Date:
20000217 Docket: CA 156378

NOVA SCOTIA COURT OF APPEAL

[Cite as: Read v. Read 2000 NSCA 33]

Chipman, Freeman and Pugsley, JJ.A.

BETWEEN:

THOMAS GORDON READ Appellant - and - KAREN ANNE READ Respondent	)	Lloyd I. Berliner for the appellant Elizabeth Jollimore for the respondent Appeal Heard: February 17, 2000 Judgment Delivered: February 17, 2000

THE COURT: The appeal is dismissed as per oral reasons for judgment of Freeman, J.A., Chipman and Pugsley, JJ.A., concurring

FREEMAN, J.A.: (Orally)

[1] This is an appeal from a decision of Edwards, J. in Supreme Court disposing of an application by the parties to vary an amended corollary relief judgment following their divorce.

[2] The parties were married on August 27, 1966 and divorced on November 2, 1994, ending a 28 year marriage. There were two children born May 19, 1972 and March 1, 1974. The original corollary relief judgment issued by Goodfellow, J. on November 2, 1994, provided **inter alia** for spousal support of $1,700.00 monthly and child support of $150.00 for each child, and that the appellant maintain a group life policy in favour of the respondent. The amended corollary relief judgment issued by Edwards, J. on January 24, 1996, provided **inter alia** that the appellant maintain his group life policy in the amount of $250,000 for the benefit of the respondent and the children of the marriage so long as there was any support obligation on his part to the respondent and/or the children.

[3] In 1998, both parties applied to Edwards, J. to vary the child and spousal support, and the respondent applied for a transfer of ownership of the life insurance. The application was heard by him in March 28, 1999.

[4] In his decision of April 28, 1999, Edwards, J. reviewed the evidence and concluded that there had been such a change of circumstances that the appellant was in a position to pay increased spousal support which he fixed at $2,500.00 per month,

effective April 1, 1998. He found that child support for both children should terminate effective August 31, 1997. He also ordered the appellant to effect an absolute assignment of permanent life insurance policies held by the appellant in the amount of $250,000 in favour of the respondent. He awarded costs to the respondent of $1,500.00.

[5] The appellant seeks for a variation of spousal support, alleging: (1) that the trial judge made a number of erroneous findings of fact; (2) that he erred in finding that the respondent was in the same or a similar position to the wife in the case of **Moge v. Moge** (1992), 43 R.F.L. (3d) 345 (S.C.C.); and, (3) that the trial judge erred in finding that there was a change of circumstance in the appellant's position sufficient to justify an increase in the order for spousal support.

FIRST ISSUE:

[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. As Lamer, C.J.C. said in **Delgamuukw v. British Columbia**, [1997] 3 S.C.R. 1010 at para. 88:

> . . . it is important to understand that even when a trial judge has erred in making a finding of fact, appellate intervention does not proceed automatically. The error must be sufficiently serious that it was 'overriding and determinative in the assessment of the balance of probabilities with respect to that factual issue'.

SECOND ISSUE:

[7] The appellant submits that Edwards, J. erred in finding that the respondent was in the same or a similar position to Mrs. Moge in **Moge v. Moge** (1992), 99 D.L.R. (4th) 456 (S.C.C.) in relation to self-sufficiency. The appellant refers to the following passage from the decision of Edwards, J. as revealing this error:

> In *Moge v. Moge, supra*, Madame Justice L'Heureaux-Dubé emphasized the focus of the inquiry in spousal support matters should be on the economic consequences of the marriage breakdown. Ms. Read is now only developing a career, not having been able to do so while married. It is to her credit that at age 52, she left a job with no security and started into life insurance sales. Her testimony is that it is a stressful job, with long hours of travel, high expectations, course requirements, and instability in company mergers.

[8] In **Moge, supra**, the Supreme Court of Canada referred to the statutory criteria found in the **Divorce Act**. All four of the objectives must be taken into account when spousal support is claimed or sought to be varied. No one of them is paramount. The judicial discretion to be exercised in applying them will depend on the facts of each case. As L'Heureaux-Dubé, J. pointed out at p. 492 **et seq.** The exercise of the discretion takes into account the economic consequences of the marriage and its breakdown.

[9] In concluding that the respondent was required to develop a career following the 28 year marriage, Edwards, J. was correct. The respondent had worked during the marriage but always changed jobs and followed her husband during a number of transfers as he advanced his career with his then employer. Just prior to the marriage break up, the respondent left a secure job in Moncton, New Brunswick when the

appellant was transferred to Sydney. She then received unemployment insurance benefits and subsequently has only succeeded in holding a succession of insecure positions. Edwards, J. was correct in his factual conclusions respecting the difficulties faced by the respondent in the employment in which she is now engaged. In our opinion, Edwards, J. made no error in the application of the principle established by the court in **Moge, supra**.

THIRD ISSUE:

[10] In addressing the change of circumstances, Edwards, J. said:

> At the time of his Order, Justice Goodfellow deemed Mr. Read's income to be $80,000 per year and Ms. Read's income to be $18,000.00 per year. There was no way Justice Goodfellow could know that within one year, Mr. Read, an undischarged bankrupt, would own his own company and earn a substantially increased annual income. That year his income increased to $111,414.00. In 1997 his total income was $107,230.97. His 1998 T4 shows an income of $100,715.20. Those figures are themselves illusory because Mr. Read is obviously "income-splitting" with his new spouse. He testified that she is paid approximately $30,000 per year by his company yet she has not worked a single day. He explained that she is on standby in the event of illness or unavailability of the current staff.
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> Ms. Read's income has not changed significantly from the time of the divorce. She has changed occupations and she is now self-employed in the insurance business. She claims that her net annual income (before taxes) is approximately $14,000.00. At best, she is grossing no more than the $18,000.00 per annum she was earning in 1994. I am satisfied that she is in no better position than she was at the time of the divorce. I am further satisfied that she is running a monthly deficit of at least $500.00 per month.

[11] Edwards, J. also referred to other evidence supporting the conclusion that the appellant has access to monies arising out of repayments of income tax and other benefits received through his business.

[12] The duty to provide reasonable support was considered by Goodfellow, J. in **Mosher v. Mosher** (1999), 177 N.S.R. (2d) 236 at 238 (S.C.); 542 A.P.R. 236 (N.S.S.C.), Goodfellow, J., when he reiterates his comments stated in **Thompson v. Thompson** (1998), 172 N.S.R. (2d) 50 at 71-72 (S.C.); 524 A.P.R. 50 (N.S.S.C.):

> The standard of living is not in law to necessarily be the standard of living of the supporting spouse. The obligation of the supporting spouse is to provide reasonable support ... reasonable support is not a mathematical entitlement to a percentage of whatever is the income of the paying spouse. The high income earning payor must meet the priority of child support and the obligation of spousal support to a reasonable level, but thereafter, the fruits of the payor spouse's labour belong to the payor.
>
> [Emphasis Added in case cited]

[13] Mrs. Read is incurring a monthly deficit of $500.00. In our opinion, spousal support is not at such a reasonable level that would preclude our consideration of the husband's increased income as a material change in circumstances.

[14] The guiding principle in deciding whether in any given case there is a change of circumstance was laid down by Sopinka, J. in **Willick v. Willick**, [1994] 3 S.C.R. 670 where he said at para. 21:

> In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation . . .

[15] In our opinion, Edwards, J. had this principle clearly in mind when he measured the evidence before him against the circumstances as they existed before Justice Goodfellow at the time of making the original corollary relief judgment. The amended corollary relief judgment is not relevant for the purposes of addressing this issue.

[16] Section 17(4.1) entitled "Factors for Spousal Support Order" provides:

> 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.

[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), or put another way, that there was a manifest error of fact or an error of law (**Edwards v. Edwards** (1995), 133 N.S.R. (2d) 8 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.

[18] The appeal is dismissed with costs which we fix at $600.00 plus disbursements.

Freeman, J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.