Date: 20010626
Docket: CA 169807

NOVA SCOTIA COURT OF APPEAL

[Cite as: Wedsworth v. Wedsworth, 2001 NSCA 102]

Freeman, Cromwell and Saunders, JJ.A.

BETWEEN:

DEBORAH LOUISE WEDSWORTH

Appellant

- and -

JOHN JAMES MacLEOD WEDSWORTH

Respondent

REASONS FOR JUDGMENT

Counsel:	Mary E. Meisner, Q.C. for the appellant Respondent in person
Appeal Heard:	June 13, 2001
Judgment Delivered:	June 26, 2001
THE COURT:	Appeal dismissed per reasons for judgment of Cromwell, J.A.; Freeman and Saunders, JJ.A. concurring.

CROMWELL, J.A.:

[1] The appellant appeals from the dismissal by Ferguson, A.C.J. (Family Division) of an interim application to vary a consent corollary relief judgment. The application was for an extension of spousal support beyond the 2 year period provided for in the judgment and was brought before the expiration of that 2 year period.

[2] The background facts were set out in Flinn, J.A.'s judgment in an earlier appeal: **Wedsworth v. Wedsworth** (2000), 188 N.S.R. (2d) 252 at § 5 - 10.

[3] Appeals from interim orders in family matters should be discouraged and this court should only intervene if such an order is clearly wrong or if a serious or substantial injustice, material injury or very great prejudice would result if it did not: **Clancey v. Clancey** (1989), 91 N.S.R. (2d) 171 (S.C.A.D.) per Matthews, J.A. at § 4.

[4] I agree with the appellant that the learned Associate Chief Justice erred in law by misstating the threshold test for the variation of this consent order. With respect, contrary to the view expressed by him, s. 17(10) of the **Divorce Act**, R.S.C. 1985, Chap. D-3 (2nd Supp.) as amended (**"Act"**) does not apply and neither does the threshold for variation as described in the so-called "CPR trilogy" (**Pelech v. Pelech**, [1987] 1 S.C.R. 801; **Richardson v. Richardson**, [1987] 1 S.C.R. 857; **Caron v. Caron**, [1987] 1 S.C.R. 892). There was nothing in the record by way of Minutes of Settlement, a separation agreement or otherwise, to indicate that this consent order was intended to settle spousal support obligations finally for all time. The parties simply consented to an order which, in the normal course, is subject to variation under s. 17 of the **Act**. They did nothing to indicate that their consent to this order was intended to affect the usual criteria upon which a variation application in relation to a time-limited spousal support order would be considered.

[5] In my respectful view, the correct threshold for this variation application is that set out in s. 17(4.1) of the **Act** which requires the party seeking variation to establish 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...". A change will be sufficient within the meaning of this section if it is one that, if the court had known about it at the time of the original order, the order made would likely have had different terms: **Willick v. Willick**, [1994] 3 S.C.R. 670 at 688.

[6] Although making this error in law, the judge found on the evidence before him that the changed circumstances relied on by the appellant, if they had been known at the time of the consent order, would not have resulted in different terms. He stated

> ... I do not conclude the changed circumstances, as submitted by the Applicant, if they had existed at the time of the making of the spousal support order or total order as to financial affairs, would have resulted in a different agreement between the parties.

[7] In making this finding, he related the evidence to the correct standard. In short, the misstatement of the law was not material to his conclusion.

[8] I turn to address the appellant's submissions that the judge erred in his consideration of the evidence. On an appeal from dismissal of this interim application, only very serious errors would justify intervention. In my respectful view, there were no such errors. In light of the fact that the final variation application is yet to be determined, I do not propose to comment more specifically on the evidence.

[9] To conclude, there was no error of law material to the result and no error of fact which justifies appellate interference with the judge's disposition of this interim application.

[10] We were advised at the hearing that the child care expense payments which were addressed by this Court on the earlier appeal were reinstated in February of this year. It follows that the six month review of that order by the Family Division which was ordered by this Court should occur in the late summer or early fall. By September, all the children will be in school and, by then, the appellant may be in a better position to assess her prospects for steady employment. It would seem to me to make sense for the final variation application, if it is to be pursued, to be heard at the same time as the review of the child care expenses ordered by this Court. Although I certainly would not order that this be done, I mention it for the consideration of the parties. It would obviously be in the interests of both former spouses and their children if the appellant were able to attain a higher degree of self-sufficiency. The appellant's counsel emphasized that this is the appellant's goal. It is also implicit in the submissions consistently made by the respondent.

[11] I also would in no way minimize the impact of the appellant's child care responsibilities on her ability to pursue it. On the other hand, the limited ability to pay on the part of the respondent, which was noted by both this

Court in the previous appeal and by Ferguson, A.C.J. (Family Division), must be given due weight. The appellant's plans and progress toward achieving greater self-sufficiency and the ongoing impact of the appellant's child care responsibilities on her educational and career prospects will have to be assessed in light of the scarce resources available from the respondent and the other relevant considerations under the **Act** if the present cycle of poverty and litigation is to be broken. The Court has no power to create wealth.

[12] The appeal is dismissed but without costs.

Cromwell, J.A

Concurred in:

Freeman, J.A.

Saunders, J.A.