NOVA SCOTIA COURT OF APPEAL
Citation: ***MacDonald v. MacDonald***, 2004 NSCA 153

Date: 20041215
Docket: CA 219531
Registry: Halifax

Between:

Florence Marie MacDonald

Appellant

v.

Charles Arthur MacDonald

Respondent

Judge(s): Bateman, Oland & Hamilton, JJ.A.

Appeal Heard: November 9, 2004, in Halifax, Nova Scotia

Held: Appeal allowed in part, with spousal support to continue at $500.00 per month, subject to either party's right to apply for a variation of support upon there being a change in circumstances, or should there be no change in circumstances, application may be made for a variation of support, but in this latter case, such hearing shall not take place before June 15, 2006, as per reasons of Hamilton, J.A.; Bateman & Oland, JJ.A. concurring.

Counsel: Kathy A. Briand, for the appellant
Roseanne Skoke, for the respondent

Reasons for judgment:

[1] This is an appeal by Florence Marie MacDonald from the February 25, 2004 oral decision and the March 16, 2004 order of Justice J. E. Scanlan of the Supreme Court. The trial judge reduced the monthly spousal support payable to Ms. MacDonald by her former husband, Charles Arthur Mac Donald, the respondent, from $750 to $500, terminated spousal support as of March 15, 2005 and ordered that the remaining spousal support be paid in advance by March 27, 2004.

Facts

[2] The parties were married in 1976 and separated in 1996, having had three children: Jason, born March 30, 1979, Andrew, born January 4, 1982 and Leanne, born February 11, 1985. The children were 17, 14 and 11 respectively at the time of separation. Mr. MacDonald worked for Michelin Tire full time throughout the marriage and continues to do so as a shift maintainer. Ms. MacDonald on the other hand worked full time for MT&T for approximately two years prior to marriage and continued with this employment until part way through her first pregnancy. She then stayed at home looking after the children and the home for twelve or thirteen years, at which time she began working part time as a cashier at different local stores which she continues to do. Her evidence before the trial judge was that she had applied for full time work once with her present employer and would again if the opportunity arose. She testified that she felt she was too old to further her education. She was 42 at the time of separation and 50 at the time of the hearing before the trial judge. She also testified that she did not know how long her spousal support would continue but she did not expect it to go on forever.

[3] The first separation agreement the parties entered into was dated May 27th, 1997. Unfortunately the terms of this separation agreement were not before the trial judge. Had they been, the trial judge's decision might have been different. A copy of this separation agreement was provided to this Court by agreement of the parties to resolve confusion in the evidence over whether Mr. MacDonald had paid spousal support prior to the second separation agreement between the parties that was incorporated into the Corollary Relief Judgment. The first separation agreement required Mr. MacDonald to pay Ms. MacDonald $650 per month child

support, plus sports related expenses for the children who were in her day to day care. There was no provision that he pay spousal support. The division of the matrimonial assets, valued at $76,200 less a $45,000 mortgage on the matrimonial home, and the payment of the unquantified matrimonial debt was also dealt with. Mr. MacDonald received the matrimonial home. Ms. MacDonald was to receive a greater portion of the matrimonial assets than Mr. MacDonald, but was not to receive most of her share for five years unless Mr. MacDonald sold the matrimonial home before then.

[4] The parties' second separation agreement was dated February 7, 2001 and was incorporated into the Corollary Relief Judgment issued November 15, 2001. On February 7, 2001 the children were 21, 19 and 15 respectively. This agreement acknowledged Jason was no longer a child of the marriage. It provided for split and shared custody of the remaining two children of the marriage. Andrew was to live with his father. Leanne was to live with her mother. The parties were to have shared custody of Leanne, with Leanne being with Mr. MacDonald 40% of the time and with Ms. MacDonald the remaining 60% of the time. Based on these custody arrangements monthly child support of $240 was to be paid by Mr. MacDonald to Ms. MacDonald, together with the expenses for Leanne's minor hockey and Andrew's graduation.

[5] In addition to this child support the second separation agreement that was incorporated into the corollary relief judgment provided that Mr. MacDonald was to begin paying monthly spousal support of $750 as set out on clause 5:

> E. The husband shall pay to the wife, as spousal support, the amount of $750.00 per month **beginning January 2001** and shall continue until varied by the parties or a Court of competent jurisdiction. The wife is to include this as income and the husband is entitled to a deduction for tax purposes.
>
> ...
>
> G. All payments shall be made through Maintenance Enforcement. It is hereby acknowledged and agreed by both parties that Section 17 of the Divorce Act applies to the variation and the maintenance provisions in relation to spousal support which are contained in this agreement. The parties agree that in the event of a change of the condition, means, needs or other circumstances of either spouse occurs (sic) after the signing of this agreement either party may apply to vary such agreement.

> H. The wife agrees that insofar as practicable, she will continue her efforts to achieve economic self sufficiency. [emphasis mine]

[6] This second separation agreement was before the trial judge and was the one Mr. MacDonald sought to have the trial judge vary by reducing and terminating the spousal support. It contained recitals indicating Ms. MacDonald's annual employment income was $7,600 and Mr. MacDonald's annual employment income was $56,000. At the hearing the trial judge determined Mr. MacDonald's income was in fact $62,133. The second separation agreement also updated the distribution of the matrimonial assets.

[7] There is no dispute that, despite the provisions of the second separation agreement, Andrew lived with his mother for approximately one year sometime after this agreement was entered into with no adjustment to the amount of child support paid to her. There is also no dispute that at the time of the hearing before the trial judge, Andrew was no longer a child of the marriage, was living with Mr. MacDonald and was about to become self sufficient. Leanne did not spend 40% of her time with Mr. MacDonald.

[8] In June 2003, Mr. MacDonald unilaterally stopped paying spousal support. Ms. MacDonald applied to the court for enforcement of spousal support and to increase the amount of child support for Leanne to conform to the child support guidelines. Leanne would be attending a community college away from home. Mr. MacDonald sought a reduction in the amount of spousal support and its termination.

[9] By the time of the hearing before the trial judge the parties had virtually agreed that Mr. MacDonald would increase the amount of non tax deductible child support from $240 per month payable to Ms. MacDonald, to $510 per month payable directly to Leanne, based on his annual income of $62,133. Thus the only issue before the trial judge was the variation of the amount and duration of spousal support.

<u>Relevant Statutory Provisions</u>

[10] Section 17 of the **Divorce Act,** R.S., 1985, c.3 (2nd Supp.) governs variations of spousal support, with s. 17(7) setting out the four objectives to be considered when a variation is sought:

> **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
>
> . . .
>
> (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] These four objectives are the same four objectives set out in s.15.2(6) of the **Act** that are to be considered when spousal support is set in the first instance.

Trial Judge's Decision

[12] The trial judge referred to the need for Ms. MacDonald to get a full time job and become self sufficient several times in his decision including in paragraphs 13, 14 and 15:

> [13] I am satisfied that Ms. MacDonald is making less than a proper or complete effort to become self-sufficient. The corollary relief judgement in terms of spousal support, did not suggest that spousal support would go on forever. A certificate of marriage is not a pension for life. Ms. MacDonald was 42 years old when the parties separated, and no doubt in terms of her child care responsibilities at that time, and the obligation she has assumed in terms of caring for the children throughout the marriage, it meant that she has not been free to pursue a career for that entire period of time. I do not accept the suggestion that at 51, she is now too old to find full time work, or even to get some minimal upgrading to find other work. It is not as though Ms. MacDonald hasn't been in the work force and doesn't have any skills to offer. I heard nothing in terms of her work search efforts outside of Wal-Mart, where she says she had applied for a full time job, and didn't get it. She says she will apply for another full time job if it comes up again. But, I heard nothing in terms of her efforts to get other jobs, I don't know, maybe a full time job at a call centre, or full time job some place else.
>
> [14] She seems to think that she can go on forever working at Wal-Mart, getting between 20 and 38 hours per week, and that's enough, because Mr. MacDonald will be saddled with the burden of making up the difference in terms of her needs. That is simply not the way it works. As Justice Goodfellow said in the *MacLean* case, a marriage certificate is not a pension for life.
>
> [15] There is a distinct obligation on you, Mrs. MacDonald, to make a reasonable effort to become self-sufficient. And if you choose not to, then the burden or the consequences fall to you.

[13] In contrast, only twice in his decision does the trial judge mention the other three objectives set out in s. 17(7) of the **Act** to be considered in an application to vary spousal support; economic advantages and disadvantages arising from the marriage or its breakdown, apportioning financial consequences arising from child care and relieving economic hardship arising from the marriage breakdown, and the more detailed reference is found in paragraph 16 of his decision which reads in its entirety:

> [16] In determining an appropriate amount and time for spousal support, there are many considerations that I must take into account pursuant to the terms of the

> *Divorce Act*, and I'm not going to refer to all of those terms. As set out in the *Divorce Act*, they were referred to extensively in cases such as *Moge v. Moge* and *Bracklow v. Bracklow*, the Supreme Court of Canada. Again, I do not have to go through all of those considerations.

[14] The trial judge referred to the fact that Mr. MacDonald had assumed the matrimonial debt when he considered whether there should be a variation of spousal support:

> [11] **Mr. MacDonald has shown that he is indeed prepared to, and has, shouldered his share of responsibility in relation to the children of the marriage, paying not only substantial spousal support, and substantial child support,** but also making substantial extra contributions in terms of the extra-curricular activities of the children. **In addition, at the time of the marriage breakdown he assumed the matrimonial debts. That has to be taken into account.** Ms. MacDonald was certainly not disadvantaged as a result of the marriage breakdown, in terms of being saddled with matrimonial debts. Mr. MacDonald, having the greater income, assumed those extra obligations. Because he assumed the debts it meant he received substantially less in terms of his share of the equity, in terms of division of property. [emphasis mine]

[15] The trial judge also stated several other times in his decision that Mr. MacDonald had paid substantial amounts of post separation support, sometimes specifically referring to post separation **spousal** support. At one point in his decision he referred to the total amount of support payable by Mr. MacDonald under the second separation agreement, $940, as being for child support, when in fact $750 of that amount was paid as spousal support.

[16] The trial judge reduced the monthly spousal support from $750 to $500, terminated it effective one year after the hearing, and ordered Mr. MacDonald to pay it in advance by March 27, 2004.

Standard of Review

[17] An appellate court should give considerable deference to the decision of a trial judge and "should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong," **Hickey v. Hickey**, [1999] 2 S.C.R. 518 paras. 11 and 12.

Grounds of Appeal

[18] Ms. MacDonald argued that the trial judge erred in overemphasizing the principle of self sufficiency and disregarding the other objectives to be considered in varying spousal support as set out in s.17(7) of the **Act** and taking into consideration Mr. MacDonald's payment of matrimonial debt, when the second separation agreement that set the ongoing $750 per month spousal support already provided that he pay that debt. She also argued that he significantly misapprehended the evidence as to the amount of spousal support Mr. MacDonald paid post separation.

[19] She argued this Court should allow the appeal and reinstate monthly spousal support in the amount of $750 to either continue indefinitely, for a longer period of time or until determined at a review hearing to be held no earlier than 2007.

Analysis

[20] Ms. MacDonald has satisfied me that the appeal should be allowed in part. She has satisfied me the trial judge erred in focussing on self sufficiency to the virtual exclusion of the other three factors and by considering Mr. MacDonald's payment of the matrimonial debt. She has also satisfied me the trial judge significantly misapprehended the evidence as to the amount of post separation spousal support paid by Mr. MacDonald, due in large part to the parties' failure to stress the wording of the second separation agreement indicating that the spousal support only began in 2001, not at the date of separation, and their failure to provide the trial judge with a copy of the first separation agreement.

[21] Section 17(7) of the **Act** set out in ¶ 12 ante specifies the four objectives to be considered when a variation of spousal support is sought.

[22] This Court in **Phinney v. Phinney,** (2002), 211 N.S.R. (2d) 135 referred to **Moge v. Moge**, [1992] 3 S.C.R. 813 in which the Supreme Court of Canada specifically rejected the notion that economic self sufficiency could be elevated to a pre-eminent status and made it clear that when a variation of spousal support is sought each of the objectives in s.17(7) of the **Act** must be considered:

> [24] Time limited spousal support orders in marriages of reasonable duration where one party has been out of the workforce and children remain dependent are not the norm. **With the decision in Moge v. Moge, [1992] 3 S.C.R. 813; 145 N.R. 1; 81 Man. R. (2d) 161; 30 W.A.C. 161; 43 R.F.L. (3d) 345, the Supreme Court of Canada responded to years of judicial over-emphasis on the promotion of spousal self-sufficiency and a clean-break between the parties after divorce. In Moge, the Court found that the trial judge had erred in giving dominance to the objective of encouraging self-sufficiency to the exclusion of the other factors in s. 17(7)** . . . **The Court noted that not only is the promotion of self-sufficiency just one of several support objectives, it is a qualified one.** L'Heureux-Dubé J., writing for the majority of the Court, said in **Moge** at p. 853 (S.C.R.):
>
> > **It is also imperative to realize that the objective of self-sufficiency is tempered by the caveat that it is to be made a goal only 'insofar as practicable'. This qualification militates against the kind of 'sink or swim' stance upon which the deemed self-sufficiency model is premised.** (See Bailey, supra, at p. 633, and Droit de la famille -- 623, [1989] R.D.F. 196 (Que. C.A.), at pp. 201-2). [emphasis mine]

[23] As stated recently in **MacLean v. MacLean,** (2004) NBCA 75:

> 26 The overarching principle expressed in Moge is that the Divorce Act's spousal support provisions must be interpreted so as to equitably distribute between the spouses the economic consequences of marriage and its breakdown.

[24] While the trial judge has the authority to decide whether Ms. MacDonald has made reasonable efforts at self sufficiency and what the consequences are of the failure to make reasonable efforts and although he need not set out in minute detail his reasoning, where the result reached is not obvious from the evidence and he has not justified the result by referring to the relevant factors I think we are entitled to

assume that he did not take into account all relevant considerations but allowed the focus on self sufficiency to overwhelm the other considerations.

[25] The trial judge appears to have failed to consider the fact that self sufficiency is the only objective in s.17(7) that is conditional in the sense that it is to be sought only "in so far as is practical."

[26] Little was said in the trial judge’s decision about the three objectives to be considered in addition to self sufficiency. They were not enumerated. No reasons were given as to why the obvious economic disadvantage Ms. MacDonald continues to suffer as a result of the marriage and its breakdown should no longer be equitably shared by Mr. MacDonald, except that he had already paid substantial post separation spousal support and Ms. MacDonald had not obtained a full time job.

[27] As stated previously I am satisfied the trial judge significantly misapprehended the evidence as to the amount of post separation spousal support Mr. MacDonald paid prior to the hearing. The decision suggests the trial judge thought Mr. MacDonald had been paying monthly spousal support of $750 since separation in 1996 when in fact he only began paying spousal support five years later in January 2001. Thus Mr. MacDonald only paid spousal support for three years prior to the hearing, rather than the eight years the trial judge apparently thought, after a twenty year marriage where Ms. MacDonald was out of the work force for twelve or thirteen years caring for the children.

[28] It is difficult to determine from the evidence before the trial judge how he reached his conclusion that spousal support should be terminated. He recognized that Ms. MacDonald’s custody of the three children following separation hampered her ability to pursue a career, “Ms. MacDonald was 42 years old when the parties separated, and no doubt in terms of her child care responsibilities at that time, and the obligation she has assumed in terms of caring for the children throughout the marriage, it meant that she has not been free to pursue a career for that entire period of time.” Yet having recognized this, he terminated her spousal support one and one-half years after Leanne left home to continue her education.

[29] He does not appear to have considered that Ms. MacDonald did not receive her full share of the matrimonial assets for six years after separation, so she was not able to use those resources to improve her job skills. He does not appear to

have considered what job skills Ms. MacDonald had or whether the full time work that he criticised her for not pursuing more diligently was available where she lives or would have provided her with an income high enough for her to become self sufficient. A diminished earning capacity often occurs after the breakdown of a marriage such as this one where one spouse has foregone employment to assume child care responsibilities during the marriage. This is an economic disadvantage and economic hardship arising from the marriage or its breakdown that must be factored into the mix in determining whether spousal support should be terminated that the trial judge appears to have overlooked.

[30] The trial judge also appears to have failed to consider Mr. MacDonald’s increased income and increased capital, he having been able to contribute almost $10,000 to an RRSP since separation. He also appears to have failed to consider that even after the second separation agreement Andrew lived with Ms. MacDonald for about one year without receiving additional support from Mr. MacDonald, and that Leanne did not spend 40% of her time with Mr. MacDonald as contemplated in that agreement. As previously set out Ms. MacDonald was receiving limited child support based on the intended split/shared custody.

[31] The inadequacy of the trial judge’s order is nicely summarized by counsel for Ms. MacDonald in her factum:

> Since no spousal support was paid until January 2001, and the majority of the wife's payment for her interest in the assets were not paid until six years post-separation, it is difficult to reconcile the trial judge's comments regarding her failure to make more efforts at self-sufficiency with the facts of her circumstances as a single parent of three children, receiving minimal child support, with no significant asset base to fall back on or finance any retraining, and only 3 years of spousal support paid prior to his decision.

[32] The trial judge also erred by taking into account Mr. MacDonald's assumption of matrimonial debt when deciding whether to terminate spousal support. This had already been taken into account by the parties in the second separation agreement where they set the amount of monthly spousal support at $750. Since the parties had already factored this payment of matrimonial debt into their agreement that provided that Mr. MacDonald would pay monthly spousal support of $750 to Ms. MacDonald, it was irrelevant in the subsequent variation application.

[33] While as stated above I cannot determine from the evidence before the trial judge how he could have reached his determination to terminate spousal support if he had considered the other three objectives in s.17(7), I cannot say the same with respect to his decision to reduce the amount of monthly spousal support from $750 to $500.

[34] The evidence before him indicated that Mr. MacDonald would now be paying $510 per month rather than $240 per month non taxable child support to Leanne. This increased child support may explain his decision to reduce the amount of spousal support and it is clear that child support takes preference over spousal support.

[35] Accordingly I would order that Mr. MacDonald continue to pay Ms. MacDonald $500 per month spousal support. Given the prepayment he made as a result of the trial judge's decision, the payment of monthly spousal support would recommence March 15, 2005. Since the evidence demonstrates entitlement to spousal support without enabling us to finally determine how long it should continue, either party may make an application for a review of spousal support without the need to prove a change of circumstances, such application not to be heard before June15, 2006. If a change of circumstances occurs prior to June 15, 2006, an application for variation can always be brought on the normal basis.

[36] This will provide Ms. MacDonald with additional time to address the economic disadvantage she has suffered from the marriage and its breakdown now that she is relieved of her child care responsibilities to a large extent and has received her share of the matrimonial assets. If she is not able to do so, she will have the opportunity to adduce evidence at the review hearing concerning the efforts she has made to contribute to her self-sufficiency.

[37] Accordingly I would allow the appeal in part but would not award costs because they were not sought by either party.

Hamilton, J.A.

Concurred in:

Bateman, J.A.

Oland, J.A.