Date: 20010612
Docket No.: CA 166904

NOVA SCOTIA COURT OF APPEAL

[Cite as: Vickers v. Vickers, 2001 NSCA 96]

Bateman, Saunders and Oland, JJ.A.

BETWEEN:

DONALD WILLIAM VICKERS

Appellant

- and -

SHARON ANN VICKERS

Respondent

REASONS FOR JUDGMENT

Counsel:	Elizabeth Cusack, Q.C., for the appellant The respondent on her own behalf
Appeal Heard:	March 26, 2001
Judgment Delivered:	June 12, 2001
THE COURT:	Appeal allowed as per reasons for judgment of Oland, J.A.; Saunders and Bateman, JJ.A. concurring.

OLAND, J.A.:

[1] This appeal considers two issues arising from the divorce of the parties. The first concerns the benefit for a child of a disabled contributor under the **Canada Pension Plan Act**, R.S.C. 1985, c. C-8 and its treatment in relation to child support paid by that contributor. The respondent receives a disability pension pursuant to that legislation. By an interim order dated September 1, 1998 she had been ordered to pay child support of $477. each month. In seeking a reduction, she pointed out that child benefit payments were being made to the appellant for two of the children of the marriage and directly to the third child. The appellant took the position that those benefits were not to be considered in determining child support.

[2] The second issue deals with the appropriateness of the order for nominal spousal support in this case. The parties had been married for a lengthy period and the respondent considered herself entitled to spousal support. The appellant argued that there was no financial dependency on him or other grounds in the divorce legislation or jurisprudence that would justify any award of spousal support in the present circumstances.

Standard of Review

[3] The burden on the appellant in this appeal is a substantial one. In order to succeed, he must establish that the trial judge's reasons disclosed material error, such as a significant misapprehension of the evidence or error in principle; that is, that there was a manifest error of fact or an error of law: **Read v. Read**, [2000] N.S.J. No. 54 at § 17.

Child's Benefit Payments

[4] During most of the marriage, the respondent mother had been employed as a civil servant. After she became ill in 1985, she continued working but finally had to stop in 1994 or 1995 after 18 years with the Government of Canada. Her income from her federal government pension and her Canada Pension Plan (CPP) disability pension is some $25,585. annually.

[5] Since their parents separated in 1997, the three children of the marriage of the parties have lived with their father, the appellant. He is a miner who earns approximately $45,000. annually. The appellant receives a CPP child's benefit of $171.77 per month for each of the two younger children who are now 17 and 12. The oldest child, who is 20 and attending university, receives a CPP child's benefit

in the same amount directly. The three child's benefit payments total $515.31 each month.

[6] In his decision dated May 31, 2000 Justice Frank C. Edwards of the Supreme Court of Nova Scotia found that the oldest child remained a "child of the marriage" as defined in the **Divorce Act**. He ordered that the children remain in the custody of the appellant and the respondent be given access at reasonable times at the discretion of the children. It was his view that the CPP child's benefits were payments made to the appellant and to the oldest child "on behalf of" the CPP disabled contributor, the respondent. The judge determined the amount of child support payable by the respondent by adding the annual amount of the three CPP child's benefits to her annual income and calculating the table amount of child support per month on that total pursuant to the **Child Support Guidelines**, and then subtracting the monthly CPP child's benefits from that figure. In the result, he ordered the respondent to pay $77.00 per month in child support for the three children of the marriage.

[7] In deciding how CPP child's benefits were to be handled in calculating child support, the judge considered **Corkum v. Corkum** (1998), 166 N.S.R. (2d) 329, (1998), 36 R.F.L. (4th) 367 (N.S.S.C.). There Moir, J. decided that such benefits belong to the child and did not reduce the support payable by the non-custodial parent under the **Child Support Guidelines**. No appellate decisions on this issue were provided to the judge in this case. He disagreed with **Corkum** and chose not to follow it.

[8] In my view, the trial judge erred in law when he determined that CPP child's benefit payments were made on behalf of the CPP disabled contributor and included them in calculating the support payable by her.

[9] In **Corkum**, Justice Moir examined the legislation which authorizes the CPP child's benefit. He summarized his analysis of the operation of the **Canada Pension Plan Act** (the **Act**) as follows:

> [11] The constitutional amendment of 1951 enabled a federal old age pension plan and the amendment of 1964 enabled disability benefits. Since then, the scheme has been to provide benefits on death, disability or retirement to employees and their families through a fund created by employee contributions, employer contributions and investment. The benefit for an employee with a disability is the same, whether or not the employee has children to support. The **Act** establishes a separate benefit, which "shall be paid to each child of a disabled contributor". The benefit is referred to as the "child's benefit" and an application for such a benefit is not made by a parent

> in the parent's right, but "on behalf of " the child. It cannot be paid to the pensioner unless the pensioner has custody, and it is paid directly to the child after 18 no matter what the relationship may be at that time.
>
> [12] Parliament did not choose a scheme by which the pensioner's entitlement increases where the pensioner has dependants. Rather, the entitlement belongs to the dependant, and is not even placed in the hands of the pensioner unless the pensioner has custody. To establish an automatic set-off of the child's entitlement against the pensioner's support obligation, is to defeat this scheme by turning the child's entitlement into a benefit of the pensioner. (Footnote references omitted.)

[10] Since **Corkum** was decided, Sections 44 and 75 which were included in the footnotes to this extract of the decision have been amended by SC 2000, c. 40. However, the changes do not affect the analysis of that legislation in **Corkum**.

[11] **Corkum** was followed in **Dooley v. Dooley**, [2000] N.S.J. No. 252 (N.S.S.C.). Trial courts in other provinces have referred to it and found it persuasive. See, for example, **Griffiths v. Griffiths**, [1999] A.J. 283 (Q.B.); **Wadden v. Wadden**, [2000] B.C.J. No. 1287 (S.C.), **Callahan v. Brett**, [2000] N.J. No. 354 (S.C.) and **Malbeuf v. Malbeuf**, [1999] S.J. No. 635 (Q.B.).

[12] The Ontario Divisional Court also examined the **Act** in **Williams v. Williams** (1995), 18 R.F.L. (4th) 129. In that case, the father was the CPP disabled contributor and non-custodial parent. At p. 132, McDermid, J. (Corbett, J. concurring) stated:

> Although the payment of the child's benefit may be triggered by the granting of a Canada Pension Plan disability pension to the father, the child's benefit does not pass through the hands of the disabled contributor nor does he have any control over it. It is not taxable in the father's hands, nor is it exigible from him for the purpose of paying child support arrears. The child's benefit is not a windfall for either parent, but constitutes a benefit that belongs to the child. The child's benefit is payable directly to the child, or, in the case of a minor, "to the person . . having custody and control of the child", (s. 75 of the *Canada Pension Plan*). . . . The Canada Pension Plan is a universal social security scheme . . . There is no additional cost to the father to provide the child's benefit for his children nor does he have a choice as to whether to pay some lesser premium to withdraw such benefit. The child's benefit is paid to the children even if the father is not subject to an order for child support.

[13] I agree with and endorse the reasoning in **Corkum**, supra and in **Williams**,

supra. An examination of the **Act** makes it clear that the CPP child's benefit belongs to the child. Payment of that benefit may arise on account of the disabled contributor's circumstances, but that payment is not one made by or on behalf of that contributor.

[14] A court must apply the **Guidelines** to determine child support: s. 15.1(3) of the **Divorce Act**. Section 3 of the **Guidelines** establishes the method for determining the amount of child support payable by a payor parent:

> 3.(1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (b) the amount, if any, determined under section 7.

[15] Child support under the **Guidelines** is based on the non-custodial parent's income. A payor spouse's annual income is determined by using the Total Income line in that person's T1 General income tax return as adjusted, where appropriate, in accordance with s. 16 to s. 19 inclusive of the **Guidelines**. That the respondent's annual income is $25,585. is not disputed.

[16] Dawson, J. pointed out in **Malbeuf**, supra at § 12 that the **Guidelines** do not direct the court to take a child's resources into account in reduction of the table amount except in the following limited circumstances: to apportion the cost of special expenses (s. 7); to determine support for adult children (s. 3(b)); where a parent alleges an order for the table amount would result in undue hardship (s. 10); and, perhaps to decide how much support a step-parent should pay (s. 5). None of these circumstances were raised at this divorce proceeding.

[17] The trial judge erred in law when he took the CPP child benefit payments into account and reduced the amount of child support payable in this case. According to the **Guidelines,** the table amount for three children based on an annual income of $25,585. is $492.89 monthly. That is the amount of child support to be paid by the respondent in this case.

Nominal Spousal Support

[18] The trial judge ordered the appellant to pay the respondent nominal spousal support of $1.00 annually. His reasons read as follows:

> As far as spousal support is concerned, this is an 18 year marriage. Insofar as is practicable, the parties are entitled to enjoy roughly the same standard of living after the marriage breakdown as before. In this circumstance however, Mr. Vickers' finances along with his child-care responsibilities do not enable him to pay more than nominal spousal support. I therefore require that he pay spousal support in the amount of $1.00 per year to Ms. Vickers.

[19] In making any order for spousal support, a court is to take into consideration the condition, means, needs and other circumstances of each spouse including the length of cohabitation, the functions performed by each during cohabitation, and any order, agreement or arrangement relating to support of either spouse: s. 15.2(4) of the **Divorce Act**. In appropriate circumstances, when need is established that is not met on a compensatory or contractual basis, an obligation to provide support may be founded on the marriage obligation itself: **Bracklow v. Bracklow**, [1999] 1 S.C.R. 420 at § 49.

[20] The parties married in 1978 and separated for the final time in 1997. Both had been employed during their marriage. The appellant who is presently 48 years old has worked for the Cape Breton Development Corporation (DEVCO) for some 23 years and earns approximately $45,000. annually. At the time of the divorce hearing, the federal government had announced its decision to cease operations at DEVCO and to sell its assets. His income in 1999 and 2000 appears to have been higher than usual due to overtime from preparations for the shut-down. Before the parties separated, they shared the care of the children and he did all the cooking. The appellant now has the responsibility of raising the children of the marriage. He has some health problems - diabetes, thinning cornea, high blood pressure and digestive problems. He and the children in his care live in the former matrimonial home in Sydney Mines, which is assessed for some $24,000.

[21] The respondent is now 45 years of age. She worked as a civil servant for almost the entire duration of the 18 year marriage. She was never financially dependent on the respondent during that time. Her testimony was that when she stopped working because of illness, she was earning $34,000. annually, slightly less than the appellant who usually brought in a couple of thousand dollars more than she did. She also agreed that they had roughly equivalent pension entitlements.

[22] The trial judge stated that the respondent has "stress-related problems which

have rendered her disabled." There was no indication that her illness was getting worse. She has medical coverage and an annual income from pensions of over $25,000. Her purchase of a 1997 Ford Ranger truck requires her to make substantial monthly payments. The respondent rents a four bedroom home in the Iona area which she shares with Bill Dawe. She testified that she provides Mr. Dawe with a place to live, but he does not pay her any room or board nor does he contribute anything to the household expenses.

[23] Some years ago there had been uncertainty as to whether a court could order spousal support following a divorce decree absolute if no such award were made when the decree issued. The practice developed of obtaining an order for nominal spousal support for the purpose of preserving the right to apply later should circumstances require, although there was no immediate need for spousal support then. It is now well established that an award of nominal spousal support is not necessary for this purpose and that an order for spousal support must be based on need.

[24] In **Nelson v. Nelson** (1984), 65 N.S.R. (2d) 210 (N.S.S.C.A.D.), Jones, J.A. writing for this court stated at p. 215:

> The result of these authorities is that the power to make an order under s. 11 of the **Divorce Act** is based on the granting of a decree of divorce and is unrestricted and subject to review at any time. It is not dependent on the making of an order at the time of the decree. The failure to make a nominal order does not bar a subsequent application for maintenance. An order, whether issued at the time of decree or subsequently, must be based solely on the need for maintenance and the circumstances existing at the time of the application. The power of review must also take into account all of the circumstances existing at the time of the hearing of the review application.
> (Emphasis added)

[25] The Manitoba Court of Appeal was also of the view that, when no order for spousal support was justified on the facts, it was preferable to avoid the use of a protective nominal order: **Filbert v. Filbert and Murphy** (1985), 48 R.F.L. (2d) 101. See also **Murdoch v. Murdoch**, [1999] B.C.J. No. 584 (S.C.) where, there being no present need for spousal support, a request for contingent spousal support of one dollar annually by a spouse diagnosed with moderately severe osteopenia and osteoporosis was denied.

[26] In a number of cases courts have ordered nominal spousal support where need has been established, but the payor spouse had no ability to pay at the time of the divorce hearing or variation proceeding. See, for example, **Davies v. Davies**,

[1999] B.C.J. No. 1578 (S.C.); **McAfee v. McAfee**, [1989] B.C.J. No. 1134 (S.C.) and **Peer v. Peer**, [1989] O.J. No. 658 (S.C.). Where need was demonstrated but the income of the payor spouse was uncertain, an application for spousal support may be adjourned: see **Marquardt v. Marquardt,** [1998] B.C.J. No. 786 (S.C.).

[27] Nominal spousal support has also been awarded where the court found no current need, but determined that future need was likely. Many of these cases involve serious existing health problems. For example, in **Wilson-Nolan v. Nolan**, [1999] O.J. No. 318 (Gen. Div.), the wife who was still working to a limited extent had a chronic heart condition, was legally blind, and had blood clotting and auto immune disorders and her medical condition was deteriorating; and in **Ghidoni v. Ghidoni**, [1992] B.C.J. No. 610 (S.C.) there was an indication that the petitioner may be suffering from multiple sclerosis. In a few cases, the future need related to a likelihood of loss of employment. See, for example, **Paul-Hus v. Paul-Hus**, [1993] S.J. No. 562 (Q.B.) and in **Passarello v. Passarello** (1998), 64 O.T.C. 118 (Gen. Div.).

[28] In summary then, generally an award of spousal support requires a finding of current need. Where need is established, an award of nominal spousal support may be made where a payor spouse had no present ability to pay. Such an award might also be considered where there is no current need, but there is a predictable future need.

[29] In the case under appeal, the trial judge's sole rationale for ordering nominal spousal support is found in his statement that as far as practicable, parties to a marriage of lengthy duration are entitled on the breakdown of that marriage to roughly the same standard of living as previously. He did not find that the respondent needed spousal support as required by **Nelson**, supra. Nor did he determine that while she did not have a present need, it was likely that she would have a future need. In my view, and quite aside from whether the judge stated the issue correctly, the evidence at trial does not support a finding that the respondent's standard of living was lower than that of the appellant or that she had either a present need or a likely future need for spousal support.

[30] Furthermore, this is not a case where a support obligation might arise from the marriage relationship itself. Unlike the wife in **Bracklow**, supra who was no longer able to work and had a very modest lifestyle, the respondent was never financially dependent upon the appellant during their marriage. There was no indication that her pension income of over $25,000. was likely to be disturbed.

[31] There was no basis in law for an award of nominal spousal support in the

circumstances of this case.

Other Issues

[32] The appellant had raised two additional issues in his factum, namely whether the trial judge erred in law in refusing to hear or consider evidence about the appellant's possible job termination and financial circumstances in considering spousal support and whether his decision was inconsistent with the weight and substance of the evidence so as to be clearly wrong on the issues under appeal. His counsel did not address these issues in her oral argument and it is not necessary to deal with either of them in deciding this appeal.

Conclusion

[33] I would allow the appeal. The paragraph in the amended corollary relief judgment issued November 9, 2000 pursuant to the trial judge's decision which required the appellant to pay the respondent $1.00 per year spousal support is to be deleted.

[34] Furthermore, the paragraphs in that amended corollary relief judgment establishing the yearly income of the respondent and the amount of child support payable by her are to be amended to provide that for the purposes of determining child support, the yearly income of the respondent is $25,585. and based on that amount, the respondent shall pay $492.89 in child support commencing on the 1st day of June, 2000 and on the 1st day of every month thereafter, with all payments payable through the Director of Maintenance Enforcement. These amendments have the effect of creating instant arrears and I would order that those arrears be paid in monthly instalments of $100. each. I would ask counsel for the appellant to prepare a further amended corollary relief judgment and to forward it to the court.

[35] Counsel for the appellant represented her client *pro bono*. There will be no award of costs but the appellant is entitled to recover his disbursements as taxed.

Oland, J.A.

Concurred in:

Bateman, J.A.

Saunders, J.A.