FAMILY COURT OF NOVA SCOTIA

Citation: *M.P. v. G.M.*, 2018 NSFC 13

Date: 2018-06-18
Docket: FPICPSA-108187
Registry: Pictou

Between:

M.P.

Applicant

v.

G.M.

Respondent

Editorial Note: **Identifying Information has been removed from this electronic version of the judgment.**

Judge: The Honourable Judge Timothy G. Daley

Heard February 12, 2018 in Pictou, Nova Scotia

Reserved Decision: June 18, 2018

Counsel: Roseanne Skoke, for Applicant
Rebecca Hiltz LeBlanc, for the Respondent

Introduction

[1] This case raises the issue of what is required for a spouse to make an application for spousal support under the *Parenting and Support Act* 1989 RSNS c.160 as amended (the *PSA*) in Nova Scotia. Specifically, is it necessary that the parties be separated at the time of the application and, if so, how is the court to determine whether there has been such a separation?

Background

[2] The husband, G.M., and the wife, M.P., lived in a common-law relationship for approximately 20 years until their marriage. M.P. says they were married in October 2015 and K.M.G. says they married on June 23, 2013. G.M. has children from another relationship. The parties do not have children together. M.P. is 74 years old and, though the evidence is not clear, I understand that G.M. is of a similar age.

[3] G.M. appointed his daughter, K.M.G., his attorney by a Power of Attorney in January 2008. G.M. was diagnosed with dementia in 2013. He was not declared incompetent at that time.

[4] By the fall of 2014, the health of both parties was in decline. In October 2015, they moved into a new residence together in Pictou, Nova Scotia.

[5] G.M. was seen by a gerontologist in January 2016, his driver's license was suspended and a VON nurse was scheduled to oversee the administration of his medications. Around that time, K.M.G. became more involved in managing his care and affairs.

[6] In July 2016, it was clear that G.M.'s mental capacity was deteriorating as his dementia progressed. He was unable to care for himself and required 24-hour personal care. His physician deemed him to be incompetent. At that time, these parties were still residing together.

[7] In July 2016, G.M. was relocated to a care facility in Antigonish. M.P. remained in the matrimonial home. This separation was because of the deterioration of G.M.'s mental health and his need for care which M.P. was unable to provide.

[8] In the fall of that year, M.P. had hip surgery, remained in the hospital for approximately two months and returned to the matrimonial home for approximately one week. She then relocated to an apartment in Stellarton.

[9] In the spring of 2016 M.P.'s health further deteriorated and she was no longer able to care for herself. She moved to an assisted living facility in New Glasgow for a short time and then was transferred to the local hospital. In December of that year, she relocated to Glen Haven Manor, another assisted care facility in New Glasgow, and she remains there to this day.

[10] In October 2017, G.M. was transferred to the Maritime Oddfellows Home in Pictou where he remains to this day.

[11] On the issue of separation, M.P, the wife, says at paragraphs 3 and 4 of her affidavit in this matter:

> 3. I am married to G.M. We have cohabitated together for 22 years as husband and wife. My husband and I cohabitated together since 1994 and we were married in October 2015 and continue to live together until we were separated by necessity in 2016 due to my husband's infirmity requiring nursing home care.
>
> 4. My husband G.M. and I are living separate and apart by necessity only due to G.M.'s diagnosis of Alzheimer's and I consider G.M. and I to be married although living separately.

[12] M.P. has made application to this Court under the *PSA* seeking spousal support from G.M. Both, in her affidavit and through her counsel, she has made it clear to the court that she does not consider herself to be deliberately separated from her husband and describes their circumstance as a separation by necessity.

[13] To put it another way, it is M.P.'s position that, but for G.M.'s infirmity due to Alzheimer's disease and her own infirmity, they would be cohabitating as husband and wife today. She has not filed for divorce and is not seeking to divorce G.M. She simply says that they are "separated by necessity" and she requires spousal support to pay her expenses.

[14] K.M.G., as attorney for G.M., says that M.P. does not have a need for spousal support as she has adequate assets and income from which to draw to support herself. She also says that G.M. does not have the means to pay the support requested.

[15] At this stage of the proceedings, it is agreed between the parties that they wish to determine the issue of whether M.P. can engage the *PSA* and seek spousal support given her position that she is only separated from her husband by necessity and would otherwise continue cohabitating with him in a marital relationship were it not for their circumstances. It is, therefore, the narrow legal issue of what is required to engage the spousal support analysis under the *PSA* that I will restrict myself to within this decision.

Is Separation Required?

[16] It is central to the position of K.M.G. on behalf of G.M. that, for an application to succeed under the *PSA*, it is a prerequisite that (1) the parties be spouses and that (2) they must have separated either prior to the application being filed or, at least, prior to the court awarding spousal support to one of the spouses. This has certainly been the experience of this court in the past.

[17] M.P. does not dispute that the existence of a separation has been the norm when seeking spousal support under the *PSA* but argues that "separation by necessity" is at least sufficient. The question before the court now is whether a separation is required prior to engaging the provisions for spousal support under the *PSA* in the first instance and, if it is, what constitutes separation, including whether a "separation by necessity" is included.

[18] The *PSA* also defined spouse as follows:

> 2(m) "spouse" means either of two persons who
> (i) are married to each other,
> (ii) are married to each other by a marriage that is voidable and has not been annulled by a declaration of nullity,
> (iii) have entered into a form of marriage with each other that is void, if either or both of them believed that the marriage was valid when entering into it,
> (iv) are domestic partners or are former domestic partners within the meaning of Section 52 of the *Vital Statistics Act*,
> (v) not being married to each other, cohabited in a conjugal relationship with each other continuously for at least two years, or
> (vi) not being married to each other, cohabited in a conjugal relationship with each other and have a child together.

[19] I have no hesitation in finding that these parties are spouses by the definition under s.(2)(v) during the time before they married and s.2(i) as of the date of their marriage. There is no contest on this issue.

[20] The *PSA* was proclaimed on May 26, 2017. Prior to its proclamation, the governing legislation was the *Maintenance and Custody Act* (the *MCA*) which was repealed upon proclamation of the *PSA*, and which contained very similar provisions respecting spousal support.

[21] Neither the *PSA* nor its predecessor, the *MCA*, define what constitutes a separation between parties. Neither Act, on its face, requires the parties be separated, on any understanding of that term, prior to making an application for spousal support.

[22] Counsel for both parties did not direct the court to any cases decided under the *PSA* or the *MCA* or any other prior provincial legislation which defines what constitutes a separation or required that a separation be established for an application for spousal support to proceed before by the Court. Likewise, I was unable to identify any such decisions.

[23] On the other hand, I was unable to identify any case under the *PSA* in which a separation had not taken place when spousal support was being sought.

[24] The *PSA* does set out under s.4 factors the court must consider in determining whether to order a person to pay spousal support. None of these factors indicate a requirement to find that, or consider whether there has been, a separation of the spouses. Having said that, I acknowledge that the factors under this section are not a closed list and the court may consider other factors that may be relevant to its assessment of the issue of spousal support.

[25] Section 5 requires that the court considered the obligation of the spouse to assume responsibility for his or her own support and includes, as a consideration of that factor, the duration of the relationship between the parties. I do not find that this phrase, in and of itself, implies that a separation of the parties must have occurred prior to spousal support being sought.

[26] Counsel for K.M.G. cites my decision in *A.J. v. K.M.*, 2017 NSFC 19 in which I found that the principles governing entitlement to spousal support under the *Divorce Act* (the *DA*) are equally applicable to those applications made under the *MCA*, K.M.G. argues that these principles are substantially the same as under the now-applicable *PSA*. I agree. In *A.J.* supra, after reviewing the provisions of s. 4 and 5 of the *MCA*, I held at paragraph 179

[27] While that is the structure of the *Act*, there are well-known, leading decisions from the Supreme Court of Canada which have set out the applicable principles as well. The two very well-trodden cases are *Moge v. Moge* [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow* [1999] 1 S.C.R. 420.

[28] Counsel for K.M.G. argues that this case stands for the proposition that the provisions of the *DA*, which require that a party established that there has been a breakdown of the marriage to obtain relief, including spousal support, are applicable under the *PSA*. Specifically, counsel refers to s. 8 (2) of the *DA* act which says

> **(2)** Breakdown of a marriage is established only if
>
> **(a)** the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or
>
> …
>
> **Calculation of period of separation**
>
> **(3)** For the purposes of paragraph (2)(a),
>
> **(a)** spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and
>
> **(b)** a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated
>
> > **(i)** by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable, or
> >
> > **(ii)** by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

[29] Counsel cites the decision in *Hermann v Hermann* [1969] N.S.J. No. 128 which explores what is meant by "separate and apart" under s.8(3)(a) at paragraph 17 as follows

> **17** Conceivably, there are many instances where husband and wife are physically absent from one another, even for a long duration of time. This absence may be brought about by a variety of causes, illness, nature of employment, etc. However, as long as the spouses treat the parting or absence, be it long or short, as *temporary* and *not permanent*, the couple is not living separately even though physically it is living apart. In order to come within the clear meaning of the words "separate and apart" in the statute, there must needs be not only a physical absence one from the other, but also a destruction of the *consortium vitae* or as the act terms it, a marriage breakdown.

[30] I agree that the principle identified in *Hermann* supra is applicable under the *DA.* This does not lead me to conclude that the requirements for relief, that there must be "breakdown of the marriage" or relationship evidenced by the parties living separate and apart, is found in or should be read into the *PSA.* This would be a misunderstanding of what is required under the two acts and the difference between those acts.

[31] The *DA* is focused an appropriate legal structure to provide married parties with a divorce which is the legal termination of the marriage. The *DA* also provides a court with authority to provide relief in the form of spousal and child support, custody and access for children and other related relief. It only applies to married parties and has no application to parties living in common-law relationships. Some parties never finalize the divorce, but to begin the matter under the *DA* one party must meet the requirements to do so.

[32] The *DA* is clear that to be entitled to relief, including spousal support, there must be proof of the breakdown of the marriage. One way to prove this is to lead evidence of the spouses having lived separate and apart for at least a year immediately preceding the determination of the divorce proceedings and that the parties were living separate and apart at the commencement of the proceedings. Section 3 requires at least one party to have the intention to live separate and apart from the other. *Hermann* supra makes clear that temporary absences, even long ones, will not suffice absent that intent and the intent must be *"a destruction of the consortium vitae or as the act terms it, a marriage breakdown."*

[33] In contrast, the *PSA* operates differently. There is nothing in the *PSA* which requires proof of separation and thus nothing requiring proof of the length of separation. There is no reference to the phrase "living separate and apart" or anything comparable. It is true, in the experience of this court, that at least one party usually provides evidence that they have separated prior to or at the commencement of the proceeding when seeking spousal support but there is

nothing in the legislation which requires this to be proven. In cases involving child support, parties may never have lived together and thus proof of separation may not be an issue.

[34] As well, despite many similarities between the *PSA* and the *DA*, including the applicability of the decisions in *Moge* supra and *Bracklow* supra to spousal support considerations under both, the acts are quite different in many ways.

[35] Among the differences are the following:

1. The *DA* is only applicable to parties who are married. The *PSA* applies to parties who are married, are domestic partners or former domestic partners within the meaning of the *Vital Statistics Act*, parties who were not married but have cohabitated in a conjugal relationship with each other continuously for at least two years or are not married and have cohabitated in a conjugal relationship with and had a child together. Put simply, the *PSA* applies to parties in a broader range of relationships.

2. The *DA* is intended to provide a mechanism and legal authority by which a marriage may be terminated and for establishing the respective rights and obligations of the parties arising from that a termination by way of divorce. The *PSA* provides no such authority for termination of the marriage.

3. The *PSA* provides for relief to parties in circumstances not provided for in the *DA* including, but not limited to, use of the family residence (s.7), a specific list of factors to consider in determining a child's best interests (s.18(6)), direction on how the court is to consider issues of family violence (s.18 (6)(j)), the inclusion of the right of grandparents to apply for contact time with a child (s.18(2)), direction on any change in residence of either parent of a child (s.18(D) a detailed regime for relocation of a child including notice, direction on presumptions and burden of proof as well as additional factors to be considered in such cases (s.18E though 18H) and provision for a dependent parent to seek support from a child (s.15).

[36] There are similar provisions and some common intentions between the acts and judicial interpretation has imported concepts and principals from the *DA* into the interpretation of the *PSA*. But important distinctions remain.

[37] In finding that one of those distinctions is that the *DA* requires proof of the separation before spousal support may be awarded and the *PSA* does not specifically set out such a requirement, I do not find that the decision in *A.J.* supra implies that the requirement of proof of living separate and apart under the *DA* is imported into, or should be read into, the *PSA*. Paragraph 179 of that decision merely notes that the principles to be considered in determining entitlement, quantum and duration of spousal support under the *DA* as set out in *Moge* supra and *Bracklow* supra, including whether spousal support is founded in compensatory, non-compensatory or contractual grounds, are applicable under the *PSA*.

[38] If the legislature had intended to require that separation be proven under the *PSA* to consider a claim for spousal support, it could have done so. It has not chosen to do so under the *PSA* or the preceding *MCA*. While it may seem apparent and it may be required that only parties that are separated should be entitled to claim relief, no such requirement exists in the *PSA*. For the purpose of this decision, I do not find it necessary to determine if separation is required to seek spousal support under the *PSA* because of my findings on the second issue raised in this matter.

What Constitutes Separation under the PSA?

[39] M.P. says that, though she and G.M. live separate and apart, this is only because they have been placed in separate facilities due to their respective physical and mental circumstances. Were it not for those circumstances, M.P. says that she would still be living with G.M. and would not seek to divorce him.

[40] G.M. is not competent to personally take a position in this matter and hasn't been competent for some time. His daughter, K.M.G. takes the position that, though the parties live in separate facilities, spousal support cannot be awarded because K.M.G. does not consider them to be separated and M.P. only considers them to be separated by necessity.

[41] In my view, though this circumstance may well not meet the test of "living separate and apart" under the *DA* as there is no evidence of "*a destruction of the consortium vitae or as the act terms it, a marriage breakdown"* the position of K.M.G. is not sustainable under the *PSA* even if proof of separation is necessary to apply for spousal support.

[42] A spouse may seek spousal support in at least circumstances where there is financial need and at least in circumstances where spouses are separated. I find no logical basis for the position of K.M.G. that spousal support cannot be awarded in circumstances where parties are physically separated from one another, have independent living costs, neither intends to end the spousal relationship and that separation is not by their choice. There is nothing in the *PSA* that requires evidence of an intention to remain permanently separated or that one spouse chose to separate, either temporarily or permanently, from the other.

[43] Separation certainly includes the description from *Hermann* supra of *"... not only a physical absence of one from the other, but also a destruction of the consortium vitae..."*. Unlike in the *DA*, there is no basis in the *PSA* to require a separation of at least one year or any other specific period.

[44] To import into the *PSA* the requirement of "living separate and apart" from the *DA* as the only definition of separation would be to endorse the very circumstance before the court in which spouses are separated not by choice but by the circumstances of their health, the spouse seeking support does not want to formally or permanently end the relationship while the other spouse uses that as a basis to deny any financial support. I find that this would cause an injustice that could not have been the intent of the Legislature and which would be contrary to the purpose of the *PSA.*

[45] The *PSA* is structured to provide the court with authority to consider what reasonable financial support can and should or should not be provided by one spouse to the other in circumstances where it is reasonably necessary to do so. I find that would at least include circumstances where the parties are separated, whether by choice or necessity. I find that, at minimum, what must be established in such circumstances is that the parties are living separately. If this is established, the court's jurisdiction under the *PSA* to consider whether spousal support should be paid and, if so, what amount and for what duration spousal support is payable is engaged.

[46] I find that it could not be the intent of the Legislature in proclaiming the *PSA* to permit a spouse of over 20 years to avoid the possibility of spousal support where the spouses are separated either by choice or by circumstances beyond their control. To permit that would, in my view, constitute an injustice and be entirely inconsistent with the purpose and structure of the *PSA* to provide relief to members

of families, including spouses, who find themselves financially vulnerable in circumstances including separations of spouses whether by choice or necessity.

[47] I am satisfied that if proof of a separation is required under the PSA in order to permit an application for spousal support, separation includes separation by necessity which exists when spouses are living separately for reasons that are beyond their control and neither party intends the end of the spousal relationship.

[48] For these reasons, I find that this court does have jurisdiction and authority to hear the application of M.P. respecting a claim for spousal support against D.M. through K.M.G. This Court will schedule a docket appearance for the matter to come back before the court to discuss how the matter will proceed further.

Daley, JFC