal income is as follows:

Total Income: \$79,702 + \$20,800 = \$100,502

His Current Share of \$79,702 is 79.3% of that amount

Her current share of \$20,800 is 20.69% of that amount

The *Guidelines* recommend a low of 1.5% per year for every year of marriage or approximately 22 years x 1.5% = 33% = \$33,165 per year; and a high of 2% for every year or approximately 22 years x 2.0% = 44% = \$44,220 per year.

[36] Ms. Lilly's current income is \$22,800. The range of spousal support is therefore \$33,165 - \$22,800 = \$10,365/year to a high of \$44,220 - \$22,800 = \$21,420/year. These calculations equate to a monthly spousal support obligation ranging from \$863.75/month to \$1,785/month.

[37] These figures result in Spousal Support Advisory Guideline recommended support in the range of \$863.75 - \$1,785 per month.

[38] The Spousal Support Advisory Guidelines are not binding on courts. However, they are a helpful reference. Given that the parties are in transition, the guidelines offer the best option for the parties to plan their futures. When a greater level of stability is achieved by the parties, a broader assessment of their positions may be warranted.

- Quantum and Duration

[39] In *Bracklow, supra*, MacLachlin J. defined the concept of quantum in reference to spousal support to include both the amount and duration of the support. She stated further that the factors relevant to entitlement also have an impact on quantum.

[40] Having decided that the Respondent owes a duty to the Petitioner to provide spousal support I must decide the amount of support that is currently payable; when that obligation arose; what form it should take; what arrears if any are payable and when the obligation terminates.

[41] The *Divorce Act*, 15.2 (4) & (6), *supra*, requires the court to consider a number of factors and objectives when determining the quantum of spousal support. I have considered the length of time these parties cohabited; their function within the marriage and their agreement to support each other. Ms. Lilly is

transitioning from the relationship and continues to require support to achieve economic self sufficiency.

[42] I am satisfied that spousal support of \$1,320 per month is warranted. This obligation is effective as of December 15, 2010.

[43] The *Spousal Support Advisory Guidelines* suggest a maximum duration for spousal support of one year for each year of marriage when parties do not have children. When children are involved, the *Guidelines* suggest an indeterminate order.

- Review

[44] Each party is to notify the other of any change in their income within fourteen days. Secondly, I order that each year the parties shall confirm income for the preceding 6 months on July 1 and January 1. On or before June 1 of each year they shall exchange a copy of each other's notice of assessment and income tax return for the preceding year. A change in the income of either party shall represent a change in circumstances entitling either party to seek a review of the entitlement to and quantum of spousal support payable.

J.