IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Galbraith v. Galbraith, 2006 NSSC 202

Date: 20060627
Docket: 1201-057986
(SFHD-027018)
Registry: Halifax

Between:

Arthur Barry Galbraith

Applicant

v.

Sheila Marie Lavoie (Galbraith)

Respondent

Judge: The Honourable Assoc. Chief Justice Robert F. Ferguson

Heard: March 1, 2006, in Halifax, Nova Scotia

Written Decision: June 27, 2006

Counsel: Sally B. Faught, for the applicant
Richard Bureau, for the respondent

By the Court:

[1] Arthur Galbraith has applied to terminate, or at least reduce, in amount and length, his court-ordered obligation to pay spousal support to his former wife, Sheila Lavoie (Galbraith).

[2] The parties who have two children, Brandon, fourteen, and Dennis, eleven, were divorced on June 10, 2004. The Corollary Relief Judgment incorporated the terms of a Separation Agreement, also finalized in the same month and year. As a result, it became court ordered that a) the children's main residence would be with Ms. Lavoie and Mr. Galbraith, with an income of $83,000.00 per year, would provide child support of $1,079.00 per month and maintain their health coverage; b) Mr. Galbraith assumed responsibility for a joint line of credit in the amount of approximately $8,000.00; and c) Mr. Galbraith was ordered to pay spousal support, beginning in June of 2004, in the sum of $1,700.00 per month. The order also stated:

> The aforementioned spousal support shall be subject to review after May 5, 2005, by a court of competent jurisdiction. The Respondent shall use her best efforts to become economically self-sufficient in so far as is practicable within a reasonable time.

[3] This application, in accordance with the foregoing, is a review of Mr. Galbraith's obligation to provide spousal support. As such, it is distinct from an application to vary which would require a demonstration of a change of circumstances.

RELEVANT LEGISLATION

[4] Section 15.2 of the *Divorce Act* which states, in part:

> (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.
>
> . . .
>
> (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.

(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.

. . .

(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.

HISTORY

[5] The couple were married in June of 1990 and separated in August of 2002. Mr. Galbraith is currently 47 years of age and Ms. Lavoie is 41 years of age. They cohabited for approximately 12 years. When married both were employed in the “Quality Assurance field.” A few years into the relationship with the arrival of their first child Ms. Lavoie’s employment ceased and she remained at home as a full-time homemaker and parent. For the duration of their relationship, during which time their second child was born, they remained primarily in the same roles.

[6] From separation in August of 2002 to March of 2003, Mr. Galbraith provided support to Ms. Lavoie and the children by providing for ongoing expenses. In March of 2003, an interim order required Mr. Galbraith to, in addition to providing child support, provide Ms. Lavoie with spousal support of $2,250.00 per month. This obligation remained in effect until the emergence of the current order.

[7] When Mr. Galbraith began this application, Ms. Galbraith was not employed. At trial, she had secured employment.

[8] Both parties provided current financial information. Mr. Galbraith submits that, with an income in excess of $83,000.00, his expenses which include his court-ordered spousal and child support obligation creates a monthly deficit in excess of $3,000.00.

[9] Ms. Lavoie submits with her current salary in excess of $26,000.00 per year she has a monthly deficit in excess of $5,000.00.

SUBMISSION OF MR. GALBRAITH

A. As to Termination of Spousal Support

[10] Mr. Galbraith submits the agreement between the parties supports a conclusion that Mr. Galbraith's responsibility to provide spousal support was for the purpose of giving Ms. Lavoie an opportunity to re-establish herself in the workforce. In support of this, he points to the statement that this obligation is subject to review after May of 2005 – only one year after they had entered into the Agreement. Further, that the Agreement, by its wording, emphasizes the objective of self-sufficiency; that it is apparent that Ms. Lavoie made no effort to become gainfully employed until he made his current review application. Further, Ms. Lavoie's relatively young age, education, background and qualifications, led credence to her ability to become economically self-sufficient and her new position could be taken as proof that self-sufficiency has been attained.

B. As to a Variation of the Existing Spousal Support

[11] In support of a request for a reduction of this obligation, Mr. Galbraith stresses that a) his income has remained relatively unchanged since the date

of the initial order; b) her income has increased roughly by $26,000.00; c) an income comparison chart which he provided to the court indicates that with his continuing to provide the current spousal and child support that Ms. Lavoie would be the recipient of 62% of the couple's total net income; and d) Ms. Lavoie's submitted budget indicates that she has created for herself a lifestyle that would require an income of approximately $93,000.00 per year.

Submission of Ms. Lavoie

[12] Ms. Lavoie indicates her financial situation as provided to the court indicates she still requires the spousal support currently being paid. Further, that apart from a means and need approach, she is entitled to support based on the economic disadvantage she has incurred from the relationship.

LEGISLATIVE CONDITIONS AS FACTORS FOR CONSIDERATION IN THIS APPLICATION

[13] The parties cohabited as spouses for approximately 12 years. The portion of their Separation Agreement dealing with spousal support has been stated earlier in this decision. Mr. Galbraith acknowledges the conditions stated in the *Divorce Act* are to be considered on a relatively equal basis. However, he submits the specific wording of their Agreement and the early return date after which there could be a review, hi-lights the objective of Ms. Lavoie's self-sufficiency and should indicate an anticipation, if not agreement, that Mr. Galbraith's provision of spousal support would cease around the time of the agreed review date.

[14] Ms. Lavoie submits insertion of a review date in an Agreement should be taken only as an indication one could be included in an order, as has been the case in this instance.

DECISION

[15] When Mr. Galbraith began this application Ms. Lavoie was not employed. It was Mr. Galbraith's contention that she was not making any legitimate effort to achieve financial self-sufficiency contrary to the specific wording of their Agreement and the dictates of the *Divorce Act*. Prior to trial, Ms. Lavoie has secured employment in a field in which she has qualifications and is earning, albeit ten years later, an income submitted to be approximately what she was earning at the time her employment ceased.

[16] Given the time that has transpired since their separation and the type of employment Ms. Lavoie has found, I conclude she has made an effort to become self-sufficient.

[17] Ms. Lavoie is currently, by her provided budget, spending funds in excess of what Mr. Galbraith can or should be required to provide. One reason given by Ms. Lavoie for this expenditure is that Mr. Galbraith is in arrears of his support payments which required her to enter into debt and, accordingly, pay for such indebtedness. Arrears aside, Ms. Lavoie's financial information indicates that, even if Mr. Galbraith's support payments were up-to-date and continuing, her expenditures far outstrip her income including her new found employment. As to the arrears, Mr. Galbraith states that, over the years, he has had constant involvement with the Maintenance Enforcement Program and the questioning of their records and, on occasion, has had them make adjustments in his favour. However, on extensive questioning, he acknowledges he may be in arrears to some extent and, if that be the case, he further acknowledged he is required to pay such arrears. Mr. Galbraith also provided the court with financial information that he submits supports a conclusion that, if he were to cease paying spousal support, given their current incomes, he would have 51% of the current cashflow of the two families. Further, if he was required to continue to pay at the given rate, Ms. Lavoie would be the recipient of 62% of their mutual monthly cash resources.

[18] Ms. Lavoie responds, given that there are three people in her portion of the family unit and one in Mr. Galbraith's, such apportionment of income is not inappropriate. Further, she again reiterates that her entitlement to spousal support should not be based solely on her need and Mr. Galbraith's ability to pay.\

[19] The Supreme Court of Canada in *Bracklow v. Bracklow*, [1990] 1 S.C.R. 420, stated at para. 15:

> "The lower courts implicitly assumed that, absent a contractual agreement for post-marital assistance, entitlement to support could only be founded on compensatory principles, i.e., reimbursement of the spouse for opportunities foregone or hardships accrued as a result of the marriage. I conclude, however, that the law recognizes three conceptual grounds or entitlement to spousal support: (1) compensatory; (2) contractual; and (3) non-compensatory. These three bases of support flow from the controlling statutory provisions and the

relevant case law, and are more broadly animated by differing philosophies and theories of marriage and marital breakdown."

[20] The *Annual Review of Family Law, 2002,* McLeod and Mamo, in reference to this decision stated at p. 193:

> "In *Bracklow v. Bracklow*, the Supreme Court of Canada held that there were three types of support:
>
> 1. compensatory support, (both specific calculable and unspecific) to address the economic advantages and disadvantages to the spouses flowing from the marriage (or the roles adopted in marriage);
>
> 2. non-compensatory dependency based support, to address the disparity between the parties' needs and means upon marriage breakdown; and
>
> 3. contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other."

[21] In this instance, there is no submission as to contractual entitlement.

[22] In entering into the Separation Agreement and ultimately having it become part of the Corollary Relief Judgment, Mr. Galbraith acknowledged Ms. Lavoie's entitlement to spousal support. Ms. Lavoie's decision to remain at home and provide for the home care of her children and her spouse meant relinquishing her opportunity to continue in her field of employment – a field in which she possessed considerable qualifications. On the dissolution of their relationship, this created an economic disadvantage to her. Ms. Lavoie established an entitlement to compensatory support. Further, the marriage breakdown, leaving her without employment, created a discrepancy between the income available to her and Mr. Galbraith which created an entitlement to her for non-compensatory support. Mr. Galbraith's provision of support to both her and the children from separation to this date, together with his assuming the matrimonial debt, has not, at this stage, satisfied such entitlement.

DURATION AND AMOUNT

[23] The *Annual Review of Family Law, 2002,* McLeod and Mamo, under the heading of "Duration of Support" at p. 221, states:

> "The duration of support should reflect the support objective that the support order is intended to address: *Bracklow v. Bracklow*, *supra*. Usually, support is awarded because a dependant is not self-sufficient as a result of the roles adopted in marriage. A court should not assume that a dependant will be able to achieve self-sufficiency. There is no deemed self-sufficiency and a support order should continue until a dependant has overcome the effect of the roles adopted in marriage: *Moge v. Moge*, *supra*." [Emphasis added]

[24] Ms. Lavoie's age, her qualifications and securing a position in a field in which she is qualified and where she wishes to be employed is an indication she is approaching self-sufficiency. Self-sufficiency does not require her to acquire an income equal to Mr. Galbraith or an income that can maintain her current spending pattern.

[25] In *Bildy v. Bildy* (February 22, 1999), Docket No. C27449, Court of Appeal for Ontario, the couple divorced after 13 years of marriage. There were children of the union entitled to child support. At trial, the spousal support payment was limited as to time. Ms. Bildy appealed. The Court of Appeal allowed the appeal as it pertained to the spousal support order but did not order indefinite support payments. Mr. Bildy was required to continue his payments for a further seven years or to terminate in April of 2006.

[26] In *Phinney v. Phinney* [2002] N.S.J. No. 540, the couple divorced after a 13 year relationship. There were children in this relationship entitled to child support. The divorce occurred in 2000. In 2002, Mr. Phinney's obligation to provide spousal support was varied by being reduced and terminated as of August of 2004. Ms. Phinney appeal this decision and was successful. Mr. Phinney was required to continue his spousal support payments until December of 2006.

[27] In both previously mentioned cases, the recipient of a limited term spousal support order was successful on appeal. Their success, however, did not come in the form of an indefinite order for support but rather an extension of the time such support would be paid.

[28] The *Annual Review of Family Law, 2002,* McLeod and Mamo, on this point, states at p. 233:

> Where support is awarded because a dependant is unable to support himself or herself because of the role he or she adopted in marriage, the amount of support should reflect the accustomed family lifestyle. A dependant should not be entitled to increased support because a payor's fortunes improved after separation unless

the dependant contributed to the payor's career so that the payor would be unjustly enriched if the payee were restricted to the accustomed lifestyle.

[29] The Spousal Support Advisory Guidelines, albeit a draft proposal, speaks to the issues of duration and amount of child support.

[30] I conclude that Ms. Lavoie's entitlement to spousal support continues. I find her securing of employment lessens the amount that Mr. Galbraith should be required to provide. I conclude that an order requiring Mr. Galbraith to provide Ms. Lavoie with spousal support in the amount of $750.00 a month, beginning July 17, 2006, up to and including December 17, 2009, will adequately provide for her compensatory and non-compensatory entitlement and overcome the roles adopted by the couple during the marriage.

[31] I request that counsel for the Applicant prepare the order.

J.