

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Foster-Jacques v. Jacques, 2011 NSSC 124

Date: 20110329

Docket: 1201-064463, SFHD-069582

Registry: Halifax

Between:

Sharon Foster-Jacques

Petitioner

v.

Hector Jacques

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: March 2, 2011, in Halifax, Nova Scotia

Written Decision: March 29, 2011

Counsel: Gordon R. Kelly, counsel for Sharon Foster-Jacques
William L. Ryan, counsel for Hector Jacques

By the Court:

[1] The Husband and the Wife began living together in November 1993 when they purchased a house together. They married in December 2004. They disagree about their separation date. The Husband considers the separation to have occurred in November 2009, the wife in February 2010. The Wife is requesting interim spousal support. The exact separation date does not need to be determined for the purpose of this interim decision. It is clear the parties have had at least a 16 year relationship.

[2] Entitlement to interim spousal support and the factors to consider when making an award is governed by section 15.2 of the *Divorce Act R.S. , 1985, c.3*. Section 15.2(6) creates four statutory support objectives. The Supreme Court of Canada in *Moge v. Moge* (1992), 43 R.F.L. 345 (S.C.C.) and *Bracklow v. Bracklow* [1999] 1 SCR 420 confirmed that all four objectives are to be considered in every case and that no one objective has paramountcy. If any one objective is relevant upon the facts, a spouse is entitled to receive support.

In *Bracklow v. Bracklow, supra*, the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support:

- a) Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.
- b) Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.
- c) Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other.

[3] These rationales take into account both the factors set out in s. 15.2 (4) and the objectives set out in s. 15.2 (6) and s. 17(7)(1).

[4] The Supreme Court did recognize that many claims have elements of two or more of the stated rationales. It confirmed that analysis of all of the objectives and factors is required. Pigeonholing was to be avoided.

[5] In this decision I will not comment on the contractual objective because it is not a factor in the case before me.

[6] McLachlan, J. in *Bracklow, supra*, indicated that the basis for a spouse's support entitlement also affects the form, duration, and amount of any support awarded.

[7] Examples of circumstances that may lead to a decision that a spouse is entitled to compensatory support are:

- a) a spouse's education, career development or earning potential have been impeded as a result of the marriage because, for example:
 - a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;

- a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;
 - a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons.
- b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.

[8] Non-compensatory support incorporates an analysis based upon need and ability to pay. If spouses have lived fully integrated lives, so that the marriage creates a pattern of dependence, the higher-income spouse is to be considered to have assumed financial responsibility for the lower-income spouse. In such cases a court may award support to reflect the pattern of dependence created by the marriage and to prevent hardship arising from marriage breakdown.

L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra*, at p. 390:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin (1991), supra*, and *Linton v. Linton, supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party.

As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", supra, at pp. 174-75). (emphasis added)

[9] It is not clear from Justice L'Heureux-Dubé's, decision whether entitlement arising from a "pattern of dependence" is compensatory or non-compensatory. This pattern of dependence may create a compensatory claim because it can justify an entitlement even though a spouse has sufficient income to cover reasonable

expenses and might be considered to be self-supporting. This often is described as the “lifestyle argument” - that the spouse should have a lifestyle upon separation somewhat similar to that enjoyed during marriage. (*Linton v. Linton* 1990 Carswell Ont 316 (Ont. C.A.) A lengthy marriage generally leads to a pooling of resources and an interdependency even when both parties are working. Often the recipient spouse will never be able to earn sufficient income to independently provide the previous lifestyle. This may form the basis of a compensatory claim but does not necessarily entitle a spouse to lifetime spousal support. The essence of a compensatory claim is that eventually it may be paid out. This leads to a discussion about the quantum and duration of the claim.

[10] Once it is decided that a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse. In considering the condition, means, needs and other circumstances of each spouse one may examine the division of matrimonial property and consider the extent to which that division has adequately

compensated for the economic dislocation caused to a spouse flowing from the marriage and its breakdown and any continuing need the spouse may have for support arising from other factors and other objectives set forth in s. 15(2).

(Tedham v. Tedham 2005 Carswell BC 2346 (B.C.C.A.))

[11] 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.

[12] The Wife is 63; the Husband is 67. Although the Wife was employed in the early years of their relationship, she has been fully supported by the Husband for at least the last 10 years. Her present employability is questionable. Whether or not the Husband agreed she should no longer be employed, the fact is she stopped working and became his financial dependent. He has supported her, in the style to which she has become accustomed, since then and he has continued to support her during their separation. The Wife now requests that his financial support be paid directly to her as spousal support.

[13] The Wife's only source of independent income is \$457.86 from CPP and rental income of \$125.00 per month. I am uncertain about how long this rental income will continue and as a result I have not factored this income into my decision.

[14] The Husband retired after selling a very successful business from which he derived substantial yearly income. In 2007 his line 150 income was \$1,046,920.00, in 2008 it was \$501,467.00 and in 2009 it was \$1,323,827.00. I do not know the details about the sale of his business. I do know the purchase price is to be paid in three yearly instalments beginning January 1, 2010. He also sits on the Efficiency Nova Scotia Board from which he receives some income. The monthly income reported on his Statement of Income sworn December, 2010 is \$17,415.71. This would provide him with a \$208,989.00 yearly income. The Wife does not accept this calculation of income.

[15] The Husband has a holding company. Money received by him from several sources has flowed through this company. Complete financial records for this company have not been provided. Information about this company's investment

account status as at November 23, 2009 was provided; however, the amounts involved do not reflect investments that would have been made as a result of the sale of his business, the first payment for which was made January 1, 2010. I am not satisfied the Husband received, in 2010, the limited dividend and investment income he discloses on his Statement of Income because I am not satisfied it takes into account the sale of his business.

[16] The Wife suggests the best evidence before me about the Husband's likely 2010 and 2011 income is the income revealed on line 150 of his 2009 income tax return. The difficulty with this suggestion is I do know the Husband is retired and, although I do not accept his income will be limited to \$208,989.00, I am uncomfortable with the suggestion it will be as much as it was in 2009. He did have employment income for part of that year. Given the Husband's history of business success and his historically significant income I do not accept he has so failed in organizing the sale of his business, and the investment of the proceeds, so as to require him to suffer a considerable lifestyle change. While he blames their affluent lifestyle on overspending by the Wife, his income always permitted this lifestyle and he participated in its benefits as well.

[17] The Husband wants to continue to pay directly certain expenses associated with the Halifax condo while the Wife continues to occupy that residence. He will pay the expenses associated with the Florida property and provide the Wife \$2,000.00 per month for her personal expenses. He had been paying approximately \$12,000.00 per month to support the Wife's expenses but he has, in his proposal, eliminated many of the expenditures claimed in the Wife's Statement of Expenses filed October 20, 2010.

[18] I have examined the Wife's Statement of Expenses. I have eliminated some of her expenses because I do not consider it appropriate to consider these on an interim application. Those I have eliminated are - savings, funeral, personal loan and Florida condo expenses. The Florida condo expenses will continue to be paid by the Husband; he has been living there periodically.

[19] At least on an interim basis the Wife will need to reduce her expenditures for - repairs, food, clothing, taxis, hair and grooming, Christmas, holidays, entertainment, golf and health. If she has in the past spent what she has claimed on these expenditures, given the Husband's retirement, they may not be sustainable and I have taken that into consideration.

[20] The Wife has been totally financially dependent upon the Husband. It would appear she may have been more advantaged than disadvantaged by the marriage and therefore it is difficult to assess, on an interim basis, her compensable claim except to the extent this claim may be justified as a result of her total dependency upon her Husband. It is clear she has non-compensable entitlement.

[21] My analysis of the wife's expenditures, taking into account the parties previous lifestyle, the requirement for some reductions, and excluding income tax, leads me to conclude she requires approximately \$9,500.00 per month. Her CPP provides her annually with approximately \$5,500.00, (\$458.33 monthly). The gross amount of monthly spousal support inclusive of income tax she will need to provide a net monthly amount of \$9,500.00 is approximately \$15,000.00 per month. This figure has been generated by a computer program in which the only data entered was the income of both parties. I do not know the full extend of tax deductions either may claim and therefore could not do a more sophisticated calculation of their finances under various support scenarios.

[22] Monthly spousal support of \$15,000.00 together with her CPP will provide the Wife with an annual income of \$185,000.00. The computer program suggests she will pay \$71,480.00 for income tax leaving her with a net monthly income of \$9,460.00. If the Husband's annual income is \$500,000.00, his net monthly disposable income after paying this spousal support will be \$14,928.00. This will be sufficient to meet the personal expenditures he has disclosed. I am satisfied the Husband's gross annual income is at least \$500,000.00. He has the financial ability to pay \$15,000.00 per month as spousal support and he is to do so commencing April 1, 2011.

[23] The Husband did not make any submissions to suggest the Wife should not have interim exclusive possession of the Halifax condo and as a result I grant this relief to her.

[24] The parties did not address the issue of costs. Usually the costs of an interim proceeding are determined at the completion of the proceeding. If the parties request otherwise, written submissions are to be provided to this court by the Wife, with a copy to the Husband no later than April 13, 2011. The Husband's

submissions are to be filed with this court and copied to the Wife no later than April 22, 2011. If the Husband has raised an issue in his submissions not considered in the Wife's submissions she may file and copy to the Husband a further submission addressing those issues no later than April 27, 2011.

Beryl MacDonald, J.