

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Power v. Jackman, 2008 NSSC 389

Date: 20081218

Docket: 1206-4438

Registry: Sydney, Nova Scotia

Between:

Nina (Jackman) Power

Applicant

v.

Marcel Jackman

Respondent

DECISION

Judge: The Honourable Justice Theresa M. Forgeron

Heard: November 4, 2008

Decision: December 18, 2008

Counsel: Lee Anne MacLeod-Archer, counsel for Nina Power
William P. Burchell, counsel for Marcel Jackman

By the Court:

I INTRODUCTION

[1] Nina Power and Marcel Jackman are former spouses. The parties have returned to court to resolve the pension division issue which arose after the divorce was granted.

[2] The consent Corollary Relief Judgment confirms an equal division of the pensions of both parties. A trust is also created in the event the pension administrator is unable or unwilling to effect the equal division of the pensions. In addition, the Corollary Relief Judgment preserves the jurisdiction of the court to resolve matters relating to the interpretation or implementation of the pension division.

[3] The parties have been unsuccessful in their attempt to divide the pension of Mr. Jackman who is employed with Marine Atlantic. The pension administrator has quantified the amount of pension benefits to be transferred to Ms. Power in keeping with the equal division which was ordered. The parties have accepted this figure. The pension administrator also requires a signed, letter of direction in which one of three options is

selected for the investment of the transferred funds. Both Mr. Jackman and Ms. Power must agree on the option before the pension benefits will be transferred to Ms. Power's name. The parties were unable to reach agreement on the investment vehicle. The pension continues to be held in Mr. Jackman's name. As a result, Ms. Power brought an application before the court to resolve the dead lock.

II ISSUES

[4] What option should the court approve to effect the equal division of the pension held in Mr. Jackman's name?

III ANALYSIS

[5] **Position of Ms. Power**

[6] Ms. Power states that she should be able to determine in which investment vehicle her portion of the pension held in Mr. Jackman's name

is transferred. Mr. Jackman should not be able to dictate what she does with her finances and with her half share.

[7] Ms. Power chose option 3 because she determined, in consultation with other professionals, that this option was best for her.

[8] Ms. Power found option 2, which was Mr. Jackman's choice, unpalatable for the following reasons:

- a) Ms. Power would only receive a pension based upon Mr. Jackman's life and only after Mr. Jackman retired;
- b) If Ms. Power died before Mr. Jackman's retirement, no benefits would be payable to Ms. Power or to her estate;
- c) If Ms. Power died after Mr. Jackman's retirement, Ms. Power's pension payments would revert back to Mr. Jackman. Nothing would be payable to Ms. Power's estate;
- d) If during Mr. Jackman's retirement, Mr. Jackman died before Ms. Power, survivor benefits on Mr. Jackman's entire pension, including Ms. Power's half share, would be payable to the person who qualified as an eligible spouse on the date of Mr. Jackman's retirement, or to Mr. Jackman's estate if no such spouse existed; and
- e) If Mr. Jackman died before Ms. Power and before Mr. Jackman retired, Ms. Power would receive no pension. Rather, survivor benefits would be payable to the person who qualified as an eligible spouse on the date of Mr. Jackman's death, or to Mr. Jackman's estate if no such spouse existed.

[9] Ms. Power wants the court to order the transfer of her share of the Marine Atlantic pension to the investment vehicle provided in option 3. This option would create a pension for Ms. Power which would be payable on Ms. Power's life from a retirement date specific to her and guaranteed for 15 years. Further, the subsequent death, remarriage or common-law relationship of Mr. Jackman would not have any effect on Ms. Power's pension.

[10] **Position of Mr. Jackman**

[11] Mr. Jackman states that he has done nothing wrong in choosing option 2 on the advice of two accountants. Option 2 was the most favourable to him. In the submissions on Mr. Jackman's behalf, the following is stated:

Marcel Jackman should not be faulted for choosing option number 2, on advice. This mischief was not created by him, Mercer [the pension administrator] was the author. ..

[12] In his written submissions, Mr. Jackman appears to be agreeable to the acceptance of option1 as a compromise when he states as follows:

While Nina Power's concern about option number 2 is understandable, she cannot simply say, as she has throughout, I choose option number three and that is the end of the matter. This is Marcel Jackman's pension, the choice of options is not exclusively hers.

It is submitted that this Honourable Court should consider option number one, wherein \$81,118.27 plus interest from March 31, 2003 would be assigned to Nina Power. This sum would be transferred to a locked-in RRSP in her name and should address the parties' concerns with the option chosen by the other.

[13] **Authorities**

[14] Clauses 14 to 18 of the Corollary Relief Judgment dated December 20, 2004 outline the parties' agreement on the equal division of the pensions. These provisions state:

14. The Pension Administrator of the pension plans of Marcel Jackman (Marine Atlantic) and Nina Jackman (NSAHO) respectively shall forthwith equally divide all pension benefit credits, including, but without limiting the generality of the foregoing, all pension benefit credits earned through employee contributions, employer contributions, indexing, life expectancy, the RET roll-over and interest between Nina Jackman and Marcel Jackman based upon actuarial principles from July 25, 1981 until March 31, 2003 which the parties agree constitutes the period of cohabitation for the purposes of the pension division. This division is based upon the pensions being a matrimonial and/or family asset.
15. Re the Pension Administrator of the pension plan or plans of either party is unable or unwilling to implement the terms of this

Order, that the party shall be the Trustee for the other party to the fullest extent required to provided the recipient party with the benefits and rights contemplated by this Order.

16. In the event of a dispute (inter parties or with the pension plan administrator) with respect to the interpretation and/or implementation of this Order or filing compliance with clause 13, the parties and/or pension plan administrator may apply to a court of competent jurisdiction for directions respecting the dispute and any monies owing to Nina Jackman as a result of the RET roll-over.
17. Both parties shall have access to information, communication and documentation respecting the pension held in the name of the other party until such time as the pension division is effected.
18. The portion of the RET roll-over not attributable to the period of the marriage has been calculated to be \$10,403.97. Marcel Jackman shall pay half of the after tax value of such calculation to Nina Jackman within thirty (30) days of this Order, such payment to be in the lump sum amount of \$3641,39, in addition to the equalization payment owing under clause 23 herein.

[15] A consent Corollary Relief Judgment is an order sanctioning an agreement entered into by the parties. It is not a declaration of rights imposed by the court: **Canada Deposit Insurance Corp. v.**

Commonwealth Trust Co., 1997 CarswellBC 2175 (C.A.); and **155569**

Canada Ltd. v. 248524 Alberta Ltd., 1992 CarswellAlta 357 (Q.B.).

[16] The consent Corollary Relief Judgment is to be interpreted in the same manner as an agreement. Negotiations are not relevant. The factual background leading up to the resolution is relevant to ensure that the understanding of the parties as to the effect of the order can be ascertained: **Toronto Dominion Bank v. Cariboo Trail Hotel Ltd.**, 1996 CarswellBC 2687 (S.C.) at para 14 and as affirmed at 1998 CarswellBC 1422 (C.A.).

[17] In **Royal Bank v. 1542563 Ontario Inc.**, 2006 CarswellOnt 5761 (S.C.J.), at para 4, Mossip J. summarized the principles to apply when a court is asked to interpret the language of an order. These principles are as follows:

- a) A broad and liberal interpretation is to be used to achieve the objective of the court in making the order;
- b) The language must be construed according to its ordinary meaning and not in some unnatural or obscure sense;
- c) A certain flexibility must be available in recognition of the fact that life is not static; developments beyond the contemplation of the parties often arise;
- d) The court must examine the context in which the order was issued, evaluate the order in accordance with the circumstances of the case, and question whether the acts or omissions could reasonably have been contemplated to fall under the terms of the order; and

e) A party cannot hide behind a restrictive and literal interpretation to circumvent the order and make a mockery out of the administration of justice.

[18] Similar principles of interpretation have been applied in family law cases: **Tetarenko v. Tetarenko**, 2005 CarswellAlta 588 (Q.B.) and **Randall v. Randall**, [2003] B.C.J. No. 1095 (C.A.).

[19] **Decision**

[20] I will grant the order sought by Ms. Power. In so doing, I am giving effect to the ordinary meaning of the language used in the Corollary Relief Judgment, and I am ensuring that the objectives of the Judgment are fulfilled.

[21] At the time of the divorce, Mr. Jackman and Ms. Power resolved their long term relationship with an equal division of the assets and debts, including their pensions. This agreement was placed in the form of a consent Corollary Relief Judgment.

[22] At the time of the divorce, each party owned one pension. Ms. Power's pension was held with the Nova Scotia Association of Health Organizations. Mr. Jackman's pension was held with Marine Atlantic. These pensions were classified as matrimonial assets in keeping with case law.

[23] The Corollary Relief Judgment created immediate ownership rights for each party in both pensions, regardless of whose name the pension was actually registered. The Judgment also established a trust which took effect in the event the pension administrator was unable or unwilling to implement the terms of the order.

[24] When the consent order was created, neither party anticipated that the pension administrator would require a further agreement before Ms. Power's share of the Marine Atlantic pension would be transferred out of Mr. Jackman's name. Thus, the Corollary Relief Judgment is silent on how this issue is to be resolved in the event of a dispute.

[25] The pension administrator requires a signed, letter of direction relating only to Ms. Power's share of the Marine Atlantic pension. Ms. Power was, and is, the owner of her share, despite the fact that it was, and is, registered in Mr. Jackman's name. Ms. Power's decision on how her share is to be invested must be determinative of the issue. To find otherwise could lead to absurd results, such as the adoption of option 2. Under option 2, Ms. Power may not actually receive a pension, and she may have no survivor benefits. Such a result is contrary to the spirit and intention of the Corollary Relief Judgment.

[26] Further, it is no defence to suggest the adoption of option 1 as a compromise solution. The court cannot arbitrarily impose an option as a compromise so there is no winner and no loser. Such is not the function of a court. When the court exercises its discretionary authority, it must do so judicially according to the rules of reason and justice. Discretion cannot be exercised in a fanciful way, but in a manner that a person competent to the discharge of his/her office ought to confine himself/herself: **Maclsaac v. Maclsaac** 1996 CarswellNS 177 (C.A.).

[27] In its February 14, 2008 letter, the pension administrator confirmed that options 1 and 3 will have the same effect on Mr. Jackman when the pension administrator states:

1) Option 1 and Option 3 presented in our July 4, 2005 [sic] have the same effect on Mr. Jackman. A value is assigned to Mrs. Power. She can either transfer such value or eventually receive a pension from the Marine Atlantic pension plan equivalent to such value. The benefits that Mr. Jackman will eventually receive will be reduced by such value, accumulated with interest. Under both cases, after the assignment of the value to Mrs. Power, the decisions of Mr. Jackman or Mrs. Power do not have any effect on each other.

[28] Because Ms. Power owns the asset, there is no justifiable reason to oust Ms. Power's decision on how she wishes to invest her share of the Marine Atlantic pension.

IV CONCLUSION

[29] I order Mr. Jackman to forthwith sign the requisite letter of direction confirming option 3 as the investment vehicle in which Ms. Power's share of the Marine Atlantic pension will be transferred. In the event Mr. Jackman refuses to do so, the sheriff is authorized to execute the letter of direction and other documentation required in his stead. If such is not

acceptable to the pension administrator, then Ms. Power may wish to avail herself of other judicial remedies to enforce the order of the court.

[30] Ms. Power requests costs. Costs of \$1,000 are granted taking into account the following:

- a) Rules 70.03, 57.27, and 63;
- b) The applicable case law including **Grant v. Grant** (2002), 200 N.S.R.(2d) 173 (S.C.) and **Bennett v. Bennett** (1981), 45 N.S.R.(2d) 683 (T.D.);
- c) The length of the chambers appearance, and the amount and quality of the documentation filed; and
- d) The fact that Mr. Jackman's decision not to sign the letter of direction from the pension administrator in accordance with Ms. Power's wishes was devoid of merit.

[31] Ms. MacLeod-Archer is to draft the order and forward it to Mr. Burchell for his consent as to form. The order should be finalized and issued before Wednesday of next week.

Forgeron, J.

