

SUPREME COURT OF NOVA SCOTIA
Citation: Campbell v. Campbell, 2011 NSSC 145

Date: 20110412
Docket: Pic No. 1205-002980
SPD 069741
Registry: Pictou

Between:

Robert James Campbell

Petitioner

v.

Peggy Maureen Campbell

Respondent

Judge:

The Honourable Chief Justice Joseph P. Kennedy

Heard:

October 5, 2010, in Pictou, Nova Scotia

Counsel:

Timothy G. Daley, Q.C. for the Petitioner
Roseanne M. Skoke for the Respondent

By the Court:

[1] This is a divorce proceeding commenced in Pictou County.

[2] The divorce will be granted.

[3] The Petitioner, Robert James Campbell (the husband), and the Respondent, Peggy Maureen Campbell (the wife), were married on December 9, 1978 and separated on August 25, 2006. The parties have three children, the youngest of whom is Katelyn Dawn Campbell (Katelyn), born March 21, 1990. Her status is in issue.

[4] The parties entered into a Separation Agreement ("the Agreement") on November 29, 2006. It provided:

- confirmation that the husband had \$65,000 annual income;
- the husband would pay child support of \$260.77 bi-weekly in accordance with the *Federal Child Support Guidelines*;
- the husband would pay the wife \$646.15 bi-weekly spousal support.

[5] The Separation Agreement also provided for a "top-up" of child support and spousal support in the event that the husband's income exceeded \$65,000.

[6] Some specifics of the Agreement read as follows:

15. If the husband should receive, in any calendar year, additional income over and above his base salary, whether by bonus or in any other form, the parties agree as follows:
 - (a) The husband should disclose to the wife documentation evidencing the additional funds within 30 days of receipt of the funds;
 - (b) The husband shall pay to the wife a retroactive lump sum amount of child support equal to the difference between the annualized amount of child support the husband is paying . . . and the annualized amount the husband would have paid if his annual income included his base salary and the additional funds received . . .

[7] Further, if such "additional income" was received, the husband was to pay to the wife "retroactive spousal support equal to 25.85% of the additional income received by the husband".

[8] Both parties received independent legal advice when negotiating the Separation Agreement.

[9] Each received RRSP's totalling \$43,127.01 and one half of the net proceeds from the sale of the matrimonial home.

[10] In fact, the husband's 2006 income exceeded the \$65,000 "base salary". His 2006 T1 return shows income of \$85,659, comprised of \$8,500 RRSP income; \$77,159 employment income. As a result, the husband paid to the wife a "top-up" of both child and spousal support that year in the amount of \$3,413.35.

[11] Then circumstances changed.

[12] The husband's employment with Trenton Works was terminated on May 18, 2007. He was provided a severance package of \$102,375 in lieu of notice.

[13] He notified the wife of the termination and the amount of severance received.

[14] The husband placed his severance package into RRSPs but then withdrew \$59,172.56 in 2007 and \$50,194.22 in 2008, a total of \$109,366.78 which represented the entire severance package plus an additional amount from his existing RRSPs.

[15] The husband's 2007 T1 Line 150 income was \$195,935.35 consisting of employment income of \$34,387.79 earned prior to his termination, his severance package of \$102,375 and the RRSP withdrawal of \$59,172.56. He paid child and spousal support for 2007 based on the Agreement basic income of \$65,000.

[16] The husband's 2008 T1 Line 150 income was \$51,039, including the \$50,194.22 RRSP withdrawal. Again in 2008 he paid child and spousal support based on an assumed income of \$65,000.

[17] The husband says that the wife raised no objection at the time to the manner in which he paid support in 2007 and 2008.

[18] In December of 2008, the husband sent the wife a letter, a copy of which was attached to her May 25, 2010 affidavit as Exhibit 2. It stated that he would be receiving unemployment benefits in January 2009. He informed her that he was discontinuing spousal and child support payments at that time.

[19] The husband paid no spousal or child support in 2009.

[20] The husband's 2009 T1 Line 150 income was \$22,458.42.

[21] The parties appeared before the Provincial Family Court in March of 2010 and on the 13th of April, 2010, a Consent Interim Order was made by that Court addressing spousal support only.

[22] Paragraph 1 of that Order reads:

IT IS ORDERED THAT:

1. The Applicant pay to the Respondent interim spousal support on the following basis:

- a. \$400 on March 23, 2010;
- b. \$500 on April 1, 2010;
- c. \$500 on April 15, 2010;
- d. \$400 per month commencing on June 1, 2010 and the first of each month thereafter until further Order of this Court or until an Order in the Nova Scotia Supreme Court respecting spousal support is made.

[23] This Order has been complied with to the date of this hearing.

[24] The wife now claims that the husband has not satisfied the terms of the Separation Agreement - she submits that she is owed retroactive child support and spousal support.

[25] The wife confirmed that in 2007 the husband paid on the basis of a \$65,000 income. However, she says the husband's income for 2007 was \$195,935.35 that being from three sources: employment - \$34,387.79; RRSP withdrawal - \$59,172.56; and the severance package of \$102,375.00.

[26] She claims a "top-up" under the Agreement addressing the amount of 2007 income in excess of \$65,000.

[27] The husband says the wife took no steps to reorganize her finances after he lost his job and it should have become obvious that he was not going to be able to continue to provide spousal maintenance in accordance with the Agreement.

[28] The husband now says that spousal support should have ended as of December 2008.

[29] The husband wants child support ended retroactive to November 28, 2008.

[30] He claims that Katelyn Dawn has not been a "child of the marriage" since she left high school on that date.

[31] The husband says that after he lost his job in May of 2007, he tried to become re-employed but with no success.

[32] He says that he is now 61 years old with health issues that have caused his physician to advise against returning to work. As a result, he considers himself retired.

[33] The husband has an estimated 2010 income of \$11,405.04 from CPP and RRSPs. As of August 20, 2010, the husband had \$17,657.97 in RRSPs and RRIFs and \$5,539.39 in other funds. He had owed Visa \$2,709.95 as of August 20, 2010.

[34] After separation the husband received an inheritance from his mother's estate of \$39,571.49 and a further undetermined amount to follow. He also was given a

property which includes the premises in which he has been living since the separation and about 28 acres of land.

"Child of the Marriage"

[35] I will firstly deal with that issue, whether Katelyn continues to be a child of the marriage.

[36] Katelyn is now 20 years of age and lives with her mother. She did not testify.

[37] As to her status, the husband says that she is not attending any educational institution, she left the Pictou Academy on or about November 27, 2008 and has made two attempts to finish Grade 12 in 2009, but did not do so.

[38] He says that he has had no relationship with Katelyn since late 2007.

[39] The wife responds that Katelyn is unable to find work because employers require a high school diploma. As a result, she finds that she cannot support herself and remains dependent upon her mother, receiving \$437 a month in social assistance.

[40] The wife says that Katelyn wants to again return to high school next year and complete her Grade 12 and requires her father's child support to allow this to happen.

[41] The *Divorce Act* recognizes that child support can continue when the child:

2 (1) (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; . . .

[42] I do not find that this has been shown to be true of Katelyn.

[43] I find that she is no longer a "child of the marriage" and has not been since November 28 of 2008.

[44] She has not either attended school regularly or been employed since November of 2008.

[45] I do not believe that there are no jobs available for those with Grade 11 education and would require evidence of both applications and rejections to conclude that Katelyn was unemployable.

[46] Should she return to high school to obtain her diploma, it is possible that she could make an application to regain her "child of the marriage" status.

[47] Having so found, I do not intend to address the claim for dental expenses pursuant to s. 7 of the *Federal Child Support Guidelines*.

As to Retroactive Spousal and Child Support

[48] The husband paid spousal and child support for the income year 2007 based on an income of \$65,000 with no "top-up" pursuant to the Agreement.

[49] The husband's Line 150 income for 2007 of \$195,935.35 consisted of his employment income of \$34,387.79, his severance package of \$102,375 and withdrawals from RRSPs of \$59,172.56.

[50] The husband's RRSP income in 2007 is directly traceable to his RRSP contribution of the same year; made with money from the severance package. He submits that it is the same money and should not be counted twice.

[51] The husband's Line 150 income for 2008 was \$51,040.82 consisting of CPP benefits of \$791.66, interest income of \$54.94 and RRSP withdrawal of \$50,194.22.

[52] Of that RRSP withdrawal \$43,202.44 is directly traceable to his 2007 RRSP contribution. Again, the husband says this is severance package income not to be counted twice.

[53] He submits that his 2008 income should be determined to be \$7,838.38, which consists of \$791.66 CPP plus \$54.94 interest plus \$6,991.78 in RRSP withdrawals.

[54] I agree with the husband's submission that it would be improper to consider both the severance received in 2007 and the RRSP withdrawal taken that year as income for determining spousal and child support. Further, I agree that having considered the severance as income, the portion of the 2008 RRSP withdrawal traceable to that payout should not be considered income in 2008.

[55] In *Dillon v. Dillon*, 2005 NSCA 166, Line 150 of Mr. Dillon's T1 return showed his employment earnings and RRSP withdrawals. The withdrawals were from RRSP

contributions that Mr. Dillon had made that same year from his employment earnings. Mr. Dillon had earned income, used that income to purchase RRSPs, and in the same year withdrew those RRSPs.

[56] The Nova Scotia Court of Appeal found (at paras. 28 and 29) that:

28 The propriety of including an RRSP withdrawal as income for child support calculation purposes is fact dependent . . . Here, . . . there was no accumulation of RRSP contributions. . . . The withdrawal was clearly from current contributions.

29 To include both the contribution as well as the withdrawal as income is indeed a double counting. In these circumstances, this would not be a fair calculation of his income for child support purposes (Guidelines, s. 17). The double counting of the RRSP resulted in a material overstatement of Mr. Dillon's income. This, in turn, directly affected the amount of monthly child support . . . From Mr. Dillon's "Total Income" of \$75,311 should be deducted the RRSP withdrawal of \$10,017

[57] In *Kretzschmar v. Séguin* [2008] O.J. No. 2834 at para. 11, the Ontario Superior Court also excluded RRSP income from the income amount used to determine spousal support payments. They accepted "that to include RRSP income would be to double count income received as severance pay given the manner in which Mr. Kretzschmar has treated this income in his calculations."

[58] The husband's severance package was meant to represent approximately 18 months of income in lieu of notice - he says, in effect, he was given his 2008 salary in 2007. He submits, therefore, that the fairest determination of his income for 2007 and 2008 is an average of the two years: $\$136,762.79$ (2007) + $\$7,838.38$ (2008) = $\$144,601.17 \div 2 = \$72,300.58$.

[59] I agree and will determine his income for purposes of spousal and child support on that basis.

[60] Having so concluded, I find that there is some retroactive support owing under the Agreement.

[61] The husband paid a "top-up" of combined child and spousal support of $\$3,413.35$ for the 2006 taxation year. Based on his actual 2006 income including RRSP withdrawals, he underpaid child support as follows:

$\$731$ per month based on $\$85,659$
 $\$565$ per month based on $\$65,000$
 $\$164$ per month owed
x 4 months from separation to year end
 $\$1,779.86$ pro-rated for four months of 2006

The husband underpaid spousal support as follows:

\$85,659 Actual 2006 Income
\$65,000 Base Income
\$20,659 Difference
x 25.85%
\$5,340.35
÷ 12
\$445.02 per month
x 4 months from separation to year end
\$1,780.12 pro-rated for four months of 2006

[62] On the basis of the Agreement income of \$65,000 the husband underpaid child and spousal support for 2006 in the amount of \$3,559.98. He did pay a "top-up" in the amount of \$3,413.35 and so owes \$146.63 for the year 2006.

[63] The husband accepted that he owed child support and spousal support until December of 2008, when Katelyn was no longer in school.

[64] Based on 2007 and 2008 incomes averaging to \$72,300.58, the husband owed a child support "top-up" as follows:

\$626.40 per month based on \$72,300.58
\$565 per month based on \$65,000
\$61.40 per month owed
x 23 months (January 1, 2007 to December 1, 2008)
\$1,412.20

The husband underpaid spousal support as follows:

\$72,300.58 Actual 2007 Income

\$65,000 Base Income

\$7,300.58 Difference

x 25.85%

\$1,887.20

x 2 years (2007 and 2008)

\$3,774.40

[65] The husband therefore owes a "top-up" of combined child and spousal support for 2007 and 2008 of \$5,186.60.

[66] In total, he owes a "top-up" for 2006, 2007 and 2008 of \$5,333.23. I find retroactive spousal and child support payable by the husband in that amount.

[67] The husband suggests that the award of the Family Division which resulted in spousal support being paid from March 23, 2010 to October 1, 2010 should be deducted from this amount, however, this is not payment on retroactive and will not be involved in the retroactive determination.

Continued Spousal Support

[68] Both parties are in agreement that the wife is entitled to continued spousal support. There is no need to be specific about her situation beyond saying that she is losing the house she purchased after separation and is living on a disability benefit.

[69] The husband's position is that, entitled she may be, however, due to the change in circumstances he can no longer afford to provide it.

[70] He says that both he and the wife are now in similar unfortunate financial situations.

[71] The husband is 61 years old, suffers from several health conditions, and has a recommendation from his physician not to work due to the effect of stress on him.

[72] He says that he continues to have stress-related issues that prevent him from continuing to work and is, he says, now retired.

[73] The husband has an estimated 2010 income of \$11,405.04. As of August 20, 2010, he had \$17,657.97 in RRSPs and RRIFs remaining to draw from and \$5,539.39 in other funds, with a hold on \$2,000 of such other funds to pay for his Visa.

[74] He has also received an inheritance from his mother's estate, including a cheque for \$39,571.49 and a further undetermined amount to follow along with approximately 28 acres on which is located the house that he has occupied since the separation.

[75] The wife's position as to the husband's current situation does not preclude some spousal support.

[76] She is not convinced that he is unable to work and suggests that he is able to do house repairs and such chores as cutting wood so could find some type of employment if motivated.

[77] There is guidance that he has skill in the repair of small appliances.

[78] He will soon be receiving both Old Age Pension as well as the CPP benefits.

[79] He lives mortgage free, while the wife is in the process of losing her home purchased after separation and must live on a disability pension.

[80] The real property and money received by the husband from his mother after the separation is not matrimonial property. It does, though, provide the husband with mortgage free accommodation.

[81] There are no medical records supporting the husband's health claims in evidence.

[82] I find out in these circumstances the husband cannot afford to retire at 61 years of age.

[83] I believe he could be employed in some low stress work at least on a part-time basis.

[84] I refer to *Bellemare v. Bellemare*, 1990, CanLII 2605 (N.S.S.C.) in which Bateman, J. found that a spouse wanting to retire could, if properly motivated, continue to produce income at a level that would address spousal support obligations.

[85] I find that the husband will continue to pay spousal support in the amount of \$400.00 per month until this Court directs otherwise.

[86] In summary, I find that the husband owes the wife \$5,333.23 in retroactive child and spousal support, payable within thirty days of the date of this decision.

[87] Further, I find spousal support will continue in the amount of \$400 per month, payable on the 1st day of every month.

[88] Each party will be responsible for their own costs.

Kennedy, C. J.