IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Galvizu v. Hernandez, 2004 NSSC 248

Date: 2004/10/18
Docket: 1201-53630 (153766)
Registry: Halifax

Between:

Carlos Alberto Galvizu (Diaz)

Petitioner

v.

Marta Liliam Hernandez (Perez)

Respondent

Judge:	The Honourable Justice A. David MacAdam
Heard:	October 14, 15, and 18, 2004, in Halifax, Nova Scotia
Written Decision:	November 25, 2004
Counsel:	Carlos Alberto Galvizu Diaz, personally Marta Liliam Hernandez Perez, personally

By the Court: (Orally)

[1] The parties were married in Sweden on October 3rd, 1996 having previously been married in Cuba in 1991 and then divorced in Sweden in 1993. There are no children of their relationship and the only contested issue on this hearing is the Respondent's claim for lump sum spousal support.

[2] The parties agree that all property has been divided to their respective mutual satisfaction and an outstanding debt, in Sweden, of approximately 34,000 krona is their joint responsibility.

[3] Following separation the parties, then each represented by counsel, consented to a Family Court Order wherein the Petitioner was ordered to pay, as spousal support, the sum of $600.00 per month for a twelve month period, commencing on January 1, 1999 and continuing on the 1st day of each month thereafter. The Order recited that he had made maintenance payments to the Respondent in the amount of $500.00 per month during the year 1998. In an Affidavit deposed to on July 22, 2004 he says that he has paid the sum of $16,160.00 to her since July 1997.

[4] During their period of cohabitation, which apparently began in 1988 while they both were living in Cuba, and ended at least by September 1997, as testified to by the Respondent, or July 1997 as testified to by the Petitioner,

they had what the petitioner described as a "modern marriage". Each kept their separate bank accounts and neither depended on the other financially during this period. Each completed their education, training and worked from time to time at various locations in different countries. The Respondent testified she always wanted to be "independent of him".

[5] The *Divorce Act,* R.S.C. 1985, c.3 (2nd Supp.), (herein referred to as "the Act"), was proclaimed in force December 12, 1988. It is reviewed in detail, both in respect to its relationship to its predecessor and in respect to the numerous decisions, at all levels of Courts, since its proclamation in the *Divorce Act Manual* by Terry W. Hainsworth (Canada Law Book Inc. 2004). In my reasons I have adopted much from the law and case review by Mr. Hainsworth.

[6] In *Strickland v. Strickland,* (1991), 107 N.S.R. (2d) 111, Justice Hallett, on behalf of the Nova Scotia Court of Appeal, in respect to an Application to vary maintenance granted by a Family Court Order, held that pursuant to Section 15 of the *Act* the Court on the divorce hearing is to determine whether a support order should be made, and in what amount, considering all relevant factors. It was not necessary for the Applicant to establish there had been a change in circumstances. In addition, he referred to the Supreme

Court of Canada decisions in *Richardson v. Richardson,* [1987] 1 S.C.R. 857, and in *Pelech v. Pelech* , [1987] 1 S.C.R. 801, to the effect that they had no application, since in *Strickland,* supra, the distinguishing factor was that there was not an agreement settling all issues such as would be provided in a separation agreement signed in contemplation of divorce.

[7] I would also note, to similar effect, the Ontario Divisional Court decision in *Clayton v. Clayton* (1989), 19 R.F.L. (3d) 430 and the B.C. Court of Appeal in *Callison v. Callison* (1989), 22 R.F.L. (3d) 123 where, in each case, it is stated the trial Court has jurisdiction to establish an appropriate support order pursuant to Section 15 of the Act, notwithstanding a prior order pronounced under provincial legislation.

[8] In *Moge v. Moge*, [1992] 3 S.C.R. 813 at pp. 848-9, the Supreme Court of Canada clarified that the support provisions of the *Act* are intended to deal with the economic consequences for both parties of the marriage on its breakdown. The focus of the inquiry, in the determination of spousal support, is the effect of the marriage in either impairing or improving each party's economic prospects. As the Court stated, the *Act* requires a fair and equitable distribution of resources to alleviate the economic consequences of the marriage on the marriage's breakdown for both spouses. Thus, the

focus is a shift away from the former means and needs test as the exclusive criteria for support, to a more encompassing set of factors and objectives which require the Court to look to a much wider spectrum of considerations. While the institution of marriage may provide a number of social and emotional benefits to the parties, the purpose of spousal support is to relieve the economic hardship that results from marriage or its breakdown. There is, as noted in the Supreme Court decision in *Bracklow v. Bracklow* [1999] 1 S.C.R. 420, a balancing process that is not entirely compensatory. The adverse consequence of the marriage breakdown might stem from the marriage relationship itself. As such, the Court is also required to look to the factors of need, means, and the circumstances of the parties including the length of cohabitation, the functions each spouse performed and any other arrangements relating to support.

[9] However, equitable distribution is not to be taken to mean an equalization of the spouses incomes. The task of the Court is to determine reasonable support within the framework of the statutory provisions. In each case, the Court is required to examine all the factors and objectives outlined in Section 15. In its analysis, the Court should take a broad approach with a view to recognizing the features of the marriage or its breakdown that

adversely affect the economic prospects of the disadvantaged spouse. In Section 15.2(4), the *Act* defines a series of mandatory factors the Court is required to take into consideration. All of the factors must be taken into account. In enumerating the factors, Parliament did not assign any greater weigh to any particular factor or create any higher order of importance.

[10] The use of the word "including", however, indicates the factors enumerated in Section 15.2(4) are not exhaustive as to means. Parliament directed the Court to consider means and not merely income. The words would include all of the persons pecuniary resources, capital assets, income from employment or earning capacity and any other source from which the person receives, gains or benefits, together with, in certain circumstances, monies which the person does not have in their possession, but which they have available to them. The means of the parties will be assessed at the time of the trial. The spouse's ability to pay must be measured in accordance with his or her actual income at the trial, and not by some historical standard.

Capacity to Provide Support

[11] The Petitioner acknowledges an income of approximately $36,000.00. In addition, his present partner has a salary of approximately $30,000.00 resulting in a total income of some $66,000.00 per annum for the family of two adults and two children. These figures are reflected in their respective notices of assessment for the year 2003 and the Petitioner in evidence referred to their, (that is, he and his partner), now having an approximate combined annual income of $70,000.00 per year. He has, however, concerns about his company's ability to continue to generate this level of income in view of the potential loss of a major contract. The Respondent testified she is now working evenings. She said she works four and a half hours a day for five days at $6.75 per hour. Consequently her weekly income would be approximately $152.00 per week.

Need as a Factor

[12] Need is a flexible concept. It will vary according to the circumstances of the parties and the family unit as a whole, and in particular, does not end once a spouse has achieved a subsistence level of income, or a level, merely above subsistence. However, as pointed out in *Moge*, supra, the most significant change in the current statute, when compared to the previous

statute, is the shift away from a means and needs test as the exclusive criteria for support to a more encompassing set of factors, and objectives requiring the Court to accommodate a much wider spectrum of considerations. Nevertheless, need will continue to be an important factor in the determination of support eligibility, duration and quantum. As the Court later pointed out in *Bracklow*, supra, need may, however, be sufficient standing alone to ground support obligation.

Casual Connection

[13] Casual connection is not a pre-requisite nor a pre-condition for support eligibility under the *Act*. The source of a Judge's power to award support is found in Section 15. The factors a Judge must strive to achieve are statutorily prescribed. Unlike Section 17.10, Section 15 does not require the Judge to embark on an inquiry as to whether the claimant's needs are casually connected to the marriage. Although Section 15 does not require a casual connection between the marriage and spousal need, as a pre-condition for the payment of support, the Judge has the right and the

obligation to take into account all of the circumstances of the parties, including any lack of casual connection between the marriage and the disability, and to give it appropriate weight in the result. Notwithstanding my comments that a casual connection is not required, particularly with respect to the position of the Respondent in Nova Scotia, the breakup of the marriage has obviously impaired her financial position and impacted adversely on her ability to provide for herself.

Need and Timing

[14] Ordinarily, spousal need is to be measured at the time of trial. It is the financial position of the parties as it exists at trial that governs, not as it might exist at some undetermined time in the future.

Accustomed Standard of Living

[15] Formerly, the assessment of the amount and kind of support was based on what was required to give the dependent spouse a standard of living reasonably equivalent to that which he or she enjoyed during the marriage,

and which he or she might reasonably have expected would be the case had the marriage subsisted. A substantial differential in the standard of living of the spouses following separation may, however, serve to highlight the disadvantages one of the spouses has suffered during the marriage or by reason of its breakdown. Maintenance of the accustomed style of living has, however, lost its currency as the proper measure of support. Relief against economic hardship resulting from the marriage or its breakdown are now more important considerations. The standard to be strived for is a reasonable standard and will vary, depending on the circumstances, by these considerations.

Capacity to Provide Self-Support

[16] The Respondent's capacity for self-support must also be taken into account. In this regard, the Respondent is now working, albeit part-time. Until arriving in Nova Scotia from Sweden, it appears each party maintained separate bank accounts. Each worked and continued their education and training. However the Petitioner was able, because of his education and background experience to improve his financial position on arriving in Nova Scotia, while the Respondent has effectively seen her position

deteriorate. Although, even in Sweden, the Petitioner was able to earn and financially contribute a greater amount to their common expenses, the disparity in their respective financial positions has greatly increased on the move to Nova Scotia. Clearly the Respondent's economic prospects, particularly on the move to Nova Scotia, have been impaired by the marriage. This impairment must be considered in the light of the admitted desire of the Respondent to maintain her accounts separate from those of the Petitioner.

[17] The task of the Court is to properly address the competing factors of compensation, need and self-sufficiency within the framework established by Section 15 of the *Act*. In this respect, Parliament did not attach any particular priority to the factors to be considered, and the objectives sought to be achieved in spousal support orders. This recognizes the great diversity of marriages and the need to deal with support entitlement and quantum on a case-by-case basis.

[18] Because, in a particular case, the basis for entitlement is need, it does not follow that the quantum of support must always equal the amount of the need. Nothing in the *Act* foreclosures an order for support of only a portion of the claimant's need - whether viewed in terms of amount or duration.

Need is but one factor to be considered, at stated in *Bracklow,* supra. It would also appear that the concept of equal distribution does not call for equality of income in either the determination of eligibility or the assessment of quantum.

Lump Sum

[19] The Court has jurisdiction to grant a support order as an incident to a divorce. Periodic payments are the norm. Accordingly, the Court must first consider if periodic payments would provide adequate support. It is only when lump sum is the proper vehicle for providing support or when a lump sum is necessary to put a person in a particular position that such an award of lump sum should be made. The award of lump sum under the *Act* must be in relation only to support and not a means of effecting or altering any division of assets or debts.

The Circumstances Justifying Lump Sum

[20] Lump sums have been awarded as an alternative to periodic payment. This form of support may be awarded to bring matters to an end where there is a history of acrimony and animosity between the parties. A lump sum has the

advantage of encouraging self-sufficiency, and enabling the parties to make a final break so they can get on with their lives once divorced. A lump sum has been ordered where the Court is doubtful that the Respondent may honour a periodic support payment.

[21] In this regard, I would reference the evidence of the Respondent, in which she indicated three reasons why she seeks a lump sum rather than periodic support payments. The first, she said was related to his failure to make some payments in 1999. She testified it was necessary for her to go to Maintenance Enforcement on two occasions in order to obtain payment of the support that was then ordered. Secondly, if she does finally achieve what she says is her goal, of returning to Sweden, she says, and to paraphrase her words, "she can forget about receiving any periodic payments from the Petitioner". Thirdly, the Petitioner is now living in another Province and her understanding is that this would itself make it difficult to obtain payment.

[22] A further issue, with respect to lump sum, is that sometimes lump sums have been ordered to ease the transition to self-sufficiency. Obviously the Respondent seeks to achieve self-sufficiency, but in Sweden, and views the award of lump sum spousal support as a means of achieving this goal.

[23] In the present circumstances, having considered the circumstances and the nature of the marriage, including the fact each party pursued their own education and career choices with little apparent dependence other than as necessary, at least while living in Sweden, I am nevertheless satisfied there was economic disadvantage or hardship brought about the separation of the parties. They apparently, while married, each pursued their own career and occupational choices. However, the opportunities available to the Respondent were clearly adversely impacted by the move to Nova Scotia, a move, I am satisfied, was instigated by the Petitioner to advance his own economic opportunities and career advancement.

[24] Having regard to this impairment of her economic opportunities and prospects, I am further satisfied that there is a need. The Petitioner has the means to provide some level of spousal support. I am therefore satisfied that despite the previous support provided, of approximately $16,000.00 over two years, there remains a need for further support on the part of the Respondent, and a capacity to pay some level of support on the part of the Petitioner. In summary, considering their present financial positions, there is a need on the part of the Respondent, she is entitled to support, and there is capacity in the Petitioner to pay support.

[25] The Respondent testified that sometime after the separation she agreed to settle spousal support for $5,000.00. She testified initially during this trial that she wanted approximately $20,000.00 to purchase an air ticket for her and her dog to travel to Sweden, and to finance her living expenses for eight months. In addition, she said there would be an expense to ship her books and other personal things to Sweden. In her final submission, she suggested she required $28,000.00 without specifying how this figure was calculated.

[26] On the other hand the Petitioner now says that all he can afford is $5,000.00 by way of lump sum support.

[27] I recognize there are outstanding matrimonial debts, possibly to the Respondent's mother, but certainly in respect to loans taken out in Sweden. The parties never provided for the resolution of the Swedish debts to be part of this proceeding, and it was only in his final submission that the Petitioner consented to the Court dealing with this debt. However, this having occurred after all the evidence and the principal submissions of the parties, I declined to deal with this outstanding matter, although ideally, all matters should have been resolved. The consent to deal with this issue came too late in the proceedings to provide a fair opportunity for both parties to

present evidence and argument as to how responsibility for this debt, and any other debt should be allocated between them.

[28] I am not satisfied the Respondent, in addition to the two years of support she has already received, is entitled to have her and her dog flown to Sweden and maintained for some eight months. She estimated that air travel to Sweden for her and her dog would be in the range of $5,000.00 and the remainder of the $20,000.00 she was seeking was to cover her living expenses for eight months while she re-established herself in Sweden. Although she did not provide support for these amounts, she was not challenged by the Petitioner.

[29] Certainly on her own evidence, upon her return to Sweden, she will be capable of obtaining some form of employment in order to assist in maintaining herself or enabling her to resume the educational or occupational training she deems necessary. On the other hand, the amount suggested by the Petitioner does not, even with the support already paid, meet the standard of fairness demanded by the breakdown of the marriage in Nova Scotia. Despite his anticipated financial deterioration, in the event his company is unable to replace the income lost by the termination of its present main contract, I am satisfied he has the ability, having regard to the

standard of living he and his present partner have established, to make a greater contribution to enable the Respondent to achieve a better, albeit modest, standard of living, whether it be in Canada or in Sweden.

[30] In determining the amount of spousal support, I have taken into account that the only claim is for lump sum spousal support, and the Petitioner's position that he now has responsibility for a partner and two children and the contract, on which his company relies for much of its income, has been terminated as of the end of October 2004. Nevertheless, as he says, he wishes to get on with his life, with his partner and two children.

[31] As I earlier noted, I recognize periodic payments are the norm, but I am further aware of the obvious acrimony that existed and continues to exist between the parties. Clearly, as was observed in the case of *Currie v. Currie*, (1986), 75 N.S.R. (2d) 439 (C.A.) there is here a history of acrimony and animosity between them. At para. 32, Justice Macdonald on behalf of the Court observed:

> Maintenance settlements or awards should be as final as possible to reduce continuing conflict of the parties and to discourage multiplicity of proceedings, so long as this can be done without prejudice and to the primary principle that maintenance must be

> reasonably adequate. The ideal award is a large lump sum, which settles matters once and for all - per MacKeigan, C.J.N.S., in **Rivera v. Rivera** (1979), 30 N.S.R. (2d) 656; 49 A.P.R. 656; 9 R.F.L. (2d) 41, at p. 46.

[32] In respect to possible problems in enforcement of a periodic support award, at para 33, Justice Macdonald, continued:

> Mr. Currie testified that he hated the respondent and her counsel advised this court that enforcement of an award of periodic maintenance might be quite difficult.

[33] In this circumstance, as referred to in *Leek v. Leek*, (1994), 3 R.F.L. (4th) 63 at p. 68 (B.C.S.C.), a lump sum has the advantage of encouraging self-sufficiency and enabling the parties to make a final break in order that they can get on with their lives, once divorced.

[34] There is also the strong likelihood the Respondent will be moving to Sweden in the near future. On questioning by the Court, the Petitioner acknowledged if there as to be spousal support, he also preferred it be by way of a lump sum award. In these circumstances, clearly a lump sum spousal award is preferable and more likely to enable each party to "get on with the rest of the lives". Having decided there is a need and ability to pay,

albeit diminishing in view of the evidence of the Petitioner that the major contract held by his company was not being renewed, a lump sum payment is preferable to periodic payments in these circumstances. I am satisfied having regard to his education and obvious skills in computer programming, that he will be able to obtain the funds necessary to make a lump sum spousal support payment to the Respondent.

[35] The evidence by the Respondent, supporting her lump sum claim, was far from satisfactory. I am nevertheless satisfied, in view of her stated intention to return to Sweden and the very "rough" estimates of the costs both to return to Sweden and to re-establish herself, and the fact these costs were not challenged by the Petitioner, it is sufficient for me to fix an amount to be contributed by the Petitioner.

[36] The Petitioner will therefore pay to the Respondent by way of lump sum spousal support, the sum of $10,000.00.

J.