

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Molloy v. Molloy, 2011 NSSC 390

Date: 20111026

Docket: SFPAF - 10373

Registry: Port Hawkesbury

Between:

Marie Molloy

Applicant

v.

John Molloy

Respondent

Judge:

The Honourable Justice M. Legere Sers

Heard:

July 20, 2011, in Port Hawkesbury, Nova Scotia

Counsel:

Tracey Sturmy, for the applicant

Wayne MacMillan, for the respondent

By the Court:

[1] On August 20, 2010, this application for spousal support was made, approximately 11 years after the separation of the parties. No divorce proceedings between the parties is evidenced.

[2] The applicant and respondent lived common law for a period of time before they married on February 14, 1972. They subsequently separated on August 16, 1999. This is a 27 year traditional marriage.

[3] The applicant is currently 55 years old and the respondent 59.

[4] The applicant began earning consistently in 1999 with an income of \$14,086.00. Her earnings fluctuated from a low in 2001 of \$8,997 to \$17,393.00 in 2007; \$12,137.00 in 2008, \$8,678.00 in 2009 and \$13,709 in 2010.

[5] Her current income is approximately \$806.00 monthly, including GST credit, for a yearly income of \$9,672.00. She shows total monthly expenditures of \$1,327.95 with a deficit of \$521.95.

[6] The applicant is currently employed at a pizzeria part time. She incurs travel expenses for work. Given her financial circumstances, she stays overnight with friends and family to avoid incurring additional residential costs.

[7] The applicant has no real property, minimal furniture and drives a 1993 Mazda.

[8] The respondent works at Atlantic Towing. He currently earns \$3,347.57 monthly for an annual income of \$40,170.00. He has group insurance and a small RRSP.

[9] In 2009, he earned \$45,245.00; in 2008, \$38,877.00; and in 2007, \$32,783.00.

[10] He lives with his common law partner. She works at Tim Hortons. I am unaware of her contribution to the household.

[11] He has furniture, no real property, a 2005 automobile, a small RRSP, cash in his account and minimal debts.

History

[12] The parties met when the applicant was 14 years old. Her mother had placed her in the home of the respondent's brother in order to assist the mother of the household (the respondent's sister-in-law) with her children while her husband was at sea.

[13] She became acquainted with the respondent while so employed.

[14] During the week, the applicant assisted the respondent's sister-in-law with her children. Initially, she advised, she received a small wage. Subsequently, she recalls that her pay ceased.

[15] The respondent was 18 when they met. They dated. When she was 15 years of age, he took her to Newfoundland to meet his parents. They stayed there for approximately two months, in part because they had no money to return. She became pregnant and returned to Nova Scotia.

[16] The applicant briefly described the difficulties she encountered at that time as a young pregnant unmarried woman. She left school at approximately eight months pregnant, married the respondent at 16 years of age and took on the role of housewife and care taker for their children.

[17] The respondent assumed responsibility for finding employment and earning an income.

[18] Their first child was born in March of 1972. They moved back to Newfoundland with this child to live with the respondent's family and six younger siblings.

[19] Throughout the marriage, the applicant followed her husband between Newfoundland and Nova Scotia and other parts of Canada while he searched for work.

[20] In part, he worked away from the household working in places which did not allow him to return home on a daily basis to assist with the care of the children.

[21] Their second child was born in 1975, their third in 1978, and their fourth in 1980. In June of 1981, they returned to Nova Scotia; lived in Halifax and then returned to live in Isle Madame.

[22] The respondent made the decisions relating to where the family would reside and the timing of their moves. The applicant's role was solely and primarily the care of the children and the household.

[23] In the late 80's the marriage deteriorated. The family continued to move from place to place. While the children were in their late teens, the applicant began working at a pizzeria.

[24] Various earlier attempts by the applicant to work failed due to the demands of the children and the costs of daycare.

[25] Eventually, in 1999, when the children were largely grown except for one who remained, the applicant left the respondent. The children are now all adults.

[26] After separation in February, 2001, the applicant filed an application for child support for the child who remained in her care. She sought contribution for post secondary expenses. The respondent advised her that he could not afford to pay.

[27] The file reflects an order of \$206.00 per month child support commencing June 1, 2001. Although the interim order was issued and remains on file, the mother received no monies for the care of herself or the child. Shortly thereafter the child left the mother's home.

[28] The first real supplementary employment the mother obtained was in 1995 when, armed with a hospitality course certificate, she obtained employment at a fast food restaurant. There she stayed until 1999, except for summer lay off periods.

[29] In 1997, she obtained shift work in a trout plant to supplement her income from the restaurant and in 1999 the restaurant closed.

[30] The applicant has achieved some minimal education and training since separation after obtaining her basic hospitality course in 1995, she obtained a diploma in eco tourism in 1996 and obtained a diploma from an Ontario school in 2005 and 2006 and she has obtained her certificate for safe food handling.

[31] The applicant finds that she is struggling to survive and cannot obtain self sufficiency.

[32] Initially after separation, and for the years in between, she strove to survive on her own. She has been unable to obtain much, if any, level of income or suitable employment that would allow her even a minimum standard of living.

[33] She made this application for spousal support after a significant delay.

[34] Her circumstances since separation have been dire at times. Her brother gave evidence that he has had to buy food for her on occasion and assist her. He advises that she struggles hard to survive.

[35] She has been treated for depression during the marriage relationship and she has advised, although he denies this, that he threatened her on occasion throughout the marriage.

[36] The respondent does not contest her evidence regarding the roles they played during the marriage, nor the moves.

[37] He alleges that at one time in 1998 the applicant collected employment insurance using his cards while he was working in Mexico. As a result, he had to pay back a debt of \$10,000.00 to \$15,000.00, inclusive of a penalty.

[38] I have no documentation to support that she signed the employment insurance cards. She did advise that she did not do anything other than follow his directions to send in his employment insurance cards blank for the period of times he was working away. She denies that she collected on her own behalf.

[39] In 2005, the respondent declared bankruptcy.

[40] He indicates in his affidavit that he lived common law with his current partner in 2009 yet his income tax returns indicate he lived common law in 2006. His oral evidence indicates that he actually lived with his current partner from approximately 2003. She continued historically and currently to work at Tim Hortons.

[41] He admits that his ability to recall accurately is limited.

[42] In 2009, he moved with his girlfriend to Isle Madame where they are currently living. They intend to move to Halifax.

[43] His confirmed that he was a fisherman working on the tug boats from 1995 to 1999. He identified a work injury that left him unemployed for two years; returning to construction in 2002 to 2007 and collecting employment insurance off season. He returned to tug boat work in 2007, travelling throughout the Maritimes and Quebec. He currently works shift work in Halifax on the harbour tugs.

[44] I have no knowledge of his partners financial situation or statement of property.

[45] The applicant's financial struggles result from many factors, including:

1. her long term traditional marriage, her age at marriage, the circumstances of the pregnancy, and the subsequent withdrawal from completing her high school education;
2. her lack of job skills;
3. lack of employment opportunities; and
4. a very traditional marriage which took her out of her educational stream and the job market, investing in her almost the sole responsibility to follow her husband or stay home while he travelled and care for the children and their well being.

The Law

[46] In assessing entitlement in the context of delay, the Courts have been required to assess, among other factors, two specific aspects:

1. the explanation for the delay; and
2. the prejudice to the possible payor spouse.

[47] In the course of the analysis of the decisions, there are collateral factors considered by the Court when dealing with delay. Among the factors the Courts have considered are as follows:

- the age of the parties;
- the length of marriage;
- the educational status of the parties;
- the role of the parties during the marriage;
- the existence of previous orders for child support and/or spousal support;
- the impact of a child support order on an award of spousal support;
- the likelihood of success had the spousal support been pursued in a timely fashion;
- the recipients financial circumstances and the connection it has to the marriage;
- the payors financial circumstances, including financial decisions made with the expectation that a spousal support award has not been requested or ordered;
- the degree of the payor's reliance on the absence of an order for spousal support or a request;

- circumstances since the separation or divorce that would impact on the decision, including delay;
- the prejudice to the potential payor given the financial circumstances and the effect of a retroactive and/or prospective order;
- special circumstances in the marriage, such as a child's illness or a parental illness; and
- evidence of duress in the marriage and efforts of the potential recipient to be self sufficient.

[48] The cases speak to the issue of delay in seeking a retroactive and prospective spousal support award. Perhaps the most compelling is the decision of ***Kerr v. Baranow***, [2011] S.C.J. 10. At paragraph 207, Cromwell J said:

“[207] While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a “retroactive” award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.

[208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is “automatic” and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position

that is prejudiced by lack of diligence on the part of the parent seeking child support: see *D.B.S.*, at paras. 36-39, 47-48, 59, 80 and 100-104. *In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, e.g., M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.*(italics mine)

[209] Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to *the certainty of the payor's legal obligations*; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns *placing proper incentives on the applicant to proceed with his or her claims promptly* (see *D.B.S.*, at paras. 100-103)." (italics mine)

[49] In *Miller v. Miller*, [2009] N.S.J. No. 467, Duncan J. sets out the analysis to consider when spousal support should be awarded. (Ref. also *S. (T.L.) v. M. (D.J.)*, 2009 NSSC 79 (59 - 72)).

[50] The *Miller* analysis refers to the three factors to consider in awarding spousal support as set out in *Moge v. Moge*, (1992),43 R.F.L.(3d) 345 (S.C.C.) and *Bracklow v. Bracklow*, [1999]1S.C.R. 420:

1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage;
2. Non compensatory dependancy based support, to address the disparity between the parties needs and means upon marriage breakdown; and
3. Contractual support to reflect an expressed or implied agreement between the parties concerning the parties financial obligations to each other.

It is settled law that no one objective has paramountcy.

[51] In *Miller v. Miller*, the Court awarded spousal support retroactive to the date of separation of the parties after a five year delay because there was a clear

connection between the spouse's current needs and the roles adopted in the marriage.

[52] Duncan, J. said at paragraph 60:

[60] “ While there is no limitation period for making an application for support, a delay in doing so may nevertheless weaken a claim for support. In the Divorce Act Manual, at 15.12.03, author T.W. Hainsworth suggests that “where there has been a lengthy separation or a delay in applying for spousal support, the courts are more inclined to award support only if there is a clear connective link between the spouse's present need and the role adopted in the marriage....” Hainsworth adds that “The spouse claiming support, after a long delay, must also justify the reasons for the delay. If, in the meantime, the parties have been divorced and have gotten on with their lives, the court may restrict its discretion to cases involving only exceptional circumstances....” (Emphasis mine)

[61] In *Lu v. Sun*, 2005 NSCA 112 (CanLII), 2005 NSCA 112, Hamilton J.A., for the court considered a recipient spouse's delay in seeking retroactive spousal support, which delay was “more significant than it is for child support,” due to “the special relationship between a child and his or her parents....” (at para. 81).

As such, “A greater onus is placed on a recipient spouse to make timely application for increased spousal support, or at least to give concrete notice that increased spousal support is being sought, than is the case where retroactive child support is sought.” (para.82).

[53] The court accepted the general principle as stated by the Manitoba Court of Appeal in *Andries v Andries*, [1998] M.J. 196, at para. 28, that:

... a payor should not ordinarily be required to pay support for a period during which none was sought or for a period during which the amount was fixed by interim order or by agreement. Generally speaking, a payor structures his or her financial affairs on the basis of known obligations. In the usual course of things, it would be quite unfair to impose an additional burden retroactively.

[62] The issue “is one of fairness.” *Sun* does not set down a hard rule that retroactive support will never be ordered where there has been a delay in requesting maintenance.”

[54] Duncan, J. concluded at paragraph 65 in *Miller v. Miller* :

[65] “Having regard to these principles I am satisfied that the petitioner’s delay in bringing forth an application for support is a relevant factor, but does not act as an automatic bar to the making of such an award.”

[55] In addressing the delay factor Turbull, JA in *Lautermilch v. Lautermilch*, 2005 NBCA 59, awarded spousal support of \$700.00 per month after an eight and a half year delay and a 19 year marriage. He said as follows:

“delay is not a concept that is evaluated in a vacuum. All of the circumstances of the case require consideration.”

[56] The respondent acknowledges that delay does not bar a claim for spousal support “provided there is a reason for the delay and events that have transpired since the delay”. (*Walker v. Greer*, (2003) O.J. 3396)

[57] Courts have decided on both sides of this issue depending on the circumstances of the case.

[58] In *Nobrega v. Nobrega*, 2007 CanLII 9615 (ON SC), the Court refused an award of spousal support in a short term marriage finding the applicant’s need did not arise from the marriage. The Court concluded that the delay created expectations that no spousal support would be applied for or ordered.

[59] No order for spousal support was issued after a four year delay in *Morgan v. Morgan*, [2006] N.J. No 9 (N.L.T.D.), after a five year marriage. The payor was unable to pay and the Court found the delay created an understanding that a claim would not be made. This, the Court found, prejudiced the payor.

[60] In *Archibald v. Archibald*, 2000 BCSC 1219 (Can LII), (2000), F.R.L. (5th) 12, the Court refused to order spousal support after a 16 year delay because of the insufficient effort on the potential recipient to become self sufficient or to improve her work skills.

[61] And again in *Olsson v. Olsson*, (1992), 36 A.C.W.S. (3d) 1171, after a nine year delay, the Court refused because the recipient made no effort to seek employment.

[62] However, in *Arrowmaker v. Arrowmaker*, 2010 NWTSC 63, June 21, 2010, Schuler, J., awarded interim spousal support of \$1,100.00 per month on the husband's annual income of \$50,000.00, after a 13 year delay.

[63] In *Arrowmaker*, the Court considered the circumstances of this traditional 28 year marriage with children. Child support had been paid by the husband. The husband was close to retirement. He had another child and was in another relationship. The wife was 66 years of age with a grade one education. She too was living with an new partner in very poor circumstances. She had little education, no marketable skills and little earning potential.

[64] The Court found that it was reasonable to conclude that the wife would have been successful. The husband had provided no proof of prejudice to him. In fact, the Court found that the absence of a spousal support order for those years could have been an indication that he in fact profited.

[65] In *Simms v. Simms*, [2002] O.J. No. 4003, the Court ordered spousal support after a five year delay because of the unique circumstances of the wife who had been stranded by her husband without independent support. She had suffered from depression, had cancer surgery and made clear but unsuccessful attempts to find employment.

[66] The court found these factors overcame the argument advanced by the husband that the wife should be estopped from receiving spousal support by reason of delay even though the Court found her need did not arise from the short marriage.

Analysis

[67] This matter was pursued under the *Maintenance and Custody Act*. The Court must review sec. 3 (1)(2)(3) including the factors considered in sec. 4 and the obligation of the maintained spouse.

[68] There was also an application under the *Pension Benefits Act*.

[69] The applicant would have an entitlement to pension benefits if a pension other than CPP existed. According to the disclosure, there does not appear to be a private pension plan in the respondent's name.

[70] She does not need a court order to apply for a division of the respondent's CPP .

[71] This was a traditional marriage in all senses of the word with a relationship that started when the applicant was 14 years old.

[72] The respondent had an income that grew from \$28,702.00 to \$38,673.00.

[73] In 1999, the mother lived on an approximate income of \$14,000.00, at the same time the father was earning an income of \$33,644.00.

[74] The mother's income declined over the next few years until 2007, when she earned approximately \$17,000.00; whereas the respondent's income hit a low of \$17,218.00 in 2001 and rose to \$31,208.00 in 2004, reduced for a period of two years and rose again to \$32,000.00, then \$38,877.00 in 2008; \$45,245.00 in 2009; and approximately \$45,700.00 in 2010.

[75] There is no question that the applicant was entitled at the time of the separation and continues to be entitled to spousal support.

[76] The respondent argues that she should be barred from her entitlement given her delay in making her application from the date of separation in 1999 to the date of her application, August 24, 2010, a period of time in excess of 10 years.

[77] This was a 27 year marriage with four children. I have not added in the period of cohabitation as I am unaware of it's length. The applicant was a stay at home mother for 23 years of the marriage. The father was not only working outside the home but often times away from the home.

[78] Ordinarily, had an application been made in 1999, according to the advisory guidelines, spousal support would have been ordered for an indefinite period of time.

[79] Certainly the applicant has some onus to provide reasons to the Court for her failure to proceed in a timely fashion with a spousal support application.

[80] She operated with the knowledge that her request for child support did not meet with success. Notwithstanding a court order, she did not receive child support for a child who remained in the household.

[81] The respondent informed her, and she believed, that he could not and would not pay child support to her.

[82] It is not uncommon to have spousal support deferred in situations in which child support is the priority. In this situation, while child support was ordered, it was not paid. From the applicant's perspective it is easy to understand her belief that there was little likelihood of receiving spousal support at that time.

[83] There is some evidence suggesting she was afraid of the respondent.

[84] The evidence supports her attempts at living independently to attain self sufficiency. This was made more difficult due to her lack of education, having met the respondent at 14 when he was 18, becoming pregnant, leaving school, having little family support, and moving around to different geographical locations with her husband and her children as he found work.

[85] The applicant never returned to school to complete her education until well after the bulk of her household duties were completed.

[86] She has only been able to earn minimum wage.

[87] There is evidence that she has worked diligently to maintain herself and is not able to obtain self sufficiency.

[88] In 2005, the applicant advised she obtained legal advice in Ontario and was informed that because of the lapse of time, she would not be entitled to spousal support.

[89] It is also clear that this is a situation where she did not receive assistance towards her efforts at self sufficiency.

[90] It could be concluded that the respondent has benefitted financially from the absence of an order to support his wife from a lengthy marriage.

[91] Her lack of opportunity in the marketplace is due in large part to the relationship and the expectation that she would remove herself from school and look after the children. She became pregnant early in life and had little option but to leave her educational track and remain out of the workforce for those considerable number of years.

[92] The Court is not in a position to determine whether she would have attained a higher standard of self sufficiency had she been able to pursue higher education.

[93] The case law would support an order of spousal support after a gap in time. It is clear that this gap in time is considerable and the Court must look at many factors before instituting a spousal support award.

[94] This case is a little usual in that it represents in this day and age a very traditional approach to marriage, a marriage that commenced with a relationship when the mother was in a position in the household of the respondent's family as an employee and assistant, an arrangement that was made between the respondent's brother's wife and the applicant's mother.

[95] She was young and inexperienced. There was a four year age difference. She was away from her home.

[96] Their relationship began when she left her own home and parents and moved into the respondents brother's home.

[97] The respondent took her to Newfoundland and they proceeded to live together over the years in a relationship which would have made her return to work virtually impossible given the lack of income and independence, given the roles that they chose, given his absence in the home and given her obligation to raise their four children.

[98] The applicant finds herself in this day and age with little educational skills; having tried diligently and persistently to be self sufficient. She has made many efforts to remain independent.

[99] Her lack of self-sufficiency in great part stems from the circumstances of her early relationship and 27 year marriage with the respondent.

[100] She has not had the assistance of the respondent since the separation and for many years during the marriage.

[101] Notwithstanding her depression and her lack of educational skills she has, according to the uncontested evidence, diligently pursued employment.

[102] I conclude on the evidence that a retroactive award of support based on the significant delay would prejudice the respondent.

[103] I find as a fact that she has established a current entitlement for support for an indefinite period of time.

[104] The respondent earns \$45,696.00. I understand the respondent's evidence regarding his medical conditions but he continues to be in a position to earn more than he has in the past.

[105] He is currently on stress leave from his employment. This stress leave commenced approximately 3 days before the court hearing. His stress, he advises, is due to this application before the Court. I have little evidence concerning this. Generally, he is working.

[106] I have no knowledge of his partner's income nor degree to which they split their expenses. The respondent pays the rent and oil bill and his partner pays the cable and phone bill.

[107] I have considered her income and income earning potential, his income and expenses as well as his current circumstances.

[108] I award her \$800.00 in monthly spousal support commencing October 1, 2011, and continuing thereafter on a monthly basis until agreement of the parties or further order of the Court.

[109] Without intending to limit the parties right to apply for a variation in the event of a material change of circumstances, a division of his CPP may well be sufficient to trigger the right to a variation application.

[110] Counsel for the applicant shall draft the order.

M. Legere Sers, J.