Date: 20010209
Docket: CA 164860

NOVA SCOTIA COURT OF APPEAL

[Cite as: Miller v. Miller, 2001 NSCA 31]

Glube, C.J.N.S.; Hallett and Oland, JJ.A.

BETWEEN:

BERNADETTE DIANE MILLER

Appellant

- and -

JAMES FRANCIS MILLER

Respondent

REASONS FOR JUDGMENT

Counsel:	Karen L. Hudson for the appellant Helen L. Foote for the respondent
Appeal Heard:	January 22, 2001
Judgment Delivered:	February 9, 2001
THE COURT:	Appeal allowed in part per reasons for judgment of Hallett, J.A.; Glube, C.J.N.S. and Oland, J.A. concurring.

HALLETT, J.A.:

[1] This is an appeal from a decision dated June 13, 2000, by a judge of the Supreme Court of Nova Scotia (Family Division) sitting in chambers wherein he granted an application to vary the spousal support provided for in a consent corollary relief judgment. He reduced spousal support from $650 per month to $350. He also forgave the arrears of spousal support of $5,500.

[2] The appellant asserts that the chambers judge erred in law by failing to consider the objectives of s. 17(7) of the **Divorce Act**, R.S.C. 1985, Chap. D-3 (2nd Supp.), c. 3, failed to consider the needs of Mrs. Miller, and further erred in that he significantly misunderstood the evidence.

[3] In considering an application to vary a spousal support order Parliament has mandated that:

> Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself 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 or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration. (s. 17(4.1))
>
> (emphasis added)

[4] Section 17(7) of the **Act** merely states that:

> 17 (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.

[5] While the Court must consider the objectives in s. 17(7), these objectives are secondary to the primary task arising out of the Court's duties as set forth in s. 17(4.1).

[6] On an application to vary the Court must find that there has been a change of circumstances since the last support order and that such a change is material. If this is not proven by the applicant the variation application should be refused.

[7] For an appeal court to interfere with an order varying spousal support, it must be satisfied that the trial judge either erred in law, significantly misapprehended the evidence, or the result is clearly wrong. This scope of review has been consistently applied by this Court and I would refer to Justice Chipman's decision in **Edwards v. Edwards** (1995), 133 N.S.R. (2d) 8, where he stated:

> [53] Having regard to all the evidence and particularly the respective incomes of the parties, I cannot say that the trial judge erred in his assessment. This court is not a fact finding tribunal. That is the role of the trial judge. Ours, as has been said many times, is a more limited role. We are charged with the duty of reviewing the reasons of the trier of fact with a view of correcting errors of law and manifest errors of fact. .....

[8] In **Hickey v. Hickey**, [1999] 2 S.C.R 518, the Supreme Court of Canada was dealing with an appeal from a decision of the Manitoba Court of Appeal which allowed an appeal from a decision of a motions judge to increase both spousal and child support on an application to vary. The Supreme Court of Canada allowed the appeal. The Court had this to say with respect to the role of courts of appeal:

> [11] Our Court has often emphasized the rule that appeal courts 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. These principles were stated by Morden J.A. of the Ontario Court of Appeal in *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, at p. 154, and approved by the majority of this Court in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, *per* Wilson J.; in *Moge v. Moge*, [1992] 3 S.C.R. 813, *per* L'Heureux-Dubé J.; and in *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 691, *per* Sopinka J., and at pp. 743-44, *per* L'Heureux-Dubéé J.
>
> [12] There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes

> the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[9] Recently, Justice Freeman of this Court in **Read v. Read** (2000), 183 N.S.R. (2d) 181, on an appeal from an order varying support provisions of a corollary relief judgment, stated:

> [17] For the appellant to succeed, it must be shown that Edwards, J.'s reasons disclosed material error, such as a significant misapprehension of the evidence or error in principle (**MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321; 436 A.P.R. 321), or put another way, that there was a manifest error of fact or an error of law (**Edwards v. Edwards** (1994), 133 N.S.R. (2d) 8; 380 A.P.R. 8; 5 R.F.L. (4th) 321, at p. 20). This court is not in a position to retry this case, but only to see if any such error occurred. Having reviewed the record and heard counsel, we are not satisfied that the appellant has met this heavy burden.

[10] Pursuant to the **Divorce Act**, the chambers judge clearly had jurisdiction to vary the amount of spousal support and to forgive arrears.

[11] A judge hearing a variation application has considerable discretion in determining whether there has been a change of circumstances that warrant a variation including the forgiveness of arrears. The exercise of this jurisdiction by a trial judge ought not to be lightly interfered with unless he has erred as described above.

Facts

[12] The parties were married in September, 1982. There were two children of the marriage, a daughter born in 1985, and a son in 1988. The parties separated in 1997, and were divorced on May 20th, 1999. The consent corollary relief judgment provided for joint custody with the children residing with Mrs. Miller in the matrimonial home. There was very extensive access to the children by Mr. Miller. Child support of $623 a month to be paid by Mr. Miller was in accordance with the Child Support Guidelines.

[13] With respect to the division of property, Mr. Miller agreed to convey his interest in the matrimonial home to Mrs. Miller. Equity in the house was stated to be approximately $37,250. Mrs. Miller retained the furnishings in

the home with a few exceptions. Mr. Miller's pension with Air Canada was divided equally. Mr. Miller retained his motor vehicle. Mr. Miller was solely responsible for the consolidated loan with the Bank of Nova Scotia. The spouses retained their R.R.S.P.s in the approximate amount of $5,000 each. The corollary relief judgment expressly stated the obvious, that there was an unequal division in favour of Mrs. Miller.

[14] Spousal support, the issue raised in the proceedings before the chambers judge, was to be in the amount of $652 per month. With respect to spousal support, the corollary relief judgement provided:

> 7. The Respondent shall pay to the Petitioner spousal support as follows:
>
> (a) For a thirty-six (36) month period commencing the 1st day of April, 1999, the sum of Six Hundred Fifty-Two Dollars ($652.00) per month or such other amount as the existing mortgage and tax payment may be from time to time to the Bank of Nova Scotia.
>
> (b) It is confirmed that all of these periodic payments are deemed to have been paid pursuant to this order and that the parties were separated from each other at the time the payments were made and have not reconciled. The amounts herein referred to above represent maintenance paid pursuant to Sections 56.1(3) and 60.1(3) of the *Income Tax Act* with the intent that the payments shall be deductible by the Respondent and taxable to the Petitioner. The fact that the above payments are paid by way of "third party payments" in respect of the Petitioner's expenses in the amount of Six Hundred Fifty-Two Dollars ($652.00) per month is intended that Sections 56.1(2) and 60.1(2) of the *Income Tax Act* are intended to apply to these payments.
>
> (c) During the thirty-six (36) month period ending March 31, 2002, the Respondent shall reimburse the Petitioner for any income tax payable as a result of claiming the aforesaid sum of spousal support.
>
> (d) Provided there has been no reviews or variations of spousal support prior to March 31, 2002, following the thirty-six (36) month period aforementioned the Respondent shall continue to pay to the Petitioner spousal support in the sum of Six Hundred Fifty-Two Dollars ($652.00) and the Respondent's obligation to reimburse the Petitioner for any tax payable will cease at that point.

> (e) Provided that upon the end of the thirty-six (36) month period aforementioned the Petitioner shall be obliged to have the Respondent's name removed from the obligations under the mortgage at that time existing and failing that the matrimonial home shall be immediately sold and the mortgage paid out.
>
> (f) Provided that even in the event that the Petitioner's income from babysitting is equal to Nine Thousand Six Hundred Dollars ($9,600.00), this will not amount to a material change in circumstances.
>
> (g) The Respondent's obligations during the thirty-six (36) month period herein are conditional on the Petitioner continuing to reside in the matrimonial home.
>
> (h) Sale of the matrimonial home by the Petitioner prior to the expiration of the thirty-six (36) month period, or upon expiration of the thirty-six (36) month period wherein the Petitioner is unable to have the Respondent's name removed from the obligations under the mortgage, that circumstance will amount to a material change in circumstances for initiating review of spousal support pursuant to the provisions of Section 17 of the *Divorce Act*.
>
> (i) The foregoing is without prejudice to the rights of either party to seek a variation of spousal support based upon any other material change in circumstances from time to time that may occur.

(emphasis added)

[15] Paragraph 7(g) and (h) of the above provision are of particular relevance to the variation application.

[16] The chambers judge found that the spousal support was tied to the monthly amount that Mrs. Miller would be required to pay on the mortgage including an amount for property taxes; the evidence supported this conclusion. It was contemplated that Mrs. Miller would stay in the matrimonial home in Dartmouth and this would accommodate Mr. Miller's access to the children. At that time, May, 1999, Mr. Miller was living in a small basement room in his brother's home in Dartmouth.

[17] At some time subsequent to the separation of the parties in August of 1997, Mrs. Miller became friends with a Mr. John White. On December 12th, 1998 she gave birth to his child.

[18] Mrs. Miller had financial difficulties making ends meet while residing in the matrimonial home and she decided, with the apparent concurrence of Mr. Miller, to sell it. The sale took place in September of 1999 (about 2 years

after the separation and approximately 5 months after the divorce). Mrs. Miller received $34,846 from the sale. She and the children moved back to Cape Breton and she purchased an older residence in New Waterford for $22,800. Her family lives in the area. She spent the remaining $12,000 of the proceeds from the sale of the matrimonial home on expenses associated with the move and in renovations to the New Waterford home which included the construction of an addition. Mr. White, who had lived with Mrs. Miller in the matrimonial home for a few months just before the sale, also moved to Cape Breton. He resided with Mrs. Miller's sister. He contributed $12,000 to $14,000 towards the addition to the New Waterford house. He had won $40,000 in a lottery. He also contributed labour. Mr. White is an alcoholic and unreliable from the point of view of making any contributions to the financial support of Mrs. Miller or the child he fathered. Mrs. Miller and Mr. White ceased their relationship in January, 2000.

[19] As renovations proceeded in the fall of 1999, it was realized that the New Waterford home was in much worse shape than Mrs. Miller realized. Among other things, wiring and the plumbing needed to be renewed. It was estimated that the cost of this would be $10,000. Needless to say, Mrs. Miller did not have the money to do this work and the work has not been done. Mrs. Miller and her children have not been able to occupy the house. They live in premises Mrs. Miller rents from her sister for $350 per month.

[20] Mr. Miller has consistently met his child support obligations. He paid spousal support until mid October, 1999, when he stopped because Mrs. Miller had sold the matrimonial home. As provided for in the corollary relief judgment, he petitioned the Court for a review of the spousal support obligation based on material change in circumstances arising out of the sale. In November, 1999, he bought a home in Dartmouth.

[21] Mr. Miller's employment income in 1999 was $49,330.

[22] Mrs. Miller's monthly income from October, 1999, to the date of the hearing before the chambers judge on May 16th, 2000, was $1,123, consisting of a child tax benefit of $500 and child support of $623 from Mr. Miller.

[23] At the time of the variation hearing the arrears of spousal support were $5,500.

[24] Both parties filed statements of financial information dated December, 1999. Mr. Miller filed an affidavit sworn September 2nd, 1999, and Mrs. Miller filed an affidavit sworn December 14th, 1999. The application was scheduled to be heard in December 1999 but was adjourned until May 16th, 2000. The parties filed supplementary affidavits sworn that month. At the

outset of the hearing, Mr. Miller agreed to increase child support to $671 a month to meet the Child Support Guidelines based on an increase in salary of $4,000 a year from that to which he was entitled when the consent corollary relief judgment was negotiated. The access issue raised by Mr. Miller in his initial application was dropped. Both parties gave *viva voce* evidence before the chambers judge. The only issue before the chambers judge was spousal support.

Issues raised on the Appeal

[25] Counsel for the appellant asserts that the chambers judge failed to consider all the evidence. In particular, she says the chambers judge failed to consider:

> THAT the marriage was 16 years in duration, 1982 to 1998;
>
> Mrs. Miller did not work outside of the home during the last 10 years of the marriage;
>
> The parties moved from Cape Breton to Halifax in 1989 so as to allow Mr. Miller to advance his career with Air Canada;
>
> Mr. Miller has been able to maintain an automobile, obtain a mortgage and purchase a home, obtain new furniture, go on a vacation, budget for savings and cable and holidays, purchase a hair piece for $1,400.00 and maintain a Visa;
>
> Mrs. Miller has had to cash in her few R.R.S.P.'s, approximately $5,500.00, obtain debt relief through orderly payments of debts, rely upon her family for financial assistance, is unable to secure a mortgage, run an automobile or budget for any of the discretionary items to the degree outlined in Mr. Miller's financial statement;
>
> Mr. Miller's income is in excess of $49,000.00 while Mrs. Miller's income has decreased since the date of the corollary relief judgment.

[26] Counsel asserts that the chambers judge in assessing quantum essentially equalized the incomes of Mr. Miller and Mrs. Miller without due consideration to the fact that Mrs. Miller's household consists of three children.

[27] Counsel for Mrs. Miller asserts that in reaching his conclusion, the chambers judge erred in law in that he did not give adequate consideration to the

means and needs of the parties, nor did he give consideration to the objectives of s. 17(7) in making the variation.

[28] In short, she asserts that the chambers judge did not take into account how well off Mr. Miller was in contrast to Mrs. Miller.

[29] Counsel for Mr. Miller asserts that the chambers judge did not err and there is no basis upon which this Court should interfere with the exercise of his discretion.

The Order to reduce monthly support from $650 to $350

[30] The chambers judge had before him statements of financial information filed by both parties and their affidavits. He also heard their *viva voce* testimony. Mr. Miller's statement of financial information showed that he had a monthly deficit of $1,533. His expenses, in arriving at this deficit, showed that these were based on his obligation to pay spousal support of $632 a month as provided for in the consent order. Mrs. Miller's statement of financial information shows a monthly deficit of $1,600. However, in arriving at this deficit she did not show that she was receiving child support of $632 a month. At the time she prepared her financial statement in December, 1999, she was not receiving any spousal support nor was she at the date of the hearing. Based on the statements showing the parties' monthly expenses, each has a significant deficit whether monthly spousal support in the amount of $350, $650, or anywhere in between is paid.

[31] I reject the argument advanced on behalf of the appellant that the chambers judge erred in stating that the problem is the fact that Mr. Miller does not have sufficient income to meet the needs of both himself and his former spouse. The chambers judge expressly stated that there was no doubt that Mrs. Miller had a need for spousal support. The question to be answered is whether the chambers judge erred in law significantly misapprehended the evidence or was clearly wrong in reducing the spousal support by $300. In **Willick v. Willick**, [1994] 3 S.C.R. 670 the Supreme Court of Canada made a comment that I feel is particularly relevant when an appeal court is considering an appeal of the nature we have before us. The Court stated at p. 746:

> A further comment is in order. Courts of appeal must realize that trial judges deal daily with applications in family law for interim and permanent spousal and child

> support, as well as variation thereof. They develop considerable expertise yet often do not have the leisure to write long and detailed reasons in all cases. In fact, most of these cases are dealt with by the chambers judge, as was the case here. Experienced judges such as Carter J., a member of a specialized division -- the Unified Family Court of Saskatchewan -- deal daily with such matters and are able to dispose of them quickly, grasping the global picture and applying the appropriate standards, particularly in cases such as this one which do not present any exceptional features. Brief reasons are very often sufficient. Our Court has recently dealt with this issue in the context of criminal law in *R. v. Burns*, [1994] 1 S.C.R. 656, where McLachlin J. held for the Court, at p. 664:
>
> > To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out.
>
> The rule should not be different in matters such as the present one.

[32] In **Read v. Read, supra**, Freeman, J.A. made a comment that is relevant to this appeal. He stated at § 6:

> [6] The appellant points to seven conclusions of fact or observations by Edwards, J., in his decision which, it is submitted, are in error. We are unable to share the appellant's view regarding these observations. None of them could be considered as determinative of any issue. ...

[33] My analysis of the evidence has satisfied me that the chambers judge, who has had extensive experience in family law matters, did not err in reducing the spousal support by $300. Since the consent corollary relief judgment was made in May of 1999 there have been material changes in the parties' circumstances and in their means and needs. Although Mr. Miller's salary increased by $4,000 over that which he was paid at the time of the corollary relief judgment, he has had increased expenses as he no longer lives in the small basement room in his brother's house. His housing expenses are not unreasonable. He has increased expenses associated with exercising his access now that the children live in New Waterford. Based on his statement of financial information he does not have a lavish lifestyle, although it would appear to be clearly better than Mrs. Miller's. Her housing expenses have been reduced since moving from the matrimonial home in Dartmouth. She now rents from her sister for $350 a month.

[34] A spousal support order is not designed to equalize the lifestyles of the former spouses. However, as the chambers judge recognized, Mrs. Miller had a need that is obvious but Mr. Miller's ability to meet that need is limited.

[35] Although the chambers judge did not mention every piece of evidence counsel for the appellant considers of great relevance, I am satisfied he would not have lost sight of the evidence as he rendered his oral decision at the conclusion of the evidence and the submissions made on behalf of the parties. The fact that he did not mention and expressly analyse the import of every piece of evidence does not mean that he did not consider all the evidence and the submissions he had just heard.

[36] The exercise of trying to figure out what would be a fair sum for monthly spousal support involves in this case the somewhat arbitrary exercise of eliminating or discounting certain specific monthly expenses claimed. I am not in as good a position to make this judgment as was the chambers judge who had seen and heard the parties and is experienced in these matters. Mrs. Miller's budget is bare bones. Obviously, there is not enough money to pay all the living expenses claimed by Mr. Miller. What Mr. Miller is left with after mandatory deductions from his pay, payment of child support of $671 a month and spousal support of even $350 a month does not leave him in a very enviable position. I have done my own calculations in making adjustments to these expenses and, as noted by the chambers judge, one can come up with different scenarios. This is a somewhat arbitrary exercise. Nevertheless, I come up with a figure that is close to the reduction made by the chambers judge.

[37] The chambers judge did not err in focussing primarily on the respective means and needs of the parties at the time of the hearing and, in particular, the ability of Mr. Miller to pay spousal support as clearly Mrs. Miller has a need. I reject the argument that in doing so he erred in law. I am satisfied that the chambers judge was well aware of his duty to consider the s. 17(7) objectives in arriving at his decision as in the course of his oral decision he stated:

> ... Even if this were an original application, I would have the same easy task in holding that there is an entitlement to support arising by virtue of the lengthy duration of this marriage. The fact that two children were raised in it and the fact that Ms. Miller had given up her career at the nursing home when the family was relocated to the metropolitan Halifax area. My interpretation of the references in

> the Divorce Act to relieving economic hardship and the reference to taking into account the advantages and disadvantages of the marriage, is that parliament intended there be a reference to something other than the mere consequence of splitting the family into two households. In other words, whenever one spouse has less financial security by way of employment income or otherwise, than the other spouse – the breakdown of a marriage will automatically cause that spouse to lose the advantage that was enjoyed by sharing incomes and expenses in a marriage and, therefore, if the mere loss of that advantage was what was intended by parliament, then virtually every spouse would be entitled, in every case, to spousal support. I consider that the reference to economic hardship is designed to reflect such things as changes and loss of career promotion, loss of opportunity to assemble long term security, such as pension security, disability coverage and so on, that occurs by virtue of one party's devotion to a domestic role in the marriage. And that occurred in this case and, therefore, entitlement is clear. ...

[38] In **Fisher v. Fisher**, [2001] NSCA 18 dated January 29, 2001, Justice Cromwell had to deal with an argument raised on that appeal that the trial judge failed to consider or give weight to the economic disadvantages and hardships flowing from the breakdown of the marriage and the fact that two of the objectives of a support order are to recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown and to relieve any economic hardship. He then went on to state in paragraph 80:

> [80] The Supreme Court of Canada has made it clear that these considerations are not limited to situations in which some economic disadvantage or hardship is attributable to the marriage. McLachlin, J. (as she then was) said for the Court in **Bracklow v. Bracklow**, [1999] 1 S.C.R. 420 at § 41, a factor such as economic hardship arising from the breakdown of the marriage may encompass "... the mere fact that a person who formerly enjoyed intra-spousal entitlement to support now finds herself or himself without it." While support on a compensatory basis may be appropriate for disadvantage or loss that would not have been caused but for the marriage, she went on to note that "... even where loss in this sense cannot be established, the breakup may cause economic hardship in a larger, non-compensatory sense."

[39] Based on the comments of McLachlin, J. in **Bracklow v. Bracklow**, [1999] 1 S.C.R. 420, it would appear that the chambers judge's view of Parliament's intent is not sound. However, he recognized that Mrs. Miller had an entitlement to support arising from the lengthy marriage, that she had had to give up her career when Mr. Miller's employment took the family to Halifax, and that economic hardship reflects such things as loss of opportunity to assemble long term security, etc. What is significant is that

the chambers judge found that Mrs. Miller clearly had an entitlement to spousal support. The only question was should the support of $650 a month, as provided for in the corollary relief judgment, be varied? The chambers judge concluded it should be reduced to $350 a month. The errors alleged by counsel for Mrs. Miller on this issue relate to findings of fact and inferences from those facts. The chambers judge did not significantly misapprehend the evidence nor was he clearly wrong in deciding that he would reduce the spousal support by $300 a month. His finding that this was all that Mr. Miller had the ability to pay is supported by the evidence. I am satisfied from a review of his reasons that the chambers judge was well aware of the objectives of a spousal support order as dictated by s. 17(7) of the **Act**. He had to assess the means, needs and circumstances of the parties and his conclusion as to the level of support is justified on the evidence.

The Forgiveness of Arrears

[40] In my opinion, the chambers judge did err in forgiving the arrears of $5,500. The arrears arose from Mr. Miller's decision to stop paying spousal support in October of 1999 as a result of Mrs. Miller selling the matrimonial home in Dartmouth and moving to New Waterford. This stoppage of spousal support was not justified.

[41] I have previously set out the provisions of the consent corollary relief judgment relating to spousal support. In my opinion, paragraph (g) must be interpreted taking into consideration paragraph (h). As noted by the chambers judge, the sale of the matrimonial home merely triggered a review of spousal support. There is no provision terminating spousal support on such sale.

[42] The chambers judge gave two reasons for forgiving the arrears. The first related to the relationship between John White and Mrs. Miller. The evidence discloses, and the chambers judge found that John White had some sort of a relationship with Mrs. Miller. This relationship started some time after the parties separated in August of 1997. Mrs. Miller gave birth to Mr. White's child in December of 1998. Mrs. Miller and Mr. White lived together in the matrimonial home for a few months just prior to the sale after which Mrs. Miller moved to Cape Breton. Mr. White went to Cape Breton with her but he resided at the home of her sister. He gave Mrs. Miller something in the range of $12,000 - $14,000 in the fall of 1999, to cover costs in connection with the addition on the house she had purchased in New Waterford. Mrs. Miller considered it child support for their child.

[43] With respect to the John White relationship and the forgiveness of the arrears, the chambers judge stated:

> An additional change in circumstance was that Ms. Miller initially had a form of relationship with a Mr. John White, as a result of which relationship a pregnancy occurred and a child was born. Mr. White is, apparently, an alcoholic whose employment income is unreliable, but there's no doubt in my mind that he assisted Ms. Miller financially and resided with her in a form of common law relationship for a period of months. If this relationship had lasted on a permanent basis, or – and certainly if it has lasted beyond the statutory limit of one year under the Family Maintenance Act, it, in itself, might have been a reason to terminate spousal support. However, that relationship ended some time in December [1999] or January and Mr. White is now in a relationship with another woman and, although remaining on good terms with Ms. Miller, is no longer a part of her life, other than for purposes of visiting their child and to assist with that child's expenses and potentially to assist with the house project from time to time. So in my view, the relevance of this short term relationship with Mr. White was that it would have entitled Mr. Miller, had he been able to apply to the court on time, to a suspension of the spousal support for those months when that relationship continued. Further, Mr. White had a lottery winning of about ten thousand dollars ($10,000) which he gave, largely, to Mrs. Miller for the house project so that his support of Ms. Miller could be said to go, perhaps, even beyond the January date when they separated. This leads me to the conclusion that while arrears have accrued in the area of fifty-five hundred ($5,500), those arrears would be offset by a successful application by Mr. Miller for retroactive variation to recognize the impact of Mr. White's contribution during those same months. So I hold that as of this date there are no arrears of support. .....

(emphasis added)

[44] The second reason he gave for concluding that the arrears should be forgiven was based on his finding that Mr. Miller could not afford to pay the lump sum and that there would be no point in ordering periodic payment of the arrears as it would just detract from Mr. Miller's ability to pay monthly spousal support.

[45] In my opinion, these reasons do not justify the complete forgiveness of the arrears of $5,500.

[46] The first reason is not a valid reason for forgiving arrears because (i) the $12,000 to $14,000 was really advanced by Mr. White to assist in constructing the addition on the New Waterford home; the money went into the addition to the house and was not available for Mrs. Miller's day to day living expenses; (ii) to the extent that it could be considered support, it was not for the support of Mrs. Miller or the two children of her marriage but for

the support of her child by Mr. White and ought not to have been considered a reason to relieve Mr. Miller from his obligation to pay spousal support from October 1999 to May 2000; and (iii) it is pure speculation that Mr. Miller could have successfully applied for relief from payment of spousal support on account of Mrs. Miller's relationship with Mr. White.

[47] For the foregoing reasons, I am of the opinion that the chambers judge, in forgiving the arrears for the reasons he gave as quoted in paragraph 43 hereof, significantly misinterpreted the evidence and reached a wholly erroneous conclusion.

[48] With respect to the second reason given by the chambers judge, there is evidence that warranted his finding that Mr. Miller did not have the ability to pay the full lump sum of $5,500 out of his monthly income. However, simply because paying the arrears by monthly periodic payments would cut into Mr. Miller's ability to pay spousal support, is not a valid reason to completely forgive the arrears. Mr. Miller had an obligation to pay spousal support. Mr. Miller might be forgiven for interpreting Clause 7(g) of the corollary relief judgment as letting him off the hook. However, when read together with Clause 7(h) the true intent of the parties is apparent. The sale of the matrimonial home only triggered a review of the spousal support.

[49] Mrs. Miller had a need for spousal support which the chambers judge clearly recognized.

[50] Mr. Miller had an obligation to pay $650 a month spousal support. He did not pay this from October, 1999, to and including, May, 2000. His monthly expenses in May of 2000, when the application was heard, were essentially the same as expenses as shown on his statement of financial information dated December, 1999. He had purchased his semi-detached home in November of 1999. His salary from Air Canada in 1999 was $49,300 whereas his statement of financial information showed a monthly income of $3,905 which translates to $46,860 annually if he was receiving this sum for the full calendar year 1999 which he may not have been. However, his monthly income in the year 2000, based on his 1999 T-4 showing an annual income of $49,300 was $4,100 a month which is $200 a month more than shown on his statement of financial information. It would appear that the December, 1999 statement of financial information was based on a prior statement prepared on September 2nd, 1999, so that it is a reasonable inference that his salary increase may have taken place subsequent to September, 1999. However, it is difficult to reconcile his statement of financial information with his T-4.

[51] In my opinion, as the chambers judge found, in May of 2000, Mr. Miller had the ability at that time to pay $350 a month spousal support, then Mr. Miller had the ability to pay that monthly sum in the period October, 1999 to June, 2000. Mr. Miller's ability to pay spousal support between October, 1999 and May, 2000 was essentially the same as it was in May, 2000. He did not pay any spousal support during this period while Mrs. Miller clearly suffered financially. In forgiving the arrears, the chambers judge significantly misapprehended the evidence in that he failed to consider his own finding that Mr. Miller had the ability to pay $350 a month spousal support.

[52] In my opinion, the chambers judge was clearly wrong in forgiving the arrears for the reasons I have indicated. He did not exercise his discretion properly and we ought to correct this error to the extent possible.

[53] Mr. Miller has a pension plan with Air Canada where he is employed. He does not have sufficient employment income to pay the lump sum of $5,500. He has an RRSP in an amount between $4,500 - $5,500. He, therefore, has the ability to make a significant payment on the arrears and Mrs. Miller has a need for support.

[54] He had an obligation to pay spousal support; he paid nothing for approximately eight months from October, 1999 to May, 2000. While cashing in his RRSP will attract income tax, he will also obtain tax relief by paying on the arrears of spousal support.

[55] I would order that Mr. Miller pay $3,000 to Mrs. Miller on or before February 28th, 2001. The sum of $3,000 represents eight months plus of support at $350 a month. Such payment shall be in full satisfaction of the arrears.

[56] In conclusion, I feel I should make some comment on the passionate argument made by counsel for Mrs. Miller that the chambers judge, in reducing the support, failed to recognize the economic disadvantage of Mrs. Miller which arose from the marriage or its breakdown and failed to relieve the economic hardship on Mrs. Miller which arose from the breakdown of the marriage. As I have previously stated, I am satisfied from a review of the remarks in his oral judgment that the chambers judge was very conscious of his duty to consider the objectives in s. 17(7) of the **Divorce Act** and that he did consider them.

[57] In my opinion, Mrs. Miller's financial problems are not entirely related to the breakdown of the marriage, but also to some unwise or unfortunate decisions made by Mrs. Miller or events that occurred subsequent to the divorce. Rather than continuing to live in Dartmouth where Mr. Miller

could have had access to the children, who were by agreement in the joint custody of the parties, she moved to New Waterford. Although she had the right to move, the effect was to greatly increase Mr. Miller's access costs and impinge on his ability to pay spousal support. Secondly, following the parties' separation she had a child by a man who cannot provide adequate support for her or her child. Thirdly, she bought an old home, built on an addition that was probably not needed, and only later realized that the wiring and plumbing needed to be renewed and other repairs done, all at a cost estimated to be in the order of another $10,000. She does not have the money to complete the renovations. She cannot occupy the house; it is uninhabitable. She rents premises from her sister for $350 a month yet she has the ongoing expenses of taxes, insurance, etc. on the unoccupied house.

[58] I wish to endorse the following comment of the chambers judge:

> ..I'm expecting that if Ms. Miller went back to work and found gainful employment, I'm expecting that there should not be a dollar for dollar reduction in her support by virtue of that return to work, because the amount being ordered today is not enough for her to live comfortably, but instead, it's the amount that reflects Mr. Miller's maximum ability to pay. In fact, I think she should be expected to earn some amount of money without any reduction at all in her spousal support in the amount that I'm about to order for spousal support. And only if her employment income was significant after the costs of employment were considered, should there be any such reduction. ....

[59] I would allow the appeal to the extent of varying the July 4, 2000, order of the chambers judge with respect to the forgiveness of the arrears. I would delete that paragraph of the Order and substitute the following:
James Francis Miller shall pay to Bernadette Diane Miller the sum of $3,000 on or before February 28th, 2001. Such payment shall be in full satisfaction of the existing arrears of spousal support in the amount of $5,500.

[60] In all other respects his variation order is confirmed.

Costs

[61] Success on the appeal has been divided. I would not make an order for costs to either party.

Hallett, J.A.

Concurred in:

Glube, C.J.N.S.

Oland, J.A.