S484|14

Cite as: Clattenburg v. Clattenburg, 2002 NSSC 385

2001 S.H. No. 1201-48937

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

BETWEEN:

DARREL VANCE CLATTENBURG

APPLICANT

- and -

VALERIE ELIZABETH CLATTENBURG

RESPONDENT

DECISION

HEARD; At Halifax, N.S., on November 28 & December 21, 2001.
Final Submissions Received March 19, 2002.

BEFORE; The Honourable Justice Donald M. Hall.

DECISION: April 23, 2002

COUNSEL: Julia Cornish
Counsel for the Applicant.

Heather McNeill
Counsel for the Respondent.

Hall, J.

[1] This is an application to vary spousal support and child maintenance by fixing the dates for termination. The issues are the following:

(a) whether spousal support for the respondent should be terminated at a fixed future date as requested by the applicant or, be increased as requested by the respondent;

(b) when did the daughter, Robin, cease to come within the definition of "child of the marriage" in the **Divorce Act**; and

(c) should child maintenance be terminated at a fixed future date for the daughter, Melissa.

[2] The parties were married June 30, 1973. Following their marriage they adopted two children, Robin, who is now twenty-four years of age and Melissa, who is now twenty-two. Conflict between the parties developed in the later years of the marriage and on April 30, 1993, the applicant moved to separate quarters in the basement of the matrimonial home. He moved out of the home entirely on April 30,. 1994. The parties were divorced by order dated December 19, 1994. According to the agreement of the parties and the corollary relief judgment, the parties were to have joint custody of the children with the respondent having primary care. The daughters have resided with the respondent following the divorce and continue to do so.

[3] Robin has been diagnosed with Attention Deficit Disorder as well as a learning disability. Despite this she graduated from high school in June of 1996 and from the Nova Scotia Community College in cosmetology in June of 1999 and obtained her Junior Hairdresser's License. She completed a further year at Community College successfully completing it in June, 2000 and received her General Hairdresser's License. She worked part time in a beauty salon for a period of time but is not now employed. She is currently participating in a "Destination Employment Project" sponsored by the Nova Scotia Learning Disabilities Association, with a view to enabling her to obtain employment for herself. She plans to marry in September of this year.

[4] Melissa is a student at the Nova Scotia College of Art and Design, specializing in the motion picture production field. She expects to complete her course and graduate in December of 2002, but will not receive her degree until May, 2003. According to the College authorities the course could have been completed in four years. She experienced a rather severe depression in 1999/2000 and was advised by her psychiatrist to cut back on her course load. She has worked during summer vacations and part time during the academic year.

[5] The respondent was not employed outside the home during most of the marriage except for some "babysitting". In recent years she has been involved in three motor vehicle accidents. The first occurred on October 13, 1987 wherein she received relatively minor injuries and settled a claim for $12,000.00. She had a further accident on November 24, 1993, and experienced fairly significant injuries and received no compensation as she

was determined to be at fault. The third accident occurred October 24, 1994, wherein she received rather significant injuries which apparently continue to cause her problems. She received a settlement of approximately $52,000.00 in connection with this accident. It appears that the respondent has had other health problems throughout the years of the marriage and now complains of chronic pain as well as fibromyalgia. She has been assessed by her physician, Dr. Roy, as being "clinically unemployable". At the present the respondent is not employed. Her income consists of Canada Pension Plan benefits of $600.00 per month and $1,800.00 per month paid in spousal and child support payments by the applicant.

[6] The applicant's income is $71,878,00 per year from his employment with the Federal Department of Public Works. The applicant lives in a common law relationship with Ms. Christine McNeil, whose income is $27,000.00 a year from a disability pension. Prior to the divorce being granted the parties had entered into a document referred to as a Marriage Settlement and Separation Agreement, the terms of which were confirmed in the corollary relief judgment. By this agreement the parties settled all corollary issues including a provision for payment of $600.00 per month by the applicant to the respondent for each of the two children and the respondent,;making a total support payment of $1,800.00 per month. The agreement provided that it would continue for six months at that rate and thereafter it would reduce to $500.00 per month at a future date. This term of the order was subsequently varied by order dated May 2, 1995, to provide that the payment was to continue at $600.00 per month for each until a final amount was determined by agreement of the parties or order of the Court.

[7] The applicant contends that Robin ceased to be a child of the marriage upon graduation from Community College in June of 2000. He proposes that support for her should be terminated retroactively to that date. Although Melissa will not graduate until December, 2002, the applicant maintains that maintenance for her should cease as of July 1, 2002, because she should have and could have completed her course by that time. He has also agreed to pay $2,000.00 toward her tuition and other educational expenses. As to spousal support for the respondent, his position is that it should be terminated as of July 1, 2005, but continue at the rate of $600.00 per month until then. He maintains that she should be self-supporting. He says that although she is physically able to take employment she has not sought such. In any event, if she is disabled he claims that her disability is the result of the last accident which occurred after the marriage was effectively ended and was not the result of anything that occurred during the marriage.

[8] The respondent acknowledges that Robin has ceased to be a child of the marriage, but suggests that the termination date should be the date of this decision and order and not retroactive as requested by the appellant. She says that to order a retroactive payment would place an unreasonable burden on her and would necessitate re-evaluation of maintenance from the retroactive date. As to maintenance for Melissa, she submitted that it should continue until March of 2003, to give her a reasonable time to find employment after graduation. As well, she submitted that the applicant should contribute toward her educational expenses proportionate to the incomes of the parties.

[9] With respect to spousal support, the respondent maintains that she is totally disabled and unable to take employment to earn income at this time. She says that there should be no termination date. She proposed further that the maintenance payments should be adjusted upward as the daughters are found not to qualify for child maintenance, that is, to $900.00 per month with respect to Robin and $1,100.00 per month with respect Melissa.

[10] Applicable sections of the **Divorce Act** are:

> 2.(1) In this Act,
>
> "Child of the marriage" means a child of two spouses or former spouses who, at the material time,
>
> (a) is under the age of majority and who has not withdrawn from their charge, or
>
> (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;
>
> 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 or by any other person.
>
> 17.(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> 17.(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 order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

17(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

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.

[11] As noted, the parties agree that Robin no longer qualifies as a "child of the marriage", but disagree on the termination date. The applicant says that it should be retroactive to June 30, 2000, when she finished her course at Community College and received her general hairdressing license. The respondent, on the other hand, suggests that it would be too great a financial burden on her to pay back the maintenance for the intervening period and that termination should be effective the date of the order herein.

[12] It appears that Robin did not become self-supporting immediately on completing her formal education. Indeed, she appears not to be self-supporting at this time and is still dependent on her parents for support. She still lives in her mother's home. It is therefore questionable now if she is unable to withdraw from the charge of her parents or to obtain

the necessaries of life. Her learning disability, Attention Deficit Disorder and emotional problems, may have contributed to this fact.

[13] A child does not necessarily cease to come within the definition immediately upon the happening of an event, such as completing his or her formal education. A period of adjustment may be necessary to enable the child to become established in the work force or otherwise become self-supporting. During this period one parent or the other should not be saddled with the full burden of supporting the child. Someone had to provide support for Robin and, in my view, it should be a shared expense. It seems to me that that is what is intended by s. 17(7)(b) of the **Divorce Act.**

[14] I agree with the position of the respondent that an applicant must make application to vary in a timely manner. Here the applicant waited until January 31st to make application, several months after he contends that Robin ceased to qualify for support. He knew or ought to have known of her circumstances at the time.

[15] A potential financial difficulty has been created by the applicant's delay in making this application. Presumably the respondent assumed she would have the income from Robin's maintenance and spent accordingly. It would be very difficult for her to now pay back the money in view of her limited resources and dependence on the applicant for her principal support.

[16] In the circumstances, I am satisfied that the determination of maintenance for Robin is to be effective as of June 30, 2001. It is to be noted that during the period that the applicant was paying maintenance for both of the children, he has had the benefit of being able to deduct it from his income tax, which undoubtedly resulted in a significant tax advantage to him. As well, the after tax dollars that he paid for child support following May 1, 1997, appears to have been considerably below the amount required by the **Federal Child Support Guidelines**.

[17] The appellant acknowledges that Melissa still qualifies as a "child of the marriage", but maintains that maintenance for her should terminate as of July 1, 2002, because she should have completed her course a year earlier. The respondent proposes that support continue until a reasonable period after Melissa has actually completed her course.

[18] I repeat the general comments that I made respecting Robin, as to the obligation of parents to support their children. Melissa is in a much stronger position than Robin to become self-supporting. In order to have any reasonable prospect of becoming self-supporting within a reasonable time she must complete her present course of education and training which will end December 31, 2002, although she will not receive her degree until May of 2003. She, of course, has an obligation to contribute to her own support and education expenses insofar as she is capable of doing so. It appears that she has and is doing this as she has worked full time during summer vacations and part time during the academic year and has applied her income to her educational expenses.

[19] Children do not always perform according to the wishes of their parents or follow the schedule parents set for them, but parents, to some extent, must take the circumstances of the children as they find them. This is not to say that a "child of the marriage" may incur expenses for education or otherwise and embark on a course of conduct that delays his or her becoming financially independent of the parents and expect the parents to "pick up the tab". The expenses must be reasonable in the circumstances of the child and the parents.

[20] Here there was a valid reason for part of the delay in that Melissa was experiencing severe depression and was advised by her psychiatrist to cut back in the number of courses she was taking. The applicant acknowledged this in his testimony.

[21] I am satisfied that the applicant's obligation to provide support for Melissa should continue until completion of her present course of studies and beyond that for a period of time to become established in the work force. The proposal of the respondent of March 31, 2003, as the termination date, in my opinion is reasonable and appropriate. I will order accordingly. In the meantime maintenance for her is to be paid at the rate of $579.00 per month under the **Guidelines** based on an income of $71,800.00, effective beginning May 1, 2002.

[22] I am also satisfied that the applicant should contribute to the cost of Melissa's education. The respondent proposes that the contribution be based on the parties' relative

incomes while the applicant agrees to pay $2,000.00 in addition to what he has already paid. He is already contributing to her living expenses through the child maintenance payment to the respondent. Thus, he should only be obliged to pay toward the expenses directly associated with her education such as tuition and books. The evidence establishes that these amounts total something in excess of $4,000.00. In the circumstances here, having regard to the ability of Melissa to contribute to her own expenses, I am satisfied that the proposal of the applicant to pay a further $2,000.00 towards these expenses in keeping with his contribution to date, is appropriate. I will order that the applicant pay toward Melissa's education expenses $2,000.00 for the year 2001 and $2,000.00 for the current year. The existing order requires that the applicant maintain coverage for Melissa under his employment medical and dental plan so long as she is eligible. Accordingly, it is not necessary to make any further order in this respect.

[23] With respect to spousal maintenance for the respondent, the questions are as to the termination date, if any and, whether maintenance should be increased to compensate for the loss of household revenue due to cessation of support payments for the two children.

[24] There was some debate over whether the separation occurred on April 30, 1993, when the applicant moved to the basement of the home, or April 30, 1994, when he moved out of the house entirely. It was suggested that this may be relevant because the second accident occurred between the two dates. In my opinion, the issue has already been adjudicated upon and thus is *res judicata*. As Ms. Cornish pointed out, the ground of divorce was based on a one year separation beginning April 30, 1993 as stated in the

petition. The court was obviously satisfied that was the appropriate date and not April 30, 1994, since it granted the divorce on December 19, 1994.

[25] Although counsel did not address the issue to any significant extent, section 17 (4.1) of the **Divorce Act** provides that before the court makes a variation order respecting spousal support it must be satisfied that there has been a material change in circumstances of either or both of the former spouses.

[26] The applicant presented no evidence of a change in circumstances insofar as the respondent was concerned, other than that he believed that she was capable of taking employment but had failed to do so.

[27] In my opinion, at this time she is physically disabled and not able to take employment outside of the home. In this respect I accept the professional opinion of Dr. Roy, her physician who testified that the respondent is "clinically unemployable". This position is supported by the statements contained in the affidavits of the two daughters wherein they described the health problems she experienced and the extra assistance they had to provide for her. I also accept the evidence of the respondent, whom I found to be a credible witness. It is clear that the respondent's present physical condition stems mainly from one or more of the accidents. In my opinion it is immaterial which one was the root or main cause. All three accidents had occurred prior to the granting of the divorce and the issue of her health should have been raised at that time if the applicant were to seek

a termination date, absent a material change in circumstances. It is apparent that her condition has not improved since the divorce was granted.

[28] It is noted that the corollary relief judgment and the subsequent variation order dated July 25, 1995, confirmed the term of the separation agreement between the parties that support would continue to be paid at the agreed rate "until a final amount has been agreed upon or determined by a court of competent jurisdiction in accordance with the aforesaid agreement". No action had been taken between the date of the variation order and this application, a period of approximately six years, so it may be taken that the parties accepted the payment of $600.00 per month for each of the children and the respondent as the "final amount".

[29] That being the case, therefore, as stated above, the court must consider only a change in circumstances that occurred after the variation order was granted. None having been established I am satisfied on that ground alone that an order for termination of spousal support should not be granted.

[30] If I am wrong in that respect, I am also satisfied that spousal support should not be terminated on the ground that the respondent continues to be in need of support. As McLaughlin, J., (as she then was) said in **Bracklow v. Bracklow** [1999] 1 S.C.R. 420 at paragraphs 43 and 49:

> In summary, nothing in the Family Relations Act or the divorce Act suggests that the only foundations for spousal support are compensatory. Indeed, I find it difficult to

> confine the words of the statutes to this model. It is true that in 1986 the Divorce Act was amended to place greater emphasis on compensation. This represented a shift away "to some degree" from the "means and needs" approach of the 1968 Act: Payne on Divorce, supra, at p. 267. But while the focus of the Act may have shifted or broadened, it retains the older idea that spouses may have an obligation to meet or contribute to the needs of their former partners where they have the capacity to pay, even in the absence of a contractual or compensatory foundation for the obligation. Need alone may be enough. More broadly, the legislation can be seen as a sensitive compromise of the two competing philosophies of marriage, marriage breakdown, and spousal support.
>
> . . .
>
> In summary, the statutes and the case law suggest three conceptual bases for entitlement to spousal support: (1) compensatory, (2) contractual, and (3) non-compensatory. Marriage, as this Court held in **Moge** (at p. 870), is a "joint endeavour", a socio-economic partnership. That is the starting position. Support agreements are important (although not necessarily decisive), and so is the idea that spouses should be compensated on marriage breakdown for losses and hardships caused by the marriage. Indeed, a review of cases suggests that in most circumstances compensation now serves as the main reason for support. However, contract and compensation are not the only sources of a support obligation. The obligation may alternatively arise out of the marriage relationship itself. Where a spouse achieves economic self-sufficiency on the basis of his or her own efforts, or on an award of compensatory support, the obligation founded on the marriage relationship itself lies dormant. But where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a vital role. Absent negating factors, it is available, in appropriate circumstances, to provide just support.

[31] I am satisfied that the respondent continues to be in need of support from her former husband and that he is able to provide some support for her. While the respondent has independent income of only approximately $8,000.00 per year, aside from the support payments, the applicant and his common law spouse enjoy an annual income of approximately $90,000.00. The applicant's income alone is almost $72,000.00 per year.

[32] The respondent's household income will be reduced by $600.00 per month as a result of Robin being no longer qualified for maintenance from the applicant. It will be further reduced by a similar amount when Melissa ceases to be entitled to such support. The loss of this source of household income will, of course, amount to a change of circumstances insofar as the respondent is concerned. Undoubtedly the respondent's household expenses will be considerably reduced when the two daughters cease to be dependent.

[33] In accordance with the foregoing, I have concluded that spousal maintenance should be increased to $800.00 per month as of July 1st, 2001, and to $1,000.00 per month as of April 1st, 2003. Although this will result in a very tight budget for the respondent, it is something that she will have to adjust to and hopefully she will be able to find some means of providing another source of income for herself. It is to be noted that the applicant will benefit from a significant income tax reduction as a result of payment of the maintenance and I suspect that the after tax dollars required will be about two-thirds of the amount of the actual cash payment. It seems to me that the end result would be that even with the increased payment he would still only be paying approximately $650.00 to $700.00 per month in after tax dollars.

[34] The respondent has requested that the applicant be required to take out life insurance to secure the spousal support obligation. No provision in that respect was included in the original agreement of the parties, which was to be a final settlement of all

issues between them. I cannot see that anything has changed in the meantime that would justify ordering such a requirement at this time.

[35] Since success was somewhat divided there will be no order for costs.

Donald M. Hall, J.