

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: A. A. C. v. M. A. B. , 2006 NSSC 136

Date: 20060426

Docket: 1201-53441, SFH D 24160

Registry: Halifax

Between:

A. A. C.

Applicant

v.

M. A. B.

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: March 31, 2006, in Halifax, Nova Scotia

Written Decision: April 26, 2006

Counsel: Heidi Foshay-Kimball, counsel, for A. A. C.
M.A.B., self represented

By the Court:

[1] To provide privacy to the parties, I will refer to the Applicant as the husband and to the Respondent as the wife even though they are divorced.

[2] On August 16, 2005 the husband commenced an application to vary a Corollary Relief Judgment dated June 10, 1999 as varied by an Order dated October 24, 2003. That Judgment required him to pay the wife \$300.00 per month for the support of their youngest daughter. The wife was required to send this support to the youngest daughter “during the months in which the child is living away from home while in attendance at university.” This support was to continue until the youngest child graduated from Law School or ceased to attend university.

[3] In his application to vary the husband requested:

- a) that the \$300.00 child support for the youngest daughter be made payable to her, not to the wife.
- b) that his requirement to pay child support cease upon the youngest daughter’s marriage.
- c) that he be reimbursed child support paid to the wife in the amount of \$1200.00 for the period from May to August, 2005 when the youngest daughter lived with him.

[4] The wife in her initial response to the husband’s application indicated her consent to item (b) only. She also requested:

- a) that she be paid spousal support in the amount of \$500.00 per month.
- b) that the husband’s pension benefit be divided equally between them.

[5] In her affidavit filed December 2, 2005 and at a pre trial conference held January 18, 2006 the wife informed the Court that she did agree child support for her youngest daughter should cease upon her marriage. In a pre trial conference held February 15, 2005 the wife informed the Court she no longer agreed that child support should end when her daughter married.

[6] At the hearing the wife informed the Court she agreed that all child support payments are to be made payable to her daughter with a direction that Maintenance Enforcement forward these payments directly to her daughter.

[7] The issues to be determined at the hearing were:

- 1) Was the wife bound by her statement in her affidavit and at the pre trial conference agreeing that her daughter would no longer be a dependent child upon her marriage?
- 2) Will the parties daughter cease to be a dependent child upon her marriage?
- 3) Should the husband be reimbursed child support paid to the wife in the amount of \$1200.00 for the period from May to August, 2005 when the youngest daughter lived with him?
- 4) Is the wife entitled to spousal support and if so in what amount?
- 5) Should the Corollary Relief Judgment be varied to terminate the wife's "right to apply for support and maintenance at any time"?
- 6) Should the Corollary Relief Judgment be varied to set aside the provisions of the attached Separation Agreement and Minutes of Settlement dated April 23, 1999 to permit the equal division of the husband's pension benefits?

1) **Was the wife bound by her statement in her affidavit and at the pre trial hearing agreeing that her daughter would no longer be a dependent child upon her marriage?**

[8] In her affidavit filed December 2, 2005 the wife agreed that the youngest child would no longer be a dependent entitled to receive child support from her father when she married. She made a similar statement at the pre-trial conference. The pre-trial conference memorandum dated January 18, 2006 states that "Pursuant to Civil Procedure Rule 26.01(2), this memo has the same force and effect as an order." The wife was quite clear when she attended the pre-trial conference that her eldest daughter would cease to be a dependent child when she married. She understood that a change would be made to the Corollary Relief Judgment to reflect this acknowledgment. The memorandum has the effect of an Order. As a result the decision on this issue has been made.

2) Will the parties daughter cease to be a dependent child upon her marriage?

[9] As a result of my decision on the first point it may not be necessary to consider this question. However, child support is said to be a right of the child and the court is not required to accept the agreement of a parent to forego child support. In this case I did so for reasons which follow.

[10] The parties youngest daughter is to be married July 2006. She will be returning to University in September. She has summer employment. Most of her financial support has come from a combination of summer employment, the \$300.00 per month child support, scholarships and student loans. No information was provided to explain whether she will have a deficit after applying her summer savings and her student loans. Her husband will be leaving his present employment to join her and he is hopeful he will find employment where they will be residing. In his previous employment he earned approximately \$8.00 per hour.

[11] The *Divorce Act, R.S. , 1985, c.3* requires a parent to pay child support for “any or all children of the marriage”. “Child of the marriage is defined as a child who:

- a) is under the age of majority and who has not withdrawn from their (the parents) charge; or
- b) is the age of majority or over and under their (the parents) charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life.

[12] Usually a child is considered to have withdrawn from a parents charge when he or she leaves home, obtains his or her own residence and has sufficient income to financially meet his or her basic needs. Children who are actively pursuing post secondary education are usually considered unable to withdraw from their parents’ charge. In this case, the parties’ daughter is to be married. This is a declaration of independence. It does constitute a withdrawal from the charge of her parents. She and her husband will be responsible for one another. Neither of her parents will be legally required to provide child support after her marriage.

3) Should the husband be reimbursed child support ?

[13] The youngest daughter lived with the father from May to August 2005 although she visited her mother occasionally. The wife believed she was entitled to keep the child support paid to her during those months because she “had to maintain a home for her daughter”. She did not provide any evidence of any specific expenditures made directly for her daughter’s benefit during that time. Her daughter did not “require her mother’s home” as a residence during the summer of 2005 nor will she in the future. She will be making her home with her husband. Given the ages of their children neither of these parents have any legal requirement to maintain a home of sufficient size to permit these children to live with them.

[14] The wife suggested she has paid more to support her youngest daughter than has the husband but she provided no evidence to support this assertion.

[15] The husband did not quantify any increased expenditures in his household as a result of his daughter residing with him for four months. However, in similar factual situations it appears to be accepted as a norm that child support follows the child. It is to be paid to the person with whom the child is living. In the summer of 2005 that person was the husband. The wife is to pay the husband the sum of \$1,200.

4) Is the wife entitled to spousal support and if so in what amount?

[16] The parties separated in 1997 after an 18 year marriage. They were parents of two children. While the children were young the wife worked part time so she could be at home more often to care for the children. After separation she would occasionally work two jobs to meet her financial needs and those of her children.

[17] Domestic violence was the cause of the separation. The wife considered the husband to be controlling and inconsiderate of her needs but stated she loved and still loves him. The husband considered the wife to be angry, unpredictable and jealous. In testimony the husband stated he had to “hold her down” to protect himself and the children. In October 1997 an incident occurred between the parties that resulted in the wife pleading guilty to assault. She was given a conditional discharge. She was to keep the peace and attend counseling if required to do so by her probation officer. In her testimony she acknowledged slapping the husband and her daughter in the face. She obviously has never forgiven herself for her actions. This was clear from her testimony.

[18] At separation the wife sought sole custody of the children. The husband sought custody with liberal access to the wife exercised at the discretion of the children. A hearing was held. The children were placed in the parties' joint custody and in the wife's primary care. The husband was to pay the wife \$522 per month for child support and \$600 per month as spousal support. The attempt by the husband to take the children out of her care also profoundly effected the wife. It is with this background she entered into negotiations to settle the remaining marital issues.

[19] The Corollary Relief Judgment dated June 10, 1999 states in paragraph 6:

The parties agree that, although the Wife does not require support or maintenance at this time, the Wife shall have the right to apply for support and maintenance at any time.

[20] This is the same provision that appears in the parties Separation Agreement dated April 23, 1999. Both parties were represented by counsel at the time the Separation Agreement was negotiated and signed.

[21] In the Corollary Relief Judgment the husband's annual income was stated to be \$45,000 and the wife's \$15,207. The wife had, up until May 1, 1999, been receiving spousal support in the amount of \$600 per month in addition to child support. Her Line 150 income on her Income Tax return was therefore greater than her actual earned income stated in the Corollary Relief Judgment. In the Judgment she was to receive \$617 per month for the support of the two children in her primary care. The parties matrimonial assets and debts had been divided somewhat unequally in the wife's favor. She retained the matrimonial home. Her mortgage was approximately \$41,000. She owned a car. With child support her annual income would be \$22,611. The husband's income was double that of his wife. Yet she agreed that she did not require spousal support at that time. One can only speculate why she did so but she did so after receiving advice of counsel.

[22] In order to finance the property division the husband did borrow \$70,000. As a result he retained undeveloped land the parties had valued at \$70,000. Prior to the agreement on property division, in 1998, the husband had received an appraisal suggesting this land had a value of \$161,000. This was not the value used by the parties. The land is in excess of 20 acres. In testimony the husband stated he has sold 3 lots. One for the sum of \$15,000, one for \$20,000 and one for \$30,000. No

evidence was given whether there were development costs involved that would have effected his net profit. He has testified that he still retains undeveloped land so these sales did not dispose of all his land. Until he sold some land the husband may have struggled to pay the mortgage and his child support payment. He may not have had the ability to pay spousal support. Reviewing his present financial statements, I find he does have the ability to pay spousal support. As with most of these statements, he has shown a deficit. However, there are areas in which he can make adjustments if required to pay support and I do not consider it unreasonable, on his income, to expect him to do so if the wife is entitled.

[23] The husband's evidence makes it clear that he resented paying the wife any money. He considered that he cared for the children 50% of the time even after the Interim Order and later Divorce. He complained that she did not make any payments to the eldest daughter to help with her education and that she favored the youngest child.

[24] By 2000 the oldest daughter began living with the husband and the parties entered into an arrangement resulting in the wife giving \$200 per month back to the husband from the child support he was then paying. In the fall of 2003 he wanted a further adjustment because the youngest daughter was to attend university. He agreed to pay \$300 per month. This was a greater amount than a setoff would have achieved but it was agreed this money would go directly to the youngest daughter while she was living in Fredericton. His understanding was the wife would keep this support in the summer when the youngest daughter was living with her.

[25] After the separation the wife was left with the matrimonial home but to sell it she would need a replacement home for herself and the children. The only means by which she could afford to remain in that home even with child support was to increase her income and her debt. She did both.

[26] In June 2003 the wife sold the matrimonial home. Only one daughter was in her primary care. She recognized she could not afford to own a car and she needed a home closer to her place of work. When she sold the matrimonial home her mortgage had increased from \$41,000 at separation to \$ 54,286. However, she did sell the home for \$144,500, \$24,500 more than its value at separation. Her overall gain was \$13,286. She now has a mortgage of \$54,822.

[27] The wife is now a full time employee. After separation she worked two jobs to cover her expenses. Her income has increased from the date of the Corollary Relief Judgment as follows:

2000	\$34,250
2001	\$38,816
2002	\$36,432
2003	\$35,760
2004	\$40,876
2005	\$45,061

[28] In comparing the situation of the parties at this time, the husband is in a marginally better situation than is the wife. However, clearly the wife is in a better financial situation than she was at their separation because she has increased her income and she has no dependents she is legally obligated to support.

[29] Entitlement to spousal support and the factors to consider when making an award are governed by section 15.2 of the *Divorce Act R.S. , 1985, c.3*. Section 15.2(6) creates four statutory support objectives. The Supreme Court of Canada in *Moge v. Moge [1992] 3 S.C.R. 813* and *Bracklow v. Bracklow [1999] 1 S.C.R. 420* confirmed that all four objectives are to be considered in every case but no one objective has paramountcy. If any one objective is relevant upon the facts, a spouse is entitled to receive support.

[30] In *Bracklow v. Bracklow* the Supreme Court analyzed the statutory objectives and decided they create three types of spousal support:

1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.
2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.

3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other.

[31] McLachlan, J. indicated that the factors justifying a spouse's support entitlement also affects the form, duration, and amount of any support awarded.

[32] The wife clearly had economic need upon separation from the husband. Even with child support her income was only one half of his and she had two children to support. She had a claim for non-compensatory dependency based support. From approximately July 1998 until May 1, 1999 she did receive spousal support in the amount of \$600.

[33] The agreement the wife signed and the later Corollary Relief Judgement stated that she did not "require support or maintenance at this time", notwithstanding the clear disparity in incomes between she and the husband. Because she consented to the documents containing these words is she no longer entitled to receive spousal support based on non-compensatory dependency?

[34] The separation agreement and the Corollary Relief Judgment did provide that the wife was entitled to apply for spousal support at any time. Does this suggest she may now request support based on a non-compensatory dependency she would have had at the date of signing the separation agreement and later the Corollary Relief Judgment?

[35] The wife had been receiving spousal support prior to signing the Separation Agreement. The disparity in income between she and the husband was obvious. She had legal counsel at the time. The agreement did not say the husband did not have the ability to pay spousal support, it said the wife did not "require" spousal support. Had it referred to the husband's inability to pay this may have suggested an attempt to keep alive a later claim for previous financial shortfalls. My interpretation of the words used indicate an intent to permit the wife to request support at a subsequent date when she did "require" spousal support. The wife suggests she requires spousal support now. I do not consider these words to permit a claim based on her previous economic hardship. She must establish the existence of a present disparity between the parties needs and means that supports her claim for spousal support.

[36] While the wife presently earns less than the husband, this, in itself, is not sufficient to entitle her to receive spousal support. She has a modest lifestyle and is able to meet her monthly expenses. Her lifestyle is not significantly different than that of the husband. The wife occasionally has a deficit in her budget, and that distresses her, but it is not unmanageable. Aside from her mortgage she is almost debt free. She has attained self-sufficiency. As a result, she has no present claim for non-compensatory support.

[37] The wife, because of her child rearing responsibilities, had only pursued part time employment during her marriage. Had she worked full time she would have accumulated a greater pension benefit and she would have been in receipt of a higher income from which to improve upon the property settlement she did receive. The unequal property division did not relieve the economic disadvantage flowing from her role in this marriage. Her assets were valued at 6% more than those retained by the husband. This did not settle her compensatory claim.

[38] I do not consider the wife to have been severely disadvantaged as a result of her role within the marriage. However there was a disadvantage that deserves compensation. There are no economic models that can assist in quantifying these claims. The spousal support guidelines may however be helpful in these situations. Objection has been made to the major premise underlying the guidelines - the sharing of income over time. However, I find reference to this as a premise in the remarks of McLaughlin J. in *Moge v. Moge*.

[39] Each of these parties have incomes that may be greater at the end of any given year than reported on the Statement of Income. For the purpose of my calculation I have taken the husband's income at \$53,500 and the wife's at \$40,500. The wife is 48 years old. After an eighteen year marriage the spousal support guidelines suggest support would be indefinite and the ranges are - upper \$405, middle \$354, lower \$304. If one used the wife's age at separation the support would be payable for 9 to 18 years. The ranges of support would be different because of the child support responsibility but the duration for support would not change. The range of support chosen and the duration may depend on many factors one of which is whether the claim is based on all of the statutory objectives or only one.

[40] In this case the claim is compensatory only. The wife has eliminated much, though not all of the disadvantage arising from her role within the marriage. She

has been separated for 9 years after an 18 year marriage. The wife is to receive as spousal support the sum of \$300 per month for a period of one year. Because the wife must repay child support received in the amount of \$1,200 this amount is to be set off against the spousal support award. As a result the husband is to pay spousal support to the wife for the period beginning July 1, 2006 and ending with his payment on February 1, 2007.

5) Should the Corollary Relief Judgment be varied to terminate the wife's "right to apply for support and maintenance"?

[41] The parties had been married for 18 years. They have been separated for almost nine years. The wife has permanent full time employment from which she earns a salary from which she can presently support herself. There is no indication this employment is at risk. No evidence was given to suggest the wife has any health concerns. She has been remunerated for her compensatory claim. After the final payment for spousal support on February 1, 2007 the wife's right to apply for support and maintenance shall terminate.

6) Should the Corollary Relief Judgment be varied to set aside the separation agreement?

[42] In the Separation Agreement, the matrimonial property was divided after considering agreed upon values for all real estate owned by the parties, his and her pension benefits and an RRSP . The wife received assets that exceed the value of those retained by the husband by the amount of \$16,937. The wife testified that she disagreed with the values used for the real property retained by the husband but she eventually stopped paying attention to the figures when she saw that she would be able to keep the matrimonial home. This was her goal - to keep the matrimonial home for the children. She also testified that because she and her husband were Fundamentalist Christians, she always believed God would move her husband to return to her. She was distraught at the time because of the marriage breakdown and as a result was not looking out for her own interest even though she was represented by counsel. Although the land retained by the husband had originally be given a higher value than the values used in the separation agreement, the wife has not provided any information indicating that the asset values used in the separation agreement were incorrect or unjustified.

[43] The wife has requested an equal division of the husband's pension. In doing so she has clearly forgotten that the value of his pension, and hers, was taken into account in the property division to which she and the husband agreed. After the division took place she retained assets valued at 6% more than those retained by the husband. There was an unequal division of all matrimonial assets in her favour. Under these circumstances there is no foundation upon which I can declare the separation agreement to be unconscionable, unduly harsh, or fraudulent. The division of matrimonial property affected between the parties shall not be changed.

[44] Because there has been divided success, no costs are awarded to either party.

Beryl MacDonald, J.