

No. 12001-057326 (D-021127)

**IN THE SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION**

BETWEEN: DAVID F. LUKE - PETITIONER/RESPONDENT

-AND-

ROSAMOND LUKE - RESPONDENT/APPLICANT

**DECISION
2003 NSSF 012**

**HEARD: BY THE HONOURABLE JUSTICE LESLIE J. DELLAPINNA ON
 MARCH 26, 2003; APRIL 3, 2003 AND APRIL 23, 2003**

DECISION: APRIL 28, 2003 (ORAL)

COUNSEL: ANGUS SCHURMAN -PETITIONER/APPLICANT

CANDACE SEDDON DAVIES - RESPONDENT/APPLICANT

DELLAPINNA, J. (Orally):

The parties are husband and wife. They lived together for two years before marrying in September of 1982. They have three children; William who is now 19 years of age, April, 15 years of age and Sarah, 9 years of age.

The parties separated on October 21, 2002.

Mr. Luke is employed with the United Nations. His position resulted in he and his wife living apart for the past ten years. Presently he works out of Zimbabwe but in June will be relocated to Pretoria in South Africa.

According to the financial information that is before the Court in the year 2002 he earned a total income of \$152,343.97 U.S.. He does not pay Income Tax but instead pays a levy called a staff assessment. In 2002, the staff assessment was \$35,445.67 U.S. bringing his net income to \$116,898.30 U.S.. In addition to his income, he is reimbursed certain travel expenses as well as 75 percent of the parties' daughters private school costs. He may also receive a living allowance for William that will help with William's university costs but there is no evidence what that might amount to. He

testified that his income will decrease when he is transferred to Pretoria due to a different cost of living factor being applied to his income.

Barring a reduction in his hardship allowance after his transfer to Pretoria his February, 2003 pay stub suggests that he will receive a pay increase of approximately \$5,000.00 U.S. in 2003. For the purpose of this application, I will assume that his hardship allowance will offset his salary increase and therefore his gross and net income this year will mirror more or less what it was in 2003. Therefore, for the purpose of this decision, I find that his gross income is \$152,343.97 U.S. and that his net income (after the staff assessment) is \$116,898.30 U.S..

Ms. Luke is a full-time M.B.A. student at Dalhousie University. She has been a full-time university student for more than a decade having obtained her B.B.A., her B.A., a Certificate in Marketing and is now studying for her Masters of Business Administration. She may go on to obtain her Ph.D.. At no time did she indicate any intention to obtain employment. That does not appear to be the goal or focus of her studies.

Ms. Lucas is 45 years of age. She is clearly an educated, intelligent woman. She presents well. She is confident and apparently healthy. There appears to be little to impede her from seeking and obtaining gainful employment.

Ms. Luke resides alone in the matrimonial home. She pays a housekeeper \$200.00 a month to maintain the home. She claims to be too busy to do the housework herself due to her courses. She attends classes Monday through Thursday each week while university is in session. Her class hours would seem to leave room in her schedule to do some housework and/or obtain employment.

The parties' son attends McGill University. Mr. Luke pays his expenses and provides him with money for incidentals. The parties' daughters live with Mr. Luke in Zimbabwe (and soon in South Africa), and he pays for their expenses. He receives no child support of any kind from Ms. Luke.

Mr. Luke initiated these divorce proceedings in November, 2002. In December, Ms. Luke filed an interim application seeking interim spousal support in the amount of \$5,000.00 per month. During her counsel's summation, she requested \$6,000.00 per month in addition to Mr. Luke paying directly her monthly mortgage payment and car lease payment.

Ms. Luke's application also includes a request for interim lump sum support. Specifically, she seeks a total of \$16,210.00 to cover the following expenses:

- (1) Her university tuition fees of \$7,300.00;
- (2) \$300.00 to reimburse her for an airline ticket which she bought for William during the Thanksgiving weekend;

- (3) \$2,000.00 to reimburse her for an airline ticket which she purchased to visit her daughter;
- (4) \$500.00 to reimburse her for books she claims to have purchased for William;
- (5) \$4,810.00 which was money she claims to have needed to lease a new vehicle (which lease was signed during the course of these proceedings); and
- (6) \$1,300.00 being the extra charges owed with respect to the lease of her previous vehicle.

Ms. Luke is also seeking an interim division of matrimonial assets and interim suit money of \$5,000.00.

A considerable amount of Court time and a considerable portion of the parties' affidavit evidence was spent addressing the issue of whether Mr. Luke adequately met his financial obligations to his wife prior to the hearing of this matter which hearing commenced on March 26th. It is not my intention to make what amounts to a retroactive order. Assuming that Mr. Luke brings current any arrears that may be owing on the promise which he gave to the Court during the Pre-hearing Conference on March 3, 2003 - which promise was to pay spousal support directly to Ms. Luke of \$1,500.00 per month plus a further \$950.00 directly on the mortgage payment as well as third party payments on the house insurance, life insurance and Ms. Luke's car lease - I am satisfied that he met his legal and moral obligations to his wife and family prior to this application being heard.

Although Mr. Luke earns an attractive income, his income supports the entire family. The circumstances of his position has required him to maintain two households - one in Halifax and one in Zimbabwe - with resulting travel costs and long distance phone charges. He pays William's expenses at McGill and he has their two daughters living with him and he supports them entirely including 25 percent of their private school costs.

From what I have heard and read, it is my belief that Mr. Luke has tried to support his wife fairly and adequately although his efforts, were, ironically, complicated as a result of an interim order obtained by Ms. Luke in January, granted on an ex-parte basis, that effectively froze Mr. and Ms. Luke's joint account into which Mr. Luke had been depositing funds for Ms. Luke's use.

As I indicated earlier, a pre-hearing conference was held before the Honourable Justice Legere-Sers of this Court on March 3rd. At that time, Mr. Luke agreed to pay interim spousal support to Ms. Luke of approximately \$3,575.00 per month most of which was by way of third party payments presumably to avoid tax consequences to Ms. Luke. There is no tax advantage to Mr. Luke given that he pays no Income Tax. The tax otherwise payable on that portion of the money which is paid directly to Ms. Luke will be minimized due to her personal tax credit, tuition costs and education credit.

Ms. Luke is seeking substantially more interim support from Mr. Luke. Mr. Luke takes the position that he cannot afford to pay her more than he is now paying. He is also opposed to interim suit money and points out that he had already given her \$2,500.00 for that purpose.

Interim Periodic and Lump Sum Support

As for Ms. Luke's application for interim support, the relevant provisions of the **Divorce Act** are found in section 15.2. Upon application the Court may make an order requiring a spouse to pay lump sum or periodic support payments. The Court may also make interim orders requiring a spouse to pay lump sum or periodic support. Such an order may be under such terms, conditions or restrictions as the Court thinks fit and just. Subsection 15.2(4) provides that when the Court makes 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 party including the length of time the parties cohabited, the functions performed by each spouse during cohabitation and any order, agreement or arrangement relating to the support of either spouse. A number of objectives are listed in subsection (6). Those objectives apply to interim orders as well as orders under subsection (1).

Interim orders are effectively holding orders intended to maintain, as far as possible, the status quo. It is a matter of balancing the needs of Ms. Luke against Mr. Luke's ability to pay. The needs of the children must also be factored into the

equation. Mr. Luke is paying the majority of the expenses relating to all three children.

Ms. Luke has presented a budget which demonstrates a lack of appreciation of the limits of her husband's resources. A number of her expenses need to be reduced; for example, her phone/postage expense, household and furniture repair and replacement, toiletries, gasoline, charitable donations, holidays, savings, her housekeeper's salary and others.

Her budget and her actions seem to suggest that she believes her husband has an unlimited supply of money. By way of example, the lease on her vehicle expired during the course of these proceedings. Initially, it was her evidence that she wanted to sign a new lease in relation to the vehicle she was already driving. However when she attended at the car dealership, rather than attempt to re-lease the same vehicle, she signed a lease for a new vehicle which required a security deposit and a down payment of \$4,810.00 - money that she does not have but which she expects Mr. Luke to pay. The vehicle which she leased has a cost of over \$34,000.00. There is no indication that she attempted to again lease the vehicle she already had or better still, lease a new vehicle of a lesser cost.

I am also not convinced that her schedule precludes her from obtaining a part-time employment position or even a full-time position. The sale of the matrimonial home is also an option worth considering.

Mr. Luke's budget and accommodations, considering he is supporting all three of the children without contribution by Ms. Luke and two of the children are residing with him, is more realistic.

Taking into account that this is an interim application only and considering the factors listed in the **Divorce Act** including the needs of the children and Ms. Luke's ability to reduce her stated needs by reducing unnecessary expenses and possibly obtaining employment, I order Mr. Luke to pay to Ms. Luke interim spousal support of \$2,000.00 per month which will be taxable in Ms. Luke's hands and a further \$2,155.00 per month by way of third party payments to be paid on living expenses being incurred by Ms. Luke during the interim period. I will leave it to the parties to agree upon those third party payments so long as the total of those third party payments come to no more than \$2,155.00. If they are unable to agree on those third party payments, I am prepared to accept written submissions from the parties within two weeks of the date of the release of this decision and the Court will then make the final determination. The Court's order will expressly declare that sections 56.1 and 60.1 of the **Income Tax Act** shall not apply to the third party payments. Such payments shall commence as of April 1, 2003.

In arriving at this decision, I have taken into account that any support paid by Mr. Luke directly to Ms. Luke must be reported by Ms. Luke for Income Tax purposes but that Mr. Luke receives no tax advantage for the payments. I have also taken into

account the fact that Mr. Luke is paid in U.S. dollars. I have calculated both his need and ability to pay in Canadian funds. The aforementioned periodic support figures are expressed in Canadian funds.

I am not prepared to order interim lump sum support. Although I accept that Ms. Luke has demonstrated a need for interim lump sum support, albeit far less than the total of her claim, I have not been satisfied that Mr. Luke has the ability to meet that need.

Interim Division of Matrimonial Assets

Ms. Luke has asked the Court to make an order effectively redistributing the matrimonial assets on an interim basis. There appeared to be two reasons for this request. One is to secure the assets and the other is because Ms. Luke wants additional funds for the same reasons she sought interim lump sum support.

Section 19 of the **Matrimonial Property Act** appears to give the Court the authority to make an interim order. It states:

" The Court may make such interim order as it considers necessary for the proper application of this Act, pending the bringing or disposition of an application under this Act."

As a general rule it is preferable, if the parties cannot agree, to leave the division of assets and debts to the trial judge to determine after having heard all of the

evidence. However there may be circumstances which would require earlier intervention by the Court. Counsel for Ms. Luke has referred me to a number of cases including the case of **Kotrla v. Mryglod** 1998 Carswell Sask. 626 (Sask. Q.B.). In that case, Wilkinson, J. made an order for an interim distribution of \$30,000.00 to the Applicant wife to assist her in meeting the goals of litigation and constructing a home. Wilkinson, J. referred to the case of **Conley v. Conley** (1985), 48 R.F.L. (2d) 331 (Sask. Q.B.) in which the Court listed eight factors to be considered in determining whether an Applicant was entitled to an interim distribution of property. Those factors were:

- (1) The assets were all acquired during marriage;
- (2) the net assets far exceeded the amount of the interim distribution;
- (3) there would be some considerable period of time before the matter could be brought to trial;
- (4) one of the spouses has virtually exclusive control of all the liquid assets;
- (5) it is possible for the money or assets to be made available for an interim distribution;
- (6) the distribution could be made without prejudicial tax consequences;
- (7) the interim distribution could be made without serious prejudicial effect on the matrimonial assets; and
- (8) the Applicant was in need of funds to meet capital demands.

I do not believe these factors were intended to be an exhaustive list.

I do not accept the argument that an interim division of assets is necessary in this case for the preservation of assets. If I accept Ms. Luke's estimate of the value of the various matrimonial assets, she is in control of approximately 33 percent of the net matrimonial assets. I suspect that she is actually in control of greater than 33 percent of the net matrimonial assets, although few of those assets are liquid. Also, the interim order of this Court dated January 20, 2003 preserves many of the remaining assets. However, I do accept that Ms. Luke is in need of funds and I am therefore prepared to make an order for an interim redistribution of matrimonial assets.

In doing so, I am satisfied that the assets that are to be redistributed were acquired during the marriage and represent a relatively small portion of the total assets yet to be divided. I therefore do not believe that an interim distribution will prejudice the position of either party at trial but may make the life of Ms. Luke a little bit easier while the parties wait for a final hearing.

It will be ordered that Mr. Luke shall transfer to Ms. Luke the remaining balance of the mutual fund account at the Toronto Dominion Bank bearing account number 4336293. Also, the Registered Retirement Savings Plan account in the name of Mr. Luke at the Toronto

Dominion Bank bearing account number 5423-2366649 shall be divided equally with Ms. Luke by way of a spousal rollover. Should Ms. Luke deregister any portion of those funds that are transferred to her name, she will be fully responsible for the tax consequences that flow from that deregistration. Ms. Luke will fully account for these assets prior to any final division being made.

This order may necessitate an amendment of the Court's January 20, 2003 order. If so, I would expect the parties to cooperate in that regard.

Interim Suit Money

I dismiss Ms. Luke's claim for interim suit money. In December, 2002 Mr. Luke gave to Ms. Luke \$2,500.00 specifically to be used for legal expenses. This money came from the aforementioned mutual fund account and will have to be accounted for by Mr. Luke prior to any final division of assets. In any event, this money was over and above other funds that he was giving to her at the time.

As stated by Goodfellow, J. in **O'Brien v. O'Brien** (1997), 28 R.F.L. (4th) 384:

"The historical changes in the suit costs rule and the introduction of the Matrimonial Property Act have seen the court move steadily in the direction of suit costs only being available for disbursements so that a party without financial

capacity may need assistance by way of appraisers, accountants, bookkeepers, etc., otherwise that party could be at a real disadvantage as against a party with access to resources."

See also **Sampson v. Sampson** 1997 Carswell N.S. 350.

There is no evidence of any significant disbursements necessary for the furtherance of Ms. Luke's defence of this divorce proceeding for which she requires a contribution by Mr. Luke.

Both parties will likely incur further legal fees and it may be, unfortunately, that they will have to liquidate some of their assets after a division under the **Matrimonial Property Act** has occurred in order to pay those expenses. But whereas Mr. Luke's pay cheque will be used to support all five members of this family with little or no surplus for legal costs, when it comes to financing litigation costs, he is in no better a position than Ms. Luke.

I request Ms. Luke's counsel to prepare an Order. If either party is seeking costs of this application, I am prepared to accept written submissions within two weeks of today's date.

Leslie J. Dellapinna, J.