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CANADA
PROVINCE OF NOVA SCOTIA

IN THE SUPREME COURT OF NOVA SCOTIA (FAMILY DIVISION)
Citation: *Murphy v. Murphy*, 2002 NSSF 21

BETWEEN:

LAWRENCE GRAHAM MURPHY

APPLICANT

- and -

BARBARA LOUISE MURPHY

RESPONDENT

DECISION

HEARD: Before the Honourable Justice F.B. William Kelly at Halifax, Nova Scotia on November 19th, 2001

DECISION: April 12, 2002

COUNSEL: Diana M. Musgrave
Deborah E. Gillis

KELLY, J.:

[1] The parties in this matter have had a long history of disputes relating to spousal and child support payments. The amount of arrears is considerable, approximately $20,000 are acknowledged by Mr. Murphy and about $65,000 is claimed by Ms. Murphy in her Application to Vary filed April 6th, 2000. Also before the court is Mr. Murphy's application to forgive arrears relating to child support for a son which were added to the arrears after the son was no longer a

child of the marriage. This reduction is not opposed by Ms. Murphy. The main issues therefore relate to the termination of spousal support and the quantification of arrears. A Corollary Relief Judgment issued in December 31, 1997 attributed an approximate income of $70,000.00 to Mr. Murphy and approximately $10,575.00 to Ms. Murphy. Mr. Murphy's 1997 Income Tax Return reflects actual income of $73,446.58 and Ms. Murphy's reflects employment income of $11,547.90.

BACKGROUND

[2] The parties were married October 3rd, 1970 in Halifax, Nova Scotia. The Respondent Barbara Murphy was then twenty-one years of age and had graduated with a Medical Technology Certificate in 1969. At the time of her marriage she had been employed for about a year as a Registered Lab Technologist with the Victoria General Hospital and she continued in that employment for another six years until the oldest of their two sons was a year old. The decision for Ms. Murphy to leave the workforce and raise the children as homemaker was a mutual decision of the parties. Ms. Murphy remained out of the work force until approximately 1990 when she began part-time employment in retail sales for approximately two evenings per week. Mr. Murphy was a sales person in the early technology market and initially earned a good income. The couple owned their own home during the years of the marriage, both when they resided in the Halifax area and when they moved for a time to Ottawa, Ontario.

[3] Ms. Murphy has inquired about the possibility of re-certifying as a Registered Technologist after she re-entered the job market, but concluded it would not be possible due to lost job skills and significant changes in the profession. At the time of the granting of the Corollary Relief Judgment she was employed in retail sales at a Bedford shop known as Inside Out Gifts Limited. The business closed in May 1998 resulting in Ms. Murphy's unemployment for a period of time. Her employment income for 1998 was $12,537.49 and her Employment Insurance benefits totaled $1,595.00, for total earnings of $14,132.49 in that year.

[4] At the time of the granting of the Corollary Relief Judgment Ms. Murphy

was residing at her current two-bedroom apartment and had been residing there since September 1, 1996. Her rent was $750.00 per month. It is now $770 per month. Her youngest son, Jason, was living with her and attending his second year at St. Mary's University. He moved to Alberta in July of 2000, and is not dependant on either parent, although he is still assisted by them in some measure. Ms. Murphy continued to support Jason who lived with her until he graduated from Saint Mary's University in May 2000. It is acknowledged by her that no support would be payable by Mr. Murphy after that date. Mr. Murphy thus no longer has an obligation to pay the $577 per month child support ordered December 31, 1997 and the arrears claim of Ms. Murphy must be adjusted to reflect this.

BARBARA MURPHY-EMPLOYMENT

[5] At the time of the granting of the Corollary Relief Judgement, Barbara Murphy had commenced working approximately four days per week as a retail clerk for a company called Inside Out Gifts Limited. That business closed in May 1998, leaving her unemployed. Initially, she drew Employment Insurance benefits, and during this period received little support from Mr. Murphy. After taking a two month course through Human Resources in July and August of 1998, she obtained work in retail sales with The Cook House earning approximately $6 per hour plus commission of 3%. In January, 1999 she started an office job as an office assistant earning $8 per hour. She maintained her sales clerk job two evenings a week until April, 1999 when she had to give it up because of an overlap in hours between the two jobs. On October 30, 1999, after her office job ended, she was rehired by The Cook House, first on a part-time basis and then on a full-time basis. She still works there and earns approximately $7.80 per hour plus commission.

[6] The office assistant position was eliminated due to lack of growth in the business and Ms. Murphy has continued to be employed in retail sales. Given her age, physical capacity, education and training this appears to be the type of job and the salary range that would be available to her in the foreseeable future. For the past few years and for the foreseeable future her earnings will be approximately $21,000 per year. Ms. Murphy is 53 years of age and remains unmarried. She has not been able to accumulate any savings or RRSP's and no

health or disability plan, life insurance or pension plan. Her motor vehicle is twelve years old and her household furnishings are 15-25 years old. It is her submission that she continues to be entitled to spousal support and further requests that Mr. Murphy name her as the beneficiary on his life insurance policies so long as there are any support arrears outstanding. She is requesting that spousal support continue at the rate of $1,700 per month.

MR. MURPHY'S EMPLOYMENT

[7] When the Corollary Relief Judgement was granted in 1997, Mr. Murphy was living in Ottawa with his common-law spouse, Sherry Smith, having moved there in October, 1996. Initially, Mr. Murphy was employed with Maritime Information Technology and Ms. Smith with Xerox. His 1997 income was $73,446.58, and Ms. Smith's was $52,231.18.

[8] On February 20th, 1998, Mr. Murphy's employment with Maritime Information was terminated with pay to that date. He was also paid $2,692.31 in lieu of notice. He was successful in finding new employment within four months at a salary range consistent with his previous employment. This employment commenced June 29, 1998 with a company called DRT Systems International. He earned the sum of$36,657.64 in the remaining six months of 1998, an average of $6110 per month. For the two month period he worked with Maritime Information Technology in 1999 he earned $12,815.47. In the year 1998 he collected Employment Insurance of $5,369 and additionally cashed in RRSPs totaling $5,703. His total reported income for 1998 was $60,545.67. Ms. Smith's income in that year was approximately $69,000.00. Although employed full-time, Mr. Murphy ceased making voluntary maintenance payments in October, 1998 and any maintenance received made since that time has been as a result of garnishment.

[9] On September 25, 1998 the Respondent filed with the Ministry of the Attorney General, Ontario Maintenance program, a proposal acknowledging earnings of $8484.00 and proposed to pay on those arrears at the rate of $100.00 per month in addition to regular support payments of $2,277, composed of $1,700 spousal and $577 child support. This proposal was not accepted on the basis that it was inadequate, and Mr. Murphy made no voluntary support payments.

[10] In October 1998 he and Ms. Smith discussed her interest in a lateral transfer back to Halifax to enhance her career opportunities and to give him an opportunity to complete his application to vary and deal with matters relating to his father's serious illness. Mr. Murphy left his job and they moved to Halifax in late January or early February 1999, however he did not have any significant employment prospects in Halifax at the time. At this time his two sons and Ms. Smith's daughter resided in the Province. When Mr. Murphy and Ms. Smith arrived in Halifax they resided for a time rent free in Mr. Murphy's father's vacant home after the latter's death until they moved into a new $142,000 home purchased in May, 1999. Title to this home was taken in Ms. Smith's name alone. The couple continues to reside there. In April 6, 2000, Mr. Murphy amended his application and sought to terminate child and spousal support and to seek relief from arrears of maintenance.

[11] In January 2000, prior to commencing the current variation Application, Mr. Murphy received approximately $29,000 as his portion of proceeds of his father's estate. Mr. Murphy's evidence was that he paid off other debts in priority to his maintenance obligations and applied none of these monies to any outstanding arrears through Maintenance Enforcement. At that time he had not made a voluntary maintenance payment in fifteen months and Ms. Murphy had only received in those fifteen months $4,390 in maintenance. The Applicant had signed a letter of direction with respect to these proceeds on September 20, 1999, directing that his legal bills be paid from sale proceeds. He contributed approximately $2,000 to Jason's St. Mary's tuition from the monies he received.

[12] Mr. Murphy's last position in Ottawa, Ontario, prior to returning to Halifax was as an executive with a division of Deloitte Consulting called DRT. He commenced that position in late June 1998 and it ended when he made his decision to transfer to Halifax to follow his partner in her lateral career move. His partner, Ms. Smith, had earned $69,515 in 1998. In his position with DRT, he had positive evaluations and was earning approximately $50,000 per year base salary, with a compensation target of $100,000 with anticipated commissions. In the seven months he had been employed with DRT, prior to he and his partner returning to Halifax, he earned $40,906.64, or approximately $70,100 annually. The evidence disclosed that he had no realistic job prospects

in Halifax when he made the move and was not to find employment for some time. I am satisfied he had little concern, if any, for the effect this move would have on his support obligations to Ms. Murphy. At no time did he consider retaining his employment in Ontario until he could move to Nova Scotia after attaining employment there. Under these circumstances, this change cannot be considered as to be so unforeseen as to warrant a variation in spousal support.

[13] **ISSUES**

1. Should Ms. Murphy's income be increased to reflect marketable rent for her son's rental payment?

2. Should there be a variation or termination of spousal support?

3. Should there be any relief granted by way of reduction of either child or spousal support, both retroactively and in the future? If so, in what amounts?

4. Is Ms. Murphy entitled to security in these circumstances?

CONSIDERATION

Should There be an Implied Increase in Ms. Murphy's Income

[14] Ms. Murphy presently resides in the same two-bedroom apartment in Bedford, Nova Scotia in which she resided at the time of the granting of the Divorce Corollary Relief Judgment. She presently shares this apartment with the parties' eldest son, Mark. He is contributing $250 per month to household expenses. Mr. Murphy argues that his son should contribute more and that such increase should be implied to Ms. Murphy's income. She responds that there is an added social and security benefit in having her son with her, and that there is not a market value on the occupancy as she would not otherwise have a stranger "boarder" in the small modest apartment. Her son has advised her that he earned $44,000 in the year 2000 but would not disclose his year 2001 income. Her evidence is that the couple's son is trying to pay off student loans, vehicle loans and other bills and advises her that if he had to pay anything more he would

move out, resulting in the loss of even this contribution to her income. Ms. Murphy does not expect her son to be residing with her for a lengthy period and his contribution cannot be relied upon in the long term.

[15] I was not presented with much evidence relating to the market rent of "boarders" in the type of premises involved in these circumstances. Ms. Murphy's proposition that there is no "market" is not reasonable on its face. I am satisfied that the amount she charges to her son for his occupancy is minimal, but not unreasonable for his limited occupancy and considering the benefits it additionally affords her. I would not increase her income amount on the basis of this issue.

Should There be a Variation or Rescission of Spousal Support?

[16] The first step in considering Mr. Murphy's application to reduce and terminate arrears is to consider the relevant legislative section and some authorities on the principles to relevant in applying that section. Section 17 of the *Divorce Act* states:

> Variation, Rescission or Suspension of Orders
>
> 17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses by any person.
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respecting of which the variation order is sought.
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation made in respect of that order, and, in making the variation order, the court shall take that change into consideration.
> 17(7) A variation order varying a spousal support order should
>
> (a) recognize any economic advantages or disadvantages to the former spouses

arising from the marriage or its breakdown;

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

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

[17] The matter of a variation of the spousal support is vigorously contested by both parties. Ms. Murphy's position is that her need has not changed and that Mr. Murphy's refusal to make voluntary payments for a considerable time has caused her great hardship and expense and argues this should weigh heavily against him. His submission is that since the support order he has experienced periods without employment and a considerable reduction in income. Ms. Murphy responds by alleging that much of his income difficulties were the result of his own bad choices and further implies that he sometimes deliberately structured his employment and income decisions to forestall enforcement procedures based on his failure to make spousal support payments.

[18] Ms. Murphy contends that there is not the necessary change in the "condition, means, needs or other circumstances of either former spouse" since the last order to authorize a variation pursuant to ss.17(4.1). There indeed been little such change in her situation, with the exception of an increase in income, but there clearly has been significant periodic changes in Mr. Murphy's income since the original support Order. In support of her contention she cites *Kilpatrick v. Kilpatrick*, (1997) 27 R.F.L. (4th) 296, where Scarth J. considered the factors that constitute such a change in "condition, means, needs or other circumstances." He referred to the discussion of the Supreme Court of Canada on this matter in *Willick* at para 14:

> **[**14**]** The test as to whether there has been a change of circumstances under s. 17(4) sufficient to justify a variation of either spousal support or child support was, according to both Madam Justice L'Heureux-Dubé and Mr. Justice Sopinka, established by the Supreme Court of Canada in *Willick* v. *Willick*, [1994] 3 S.C.R. 670. In that case, at p. 688, Mr. Justice Sopinka, wrote:

> In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

This practical test is, in my opinion, an appropriate one to apply here: whether at the time that spousal support was granted, the changing situation of the parties could reasonably have been contemplated. If so, then a variation should not be granted. I conclude that the changes referred to above are so numerous and so significant in their effect that a basis for variation of the support issues has been established.

Should There be Relief Granted, and if so the Date and Amount of such Relief

[19] At the time of the Corollary Relief Judgment of December 31, 1997, their attributed annual income was $70,000 for Mr. Murphy and $10,575.00 for Ms. Murphy. Presently it is $21,000 for her, but his is not so clear. In October of 2001, shortly before the hearing of this matter, Mr. Murphy obtained employment with Dynamics Canada Inc. which resulted in a base salary of $36, 000. In addition he has an automobile allowance of $469 a month and other potential taxable allowances for a laptop and a cell phone. The commission arrangement is somewhat complex: 5% of a specific targeted sales figure, which apparently he is not expected to achieve for several months, and which is guaranteed at $250 a month for two months. For the purpose of this application I will imply an income of $40,000 for the first six months of his employment, $45,000 for the next six, and $50,000 subsequently. Income is only one of the factors to be considered but it is not an insignificant one. The argument advanced by Mr. Murphy's counsel is that his subsequent gross income did not normally meet the amount of $70,000 set by the court in June of 1997 and that the spousal arrears should reflect the actual income he earned over the period. His counsel's proposal is that the original spousal support ordered represented 29% of his income and he requests a reduction of arrears based on spousal support continuing for the years1998 to 2000 at 29% of his gross income, in their

calculation resulting in an amount of $19,910 according to the credits and payments made as of August 16, 2000. Such a calculation based on a percentage on a changing income may be useful in considering the factor of the payors capacity to pay but does not reflect other factors, such as the need of the payee, and also the other well established factors relating to the circumstances of the marriage as reviewed in *Moge v. Moge* (1993) 43 R.F.L. (3d) 345 (S.C.C.),and stated in s. 17(7) of the *Divorce Act*.

[20] The Supreme Court of Canada in *Moge* reviewed extensively the basis of spousal support law, and emphasized the importance of the principles of compensation and economic disadvantage arising from the marriage and its subsequent breakdown. Justice L'Heureux-Dube, speaking for the majority, emphasized that a husband's obligation to support his wife depended on factors sent out in the *Divorce Act*, R.S.C. 1985, c.3. In *Mog*e the court found that the "needs and means test" is not the exclusive basis for determining spousal support under the *Divorce Act*.

[21] In *Moge* at pp. 375-377, Justice L'Heureux-Dube, J.A. approved of the authorities who argue that judicial emphasis in spousal support should shift from the narrow emphasis on "needs" and "capacity to pay", particularly in situations where one of the spouses had some means, either an asset base or income potential. These authorities stress that the four objectives of s.15(7) and s. 17(7) can be interdependent and that no single one of them should be unduly emphasized. Although economic self-sufficiency should be sought by former spouses where practicable, it should not be considered the dominant factor. At pp. 380-381 the Court stated:

> It would be perverse in the extreme to assume that Parliament's intention in enacting the Act was to financially penalize women in this country. And, while it would undeniably be simplistic to identify the deemed self-sufficiency model of spousal support as the sole cause of the female decline into poverty, based on the review of the jurisprudence and statistical data set out in these reasons, it is clear that the model has disenfranchised many women in the courtroom and countless others who may simply have decided not to request support in anticipation of their remote chances of success. The theory, therefore, at a minimum, is contributing to the problem. I am in agreement with Professor Bailey, at p. 633 that:
>
> > The test is being applied to create a clean break between the spouses before the

> conditions of self-sufficiency for the dependent partner have been met, and *will undoubtedly cause an increase in the widespread poverty (at least relative poverty) of women and children of failed unions.* [Emphasis added.]

In the result, I am respectfully of the view that the support model of self-sufficiency which Mr. Moge urges the court to apply, cannot be supported as a matter of statutory interpretation, considering, in particular, the diversity of the objectives set out in the Act.

[22] Justice L'Heureux-Dube also reviewed the extensive academic literature on the general subject, much of which urged a change from most past approaches to spousal support, and she repeated comments of Judge Abella at pp. 382-383 of *Moge*:

> The law should have two primary objects. First, it should adopt a philosophy of interspousal maintenance that does not tend to compel a sexually-determined mode in which marriage functions are divided, leaving it to the market place of social custom as to how individuals will arrange their marriages in future. Second, it should ensure, as far as it is able, that the economic disadvantages of caring for children rather than working for wages are removed.
> . . .
>
> A division of functions between marriage partners, where there is a wage-earner and the other remains at home will almost invariably create an economic need for one spouse during the marriage. The spouse who stops working in order to care for children and manage a household usually requires financial provision from the other. *On divorce, the law should ascertain the extent to which the withdrawal from the labour force by the dependent spouse during the marriage (including the loss of skills, seniority, work experience, continuity and so on) has adversely affected the spouse's ability to maintain himself or herself. The need upon which the right to maintenance is based therefore follows from the loss incurred by the maintained spouse in contributing to the marriage partnership.*

And further at pp. 383-384, L'Heureux-Dube, J.A., observed:

> Women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non-monetary and came in the form of work at home, such as taking care of the household, raising children, and so on. Today, though more and more women are working outside the home, such employment continues to play a secondary

> role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband), who, because his wife is tending to such matters, is free to pursue economic goals. This eventually may result in inequities.

The Court in *Moge* also stressed the principle that the financial consequence of marriage breakdown should be apportioned as equally as possible in long term marriages in the interest of equity.

[23] In her discussion of post-divorce equity in *Moge*, L'Heureux-Dube, J., discussed the factor of self-sufficiency at p. 383:

> Although the promotion of self-sufficiency remains relevant under this view of spousal support, it does not deserve unwarranted pre-eminence. After divorce, spouses would still have an obligation to contribute to their own support in a manner commensurate with their abilities. (Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act*, 1985 (Part 1)", at p. 171.) In cases where relatively few advantages have been conferred or disadvantages incurred, transitional support allowing for full and unimpaired reintegration back into the labour force might be all that is required to afford sufficient compensation. However, in many cases a former spouse will continue to suffer the economic disadvantages of the marriage and its dissolution while the other spouse reaps its economic advantages. In such cases, compensatory spousal support will require long-term support and an alternative settlement which provides an equivalent degree of assistance in light of all of the objectives in the Act ("Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act*, 1985 (Part 1) ", at pp. 171-172).

L'Heureux-Dube, J., stated further at pp. 386-87:

> The Act refers to economic advantages and disadvantages flowing from marriage or its breakdown (see Payne, "Further Reflections on Spousal and Child Support After *Pelech, Caron and Richardson"*, and *Linton* v. *Linton, supra*). Sections 15(7)(a) and 17(7)(a) of the Act are expressly compensatory in character while ss.15(7)(c) and 17(7)(c) may not be characterized as exclusively compensatory. There latter paragraphs may embrace the notion that the primary burden of spousal support should fall on the family members, *not* the state. In my view, an equitable sharing of the economic consequences of divorce does not exclude other considerations, particularly when dealing with sick or disabled spouses. While the losses or disadvantages flowing from the marriage in such cases may seem minimal in the view of some, the effect of its

> breakdown will not, and support will still be in order in most cases.
> ....
>
> The four objectives set out in the Act can be viewed as an attempt to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown. At the end of the day, however, courts have an overriding discretion and the exercise of such discretion will depend on the particular facts of each case, having regard to the factors and objectives designated in the Act.

L'Heureux-Dube, J. continued at p. 390:

> 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 1)", at pp. 174-175). [emphasis added]

[24] In concurring reasons, McLachlin, J., stated at p. 397:

> The third thing which the judge's order should do is grant relief from any economic hardship arising from the breakdown of the marriage. The focus here, it seems to me, is not on compensation for what the spouses have contributed to or gained from the marriage. *The focus is rather post-marital need;* if the breakdown of the marriage has created economic hardship for one or the other, the judge must attempt to grant relief from that hardship. [emphasis added]

[25] In *Bell* v. *Bell* (1998), 44 R.F.L. (4^{th}) 73, the Nova Scotia Court of Appeal upheld the trial judge's award of $800 per month spousal support to a spouse earning $37,000 by a spouse earning $66,500. The trial judge found that Ms. Bell had suffered economic hardship as a result of the marriage breakdown, entitling her to spousal support. The Court of Appeal found there was no basis to interfere with the trial judge's decision on appeal.

[26] In *Murphy* v. *Murphy*, [1988] N.S.J. No. 498, the court refused to rescind support notwithstanding that the ex-wife's income had almost doubled since the

entering into a support Agreement with her ex-husband and was in a debt-free position. Here, the Plaintiff's counsel argues there has not been such a significant change in the condition, means, needs or other circumstances of either former spouse since 1997 that would warrant a variation of the spousal support Order issued in December, 1997.

[27] In *Heinemann* v. *Heinemann* (1989), 91 N.S.R. (2d) 136 (C.A.), Hart, J.A., speaking for the court, engaged in an full analysis of the often conflicting cases and principles relating to spousal support. He discussed the changing roles of spouses in marriage and noted that spousal support should not necessarily be used to equalize the standard of living of the parties. He recognized that it would be unlikely in many situations for the dependent spouse, often the wife, to have the skills or opportunity to enter the work force at a level she would have gained but for leaving the work force and altering her career curve. At p. 273 he stated as follows:

> If the wife is able to earn some income but as a result of a lengthy marriage is unable to earn enough to meet her needs for a reasonable standard of living then, in my opinion, the husband is responsible to supplement her income to the extent necessary to meet that standard.

[28] In *Mosher* v. *Mosher* (1993), 126 N.S.R. (2d) 367 (T.D.), I had the opportunity to review *Moge* and *Heinemann* and stated at page 376, paragraph 34:

> Although it may be argued that some of the principles of support espoused in *Heinemann* are now altered by *Moge*, the above comments regarding the function of the trial judge has not been substantially altered. The change, if any, may be a greater recognition in *Moge* of the numerous financial consequences to a custodial parent not reflected in the direct costs of supporting a child, and a greater emphasis on the negative financial consequences to the parent who leaves a career path for the sake of the family unit. Included in the consideration would be such factors as missed promotions, loss of seniority, and lack of access to fringe benefits.
>
> It is clear from *Moge* that the application of spousal support principles, as enunciated in the *Divorce Act*, do not guarantee a pension or a certain standard of living to a spouse on marriage break-up. The trial judge is left with exercising her or his discretion to determine the effects of the marriage in impairing or improving each spouse's future economic prospects and attempting to achieve an equitable sharing of the economic consequences of the marriage breakdown. In exercising its discretion, the court will

> consider the specific circumstances of the case before the court, including the asset base of each party, their abilities, their education and training, their capacity to enter the work force, their present prospects in the work force, their continuing childcare responsibilities, and generally their roles in the marriage and how those roles have affected the above factors as outlined in *Moge*.

[29] Considering the factors relevant to spousal support expressed in the above authorities, I come to the following factual findings:

1. The marriage was a "traditional' one where the wife interrupted her career opportunities to care for the children and act as the principle homemaker with the agreement of the husband. From time to time she worked during the marriage, when family duties allowed, but only rarely and at minimum-skill jobs and at minimum salary. Her original career potential has been effectively terminated. Her employment and other economic prospects were clearly affected by this mutual decision. The wife's prospects of an economic or income improvement are minimal.

2. Neither party has any significant asset base. Presently Ms. Murphy does not have any reasonable prospects of savings or pensions before her retirement from the workforce. Her opportunity of establishing any post-employment financial security is practically non-existent. Ms. Murphy has a need to provide for her future security, including the income needs of her retirement period.

3. Mr. Murphy has some future possibility of establishing an asset and security base based on his potential future salary. He has the additional benefit of having a financially secure partner with whom he apparently shares a secure long-standing relationship. This affects his long term security possibilities as well as his concerns about future periods of unemployment. To some extent, any present apparent financial insecurity is caused in considerable measure by his arrears liability and his attempts to avoid the consequences of support enforcement. In addition to his support arrears he has about $10,000 of debt.

4. Mr. Murphy no longer has the child support obligations he had at the time of the divorce.

I am satisfied on the evidence and after consideration of the principles reviewed above that Ms. Murphy continues to be entitled to spousal support from Mr. Murphy. It remains only to determine if that future support should be reduced. As noted above, Ms. Murphy asks the support remain the same and Mr. Murphy requests that if support is not terminated, it should be reduced because of the change of the financial circumstances of both parties. As he also seeks this reduction retroactively, I next must determine when the reduction, if granted, should apply. The major factors that come into play in this consideration, in addition to those discussed above, are the present salaries of the parties, both of which have changed since the original order and their present and long term needs.Ms. Murphy's income has increased from $10,575 to $21,000 and his has decreased from $70,000 to the $40,000 to $50,000 figure referred to above.

[30] As Mr. Murphy also seeks a retroactive reduction in child support I will deal with both issues of such support together. I repeat that there is an agreed elimination of child support retroactive to April 30th, 2000. It is the subject of the Court Order which was not issued until August 16th, 2002 and any arrears in child support calculated after April, 2000 will be eliminated. Mr. Murphy also seeks a reduction of the arrears prior to April 30th, 2000, based on his claim that the benchmark of $70,000, his income at the time the child support was assessed, was not realized in subsequent years. His employment income (in round figures) for 1997 was $73,450 (instead of the $70,000 anticipated in the Order), $63,800 in 1998, $34,400 in 1999, $22,850 in 2000 and $23,000 during the four months of 2001 he was required to pay child support. This annualizes to approximately $50, 200 of income per annum. However, a number of factors weigh against Mr. Murphy receiving the full benefit of calculating child support based on this income including such matters as the sometimes questionable necessity of leaving jobs, his delay in applying for a variation of arrears, the financial planning inconvenience for Ms. Murphy in non or late receipt of the funds, and most significantly his failure to pay at times when he was in a financial position to do so. On the part of Ms. Murphy, there was some less than effective effort to enforce payment of support, and she survived financially on a basic income with frugality and with family support. In making some attempt to compensate for these factors I find Ms. Murphy should be entitled to child support during the appropriate period in the Guideline amounts based on an implied annual income

of Mr. Murphy in the amount of $60,100.

[31] Returning to the issues of spousal support, based on the same general factors discussed above, the needs of the parties, the implied income and the comparative income stream of the parties, I conclude that the spousal support should be varied from one month following his first spousal support payment date subsequent to the date of his application to vary spousal support, to the amount of $1400 per month until November 1st , 2001. At that time the amount of spousal support will be fixed at $1,250. I further conclude that Mr. Murphy should make arrears payments in the amount of $500 per month to Ms. Murphy commencing thirty days following the next support payment date.

Security for Arrears and Future Payments

[32] Having found that the Respondent is entitled to continuing support in the amounts described above, and having ordered that Mr. Murphy pay an additional amount of $500 per month to address outstanding arrears, I come to the issue of security as advanced by Ms. Murphy. Mr. Murphy has admitted that he has repeatedly neglected to comply with his support obligations in relation to his former spouse. Arrears continue to accrue even now. With this in mind, it seems clear that an order for security is appropriate in this case.

[33] The relevant statutory authority for such an order can be found in section 15.2 of the *Divorce Act* (R.S. 1985, c. 3), which reads in part as follows:

> (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 and periodic sums, as the court thinks reasonable for the support of the other spouse.
>
> (2) Where an application is make 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).
>
> (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.

While this section makes no explicit mention of life insurance policies, it gives the court a fairly broad authority to tailor appropriate support and security regimes based on a case-by-case analysis.

[34] In a number of reported cases courts have ordered payors under spousal support orders to designate the payee as beneficiary to their life insurance policies. One such authority is *Henry v. Henry*, [1998] N.B.J. No. 450, in which Athey J. of the Court of the Queen's Bench, faced with a similar situation, stated at para. 39:

> I order Mr. Henry to designate Ms. Henry beneficiary of not less than 75% of the proceeds of his life insurance through employment as long as he has an obligation to contribute to her support. If requested by Ms. Henry he shall periodically provide her with proof of her designation as beneficiary.

Indeed, it seems clear from my review of the case law that orders of this nature have begun to be granted on a fairly routine basis. In Freedman et al., *Financial Principles of Family Law* (Toronto: Carswell, 2001, release 2), at 30.1(b), the authors state unequivocally:

> Life insurance can provide security for divorce settlements. To secure future payments of i) an equalizing payment or ii) spousal and child support, the recipient spouse may require that he or she be designated as the beneficiary of the payor-spouse's life insurance policy.

There seems considerable authority for the authors' assertion in Canadian jurisprudence. See *Taylor v. Taylor*, [2001] O.J. No. 835; *Hopkins v. Hopkins*, [2000] O.J. No. 4248; *Maveety v. Maveety*, [2001] O.J. No. 3982 and *Bursey v. Bursey*, [1993] N.B.J. No. 655 among many others.

[35] While it was not cited by either party to this matter, I find Hood, J.'s recent decision in *Crouse v. Crouse*, [2001] N.S.J. No. 252, to be compelling and significantly on point. That case involved a long traditional marriage, in which the wife had forgone employment opportunities early on and with the consent of

her husband in order to provide full-time care to their children. At the time of trial, Mr. Crouse had failed to voluntarily pay any of the support payments owing under an interim order. In dealing with Ms. Crouse's request for security in the form of a beneficial interest in Mr. Crouse's life insurance policy, Hood J. wrote, at paragraphs 28 and 29:

> [28] I order that the spousal support be secured by a beneficiary designation in favour of Catherine Crouse on Ross Crouse's group life policy through his employment in the amount of $100,000.00. That beneficiary designation shall continue as long as spousal support continues to be paid.
>
> [29] In the event the group policy, for whatever reason, does not continue, Ross Crouse shall continue to provide security for spousal support by beneficiary designation on another life insurance policy. He shall provide annually proof of such insurance to Catherine Crouse.

Mr. Crouse appealed the decision on a variety of grounds, but his appeal was eventually dismissed when he failed to provide security for costs as ordered by the Court of Appeal ([2002] N.S.J. No. 31). Admittedly, Ms. Crouse's employment prospects after the marriage were hampered by illness, however, I do not find this to be adequate grounds for distinguishing the case. Security should be granted in any case of this nature when it is found, for whatever reason, to be legitimately and reasonably warranted under the circumstances. Mr. Murphy has persistently neglected his responsibilities to Ms. Murphy, and it is not unreasonable to expect that he might continue to do so. Therefore, security in the form of an irrevocable designation of Ms. Murphy as beneficiary of Mr. Murphy's life insurance policy is reasonably warranted and will be ordered.

[36] Accordingly, I hereby order that spousal support and arrears owed by Mr. Larry Murphy be secured by a beneficiary designation in favour of Ms. Barbara Murphy on Mr. Murphy's existing life insurance policy in the amount of $50,000. In the event that his existing policy now, or at some point in future, bears a face value of less than $50,000, Mr. Murphy must acquire additional coverage sufficient to satisfy his then current obligations under this order. The beneficiary designation will continue as long as Mr. Murphy is liable to pay spousal support and/or arrears. Mr. Murphy has one month to make the necessary arrangements with his insurer. Ms. Smith, who is currently named as

beneficiary, is of course entitled to any residual benefits after the amount due is paid to Ms. Murphy. If the effect of this order is to leave Ms. Smith with inadequate insurance on Mr. Murphy's life, there is nothing to prevent either Ms. Smith or Mr. Murphy from acquiring additional coverage beyond the $50,000 required under this order.

Conclusion

[37] An order on these matters will follow. Based on the above determinations, Mr. Murphy's arrears can be assessed. I find it prudent to have the benefit of the assistance of counsel in determining that amount and some further matters, such as the trigger dates and details of the ordered security. Consequently I will reserve on these matters and ask counsel to consult and if agreement cannot be reached, I will be available on short notice and on receiving briefs to conclude any matter not agreed upon. Although Ms. Murphy has been substantially successful in this matter and costs to her should normally follow, I will reserve as well on costs and request the guidance of counsel.

Kelly, J.