IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Rowe v. Rowe, 2010 NSSC 8

Date: 20100107
Docket: 1201-062221
Registry: Halifax

Between:

Albert John Rowe

Applicant

and

Paulette Marie Rowe

Respondent

Judge: Justice Lawrence I. O'Neil

Heard: November 19, 2009, in Halifax, Nova Scotia

Counsel: Mr. Brian Bailey, for the Applicant
Mr. Patrick Eagan, for the Respondent

By the Court:

Introduction

[1] The parties were married April 22, 1989 and separated May 18, 2007. They have two children of the relationship, born August 1, 1997 and August 27, 1989. On January 26, 2009, the parties executed a document described in its text as a "separation agreement and minutes of settlement". Herein, the words separation

agreement or agreement are a reference to the parties' separation agreement and minutes of settlement dated January 26, 2009.

[2] The agreement required Mr. Rowe to pay Ms. Rowe $1,200 per month commencing September 1, 2008 through to December 2012. The payment is described in the agreement as "child support". After December 2012, child support payable to Ms. Rowe will be based on the child support tables forming part of the Federal Child Support Guidelines.

Background to the Current Litigation

[3] The Petition for Divorce was filed November 8, 2007 by Ms. Rowe. She filed an application for interim relief on November 21, 2007. Mr. Rowe filed a response on January 8, 2008. The matter came before me on February 21, 2008 for a hearing. The matter did not proceed to a hearing. The parties reached an interim agreement on several issues and the agreement was read into the record.

[4] In November 2008, I was advised by Mr. Eagan that following the February appearance a disagreement had developed between the parties over the text of the interim consent order. He asked the court to consider issuing the order. On April 1, 2009, Mr. Eagan sought registration of the January 26, 2009 separation agreement/minutes of settlement pursuant to s.52 of the *Maintenance and Custody Act*. Approximately one month later, on May 7, 2009, Ms. Rowe applied for a Divorce Judgment and a "CRJ" on an uncontested basis as provided by R.70.23. (The application however had been sworn February 5, 2009.)

[5] Communication with the court continued into June, 2009. Counsel for Mr. Rowe, the Respondent, would not consent to the issuance of a divorce judgment and corollary relief judgment consistent with the separation agreement/minutes of settlement. A series of letters were forwarded to me which ultimately led to a telephone pretrial on August 21, 2009. As a consequence of that pretrial, counsel for Ms. Rowe agreed that he would not challenge the court's jurisdiction to consider an application by Mr. Rowe to vary the corollary relief judgment, hereinafter referred to as the "CRJ". Counsel for Mr. Rowe agreed to the issuance of the "CRJ" presented by Mr. Eagan.

[6] The Divorce Judgment and original Corollary Relief Judgment were therefore issued September 29, 2009.

Issues

[7] Mr. Rowe now argues that a change of circumstances justifies a variation of the separation agreement/minutes of settlement, incorporated in the corollary relief judgment. The change in circumstance relied upon by Mr. Rowe to support his application to vary is his retirement from the Canadian Forces in April, 2009 and the resulting dramatic drop in his income. Ms. Rowe argues that this is not a change of circumstance relieving Mr. Rowe from his obligation in the separation agreement, since incorporated into the parties "corollary relief judgment". Mr. Eagan argues in the alternative that the court should impute income to Mr. Rowe, given his decision to retire.

[8] The issues therefore are:

1. What significance should be attached to the language of the separation agreement ?

2. Whether there is a distinction between the weight attached to the terms of a separation agreement when the court is considering the issuance of an original order as contrasted with an application to vary an existing order ?

3. Whether Mr. Rowe has demonstrated a change in circumstances?

4. If Mr. Rowe has demonstrated a change in circumstance, whether the change justifies varying the terms of the corollary relief judgment?

5. If any change in the corollary relief judgment is justified, what change should be made?

Issue One and Two

- The Interaction of the Separation Agreement and the *Divorce Act*

[9] Do different principles apply if the application to disregard the terms of the separation agreement/minutes of settlement arises from an application to vary as opposed to when the issuance of the original corollary relief judgment is before the court ?

[10] The Supreme Court of Canada in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303 considered the interaction of section 15.2 of the *Divorce Act*, 1985, c.3

(2nd Supp.) with a pre-existing separation agreement/minutes of settlement. The court was considering how a separation agreement/minutes of settlement impacted on the court's latitude when deciding on an appropriate original order under the *Divorce Act*. The application before the court herein is to vary a corollary relief judgment, pursuant to section 17 (order for variation, rescission or suspension) of the *Divorce Act*.

[11] An application may be made for a corollary relief judgment that is at variance with the parties' separation agreement. In the case of an original proceeding pursuant to the *Divorce Act*, the governing legislative provision is s.15.2. It provides:

> Spousal support order
>
> 15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
>
> . . . . .
>
> Terms and conditions
>
> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
>
> Factors
>
> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> © any order, agreement or arrangement relating to support of either spouse.
>
> . . . . .
>
> Objectives of spousal support order
>
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the 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;
>
> © relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[12] In contrast, once the agreement is incorporated in a corollary relief judgment, an application seeking to, in essence, vary the agreement is an application to vary the corollary relief judgment. The governing provision of the *Divorce Act* is then s.17.

[13] The provision reads as follows:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> > (a) a support order or any provision thereof on application by either or both former spouses; or
> >
> > (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> . . . . .
>
> Terms and conditions
>
> (3) The court may include in a variation order any provision that under this *Act* could have been included in the order in respect of which the variation order is sought.
>
> Factors for child support order
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> Factors for spousal support order

> (4.1) 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.

[14] The extent of the court's authority to decide upon a corollary relief judgment at variance with the parties' separation agreement must be reviewed when the court is called upon to issue an original corollary relief judgment or to vary an existing corollary relief judgment that effectively changes the parties' pre existing agreement.

[15] The court's considerations are the same when called upon to set aside a separation agreement regardless of whether the application arises at the time the original corollary relief judgment is being issued, or in the context of an application to vary a corollary relief judgment. At para. 91 in *Miglin supra*, the court stated:

> 91 Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the *Act*, that the court may be persuaded to give the agreement little weight. As we noted above, it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17. In our view, the *Act* does not create such inconsistency. We do not agree with the Ontario Court of Appeal when it suggests at para. 71, that once a material change has been found, a court has "a wide discretion" to determine what amount of support, if any, should be ordered, based solely on the factors set out in s. 17(7). As La Forest J. said in his dissent in Richardson, supra, at p. 881, an order made under the *Act* has already been judicially determined to be fit and just. The objectives of finality and certainty noted above caution against too broad a discretion in varying an order that the parties have been relying on in arranging their affairs. Consideration of the overall objectives of the *Act* is consistent with the non-exhaustive direction in s. 17(7) that a variation order "should" consider the four objectives listed there. More generally, a contextual approach to interpretation, reading the entire *Act*, would indicate that the court would apply those objectives in light of the entire statute. Where the order at issue incorporated the mutually acceptable agreement of the parties, that order reflected the parties' understanding of what constituted an equitable sharing of the economic consequences of the marriage. In our view, whether acting under s. 15.2 or under s. 17, the Court should take that into consideration.

[16] Clauses 6 and 7 of the parties' separation agreement describe the monthly financial obligation to Ms. Rowe as follows:

> Child & Spousal Support
>
> 6. The parties acknowledge that the Husband made regular monthly payments of child and spousal support in the amount of $1,600.00 per month which commenced last day of May 2007 and the parties mutually agreed to reduce the support and they appeared in Court on February 21, 2008 and the Husband has been making regular support payments every month to the Wife in the amount of $1,200.00 per month with monthly spousal support payments every month to the Wife in the amount of $578.00 per month and monthly child support payments in the amount of $622.00 per month since on or about the last day of February, 2008 for a total support payment of $1,200.00 per month.
>
> 7. (a) Spousal support for the Wife ceased as of the last day of August 2008. The parties agree that neither will claim further spousal support nor reimbursement of amounts paid.
>
> (b) Starting September 1, 2008, the Husband will pay and continue to pay the Wife child support in the amount of $1,200.00 per month, and continuing on the first day of each month thereafter through the month of December 2012. Thereafter, child support shall be paid to the Wife for the child, Jason, based on the Table amount in the Federal Child Support Guidelines and will continue so long as Jason remains a child of the marriage pursuant to the *Divorce Act*.
>
> © The parties agree that if either child suffers an unforeseen injury or illness, which as a result thereof prevents them or either of them from being self-sufficient, they will review the entire issue of child support with a view to providing appropriate child support.
>
> (d) The parties further agree to exchange Income Tax information on or about June 1st of each year while child support is paid or payable.

[17] The corollary relief judgment reflects the parties' agreement:

> Child Support
>
> 4. The Respondent, John Albert Rowe, shall pay child support to the Petitioner, Paulette Marie Rowe, for the benefit of the one (1) child of the marriage, pursuant to the Child Support Guidelines, in the amount of $1,200.00 per month commencing on the 1st day of September 2008 and on the first day of each month thereafter through the month of December 2012. Thereafter, child support shall be paid by the Respondent to the Petitioner based on the Table amount in the

> Child Support Guidelines and will continue for so long as Jason remains a child of the marriage as defined by the Divorce Act, subject to annual review following the exchange of income tax information;
>
> Spousal Support
>
> 5. The Respondent, John Albert Rowe, has paid spousal support to the Petitioner, which payments ceased on the last day of August 2008, on terms as set out in the attached Separation Agreement and Minutes of Settlement. Thereafter, neither party will pay spousal support to the other;

[18] Clearly, the payment of $1,200 per month as child support was far in excess of the table amount required based on a payor's salary of $74,000 and responsibility for two children. A payment of this amount is required when a payor has an income for child support purposes of $88,000 when there are two children of the marriage, or $150,000 when there is only one child of the marriage. There is agreement that the older child is no longer a child of the marriage.

[19] Ms. Rowe earns approximately $26,000 per year. Her share of Mr. Rowe's military pension is inaccessible with the exception of an amount of $5,000 or so per year. The bulk of the pension income will be available to her when she turns 55 years of age. She "rolled" approximately $173,416.33 into an R.R.S.P. This was her share of the pension.

[20] She acknowledged various payments made by Mr. Rowe to her since April 2009.

[21] She agreed that she assumed the bulk of the marital debts as described in the separation agreement and she wanted to avoid bankruptcy. She has been forced into bankruptcy and she attributes that event to Mr. Rowe's failure to honour their separation agreement.

[22] Mr. Rowe's pension income is $1,480/month. As stated, he and Ms. Rowe did divide his pension. In addition, he is currently employed by the Corps of Commissionaires ($1,855/month) for thirty-five (35) to forth-five (45) hours each week. Mr. Bailey places his client's annual income for child support purposes at $36,756.

[23] Mr. Rowe is confident that within three (3) - six (6) months, he will have a better paying job and his total annual income will be in the fifty (50) to sixty (60) thousand dollar range.

[24] Mr. Rowe explained that he remains committed to the agreement and is prepared to honour the financial obligations he assumed, but he can not currently do so. He wants to postpone the obligation. He argues that he will make the 51 payments still required by the agreement, but requires relief from the obligation to do so now. He suggests that the obligation be suspended until the late fall of 2010.

[25] Mr. Eagan, counsel on behalf of the Respondent, argued that the Supreme Court of Canada decision in *Miglin v. Miglin*, [2003] 1 S.C.R. 303, requires that Mr. Rowe continue to pay the agreed-upon amount of $1,200 per month to Ms. Rowe; regardless off any changes in his income. Mr. Bailey, counsel on behalf of Mr. Rowe, argues that the assumptions that gave rise to the agreement are no longer correct and therefore there has been a drastic change in the parties' circumstances that justify a movement away from the terms of the agreement and the "CRJ" should be varied.

[26] Mr. Bailey is asking the court to order that until the late fall of 2010, Mr. Rowe pay only child support according to the child support tables for one child, based on the payor having an income of $36,756.00, i.e. $322.00/month.

[27] Faced with a similar issue, the Supreme Court of Canada in *Rick v. Brandsema* [2009] S.C.J. 10 also assessed the circumstances at the time the separation agreement was negotiated and signed. Justice Abella, on behalf of the court, overturned an agreement because of incomplete disclosure by the husband. In the course of her discussion of the principles to be applied when the court is asked to set aside a separation agreement, Justice Abella referenced the *Miglin* decision and the guidance lower courts must take from it.

[28] At paragraph 48, she stated:

> 48 . . . . . An agreement based on full and honest disclosure is an agreement that, *prima facie*, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. . . . .

There is no suggestion herein that the parties did not enter a binding agreement or that the agreement was not binding at the time it was entered.

[29] Justice Dellapinna in *Stening-Riding v. Riding*, 2006 NSSC 221 at para 22 observed that *Miglin* applied to variation proceedings. In a helpful analysis, Justice Dellapinna systematically applied principles enunciated in *Miglin* to the evidence before him and factual conclusions he reached.

[30] Beginning at paragraph 37 he paraphrases the test he is applying as, "the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the *Act*".

[31] Obstacles to performance by either party should not be confused with a determination of the original intentions of the parties. In my view, care must be taken to distinguish between circumstances giving rise to the agreement and those which make compliance with the agreement difficult, assuming substantial compliance with the objectives of the *Divorce Act*.

[32] Counsel for Mr. Rowe argues that the extent of the change in Mr. Rowe's circumstances impacts on the integrity of the bargain the parties reached.

[33] He is not arguing that the original agreement was unfair when it was made, or that the agreement, when reached, did not promote the relevant support objectives outlined in the *Divorce Act*. In any case, I find the agreement to be fair when made and that it promoted the objectives of the *Divorce Act*.

[34] The terms of the separation agreement must be given great deference. As stated, the leading authority dealing with when a separation agreement may be subject to change is *Miglin, supra.*

[35] The Supreme Court of Canada, in *Miglin supra*, rejected the requirement that a "radical, unforeseen" change had to be shown before an agreement could be varied. It also rejected a "material change" test. As discussed in McLeod and Mamo (2008, Carswell) at page 570, the court enunciated a two step process:

> (i) determining whether the agreement was fairly negotiated and reflected the support objectives set out in the *Divorce Act,* as well as the overarching objectives of finality and certainty to enable the parties to move on with their lives; and

> (ii) whether anything outside the parties' reasonable contemplation had occurred since the date of the agreement to undermine the integrity of the settlement.

[36] We are concerned with the second branch of the test.

Issue three: The Parties' Separation Agreement/Minutes of Settlement

[37] Clearly the parties agreed to have the terms of the separation agreement incorporated and to become the terms of the corollary relief judgment. This is stated in the recitals to the agreement; in clause 1; 2 and 14. Clause 14 (b) reads as follows:

> Agreement represents a full and final settlement
>
> 14.(b) The parties are aware that this is a final agreement between them. No further claims will be made again either party by the other arising from the marriage or upon the dissolution thereof, including any claims under Section 15 of the *Divorce Act Canada* or upon the death of one of them. Both parties are aware of the possibilities of fluctuation in their respective incomes and assets, are cognizant of the possible increases and decreases in the cost of living and are aware that radical, material, profound catastrophic changes may affect either of them. Each party is prepared to accept the terms of this Agreement as a full and final settlement and waive all further claims against the other, except a claim to enforce the terms of this agreement or for dissolution of the marriage. The parties specifically agree and acknowledge that there is no causal connection between the present or any future economic need of either party and their marriage. No pattern of economic dependency has been established in the marriage.

[38] The agreement provided at clause 11 that the Petitioner would assume the matrimonial debts, the Respondent having filed for bankruptcy. Evidence supports the conclusion and I conclude that Ms. Rowe wished to avoid bankruptcy. Ms. Rowe has since been forced into bankruptcy. The exchange of benefits that the separation agreement represented are somewhat typical. For example, sub clause 7(b) provided for time limited support payments to Ms. Rowe above payments required as child support. The payments are characterized as enhanced child support. Ms. Rowe clearly benefited from this provision. The immediately preceding sub clause 7(a) is a waiver of spousal support by both parties. Given the income disparity of the parties at the time the agreement was signed, the anticipated payor benefiting from this waiver was Mr. Rowe.

[39] The parties both received independent legal advice and understood the full nature and effect of the agreement and his or her rights and obligations. This is

stated in clause 16 of the agreement itself and no evidence has been led to suggest that this is not so. In fact, certificates of independent legal advice are attached to the agreement. It was not argued that this was not so.

[40] Further at clause 17, the parties agree that they entered into the agreement without undue influence, fraud or coercion and that they have voluntarily executed the agreement. Again no evidence has been led to suggest that this was not so. Nor has it been argued that it is not so.

Issue Four: Has Mr. Rowe Demonstrated a Change in Circumstance?

[41] Mr. Rowe's argument is that when he signed the separation agreement on January 26, 2009 he was earning $74,000 per year. He argued that he had not decided to retire and believed that he would continue for several more years as a member of the Canadian Forces. In the spring of 2009 he changed his mind and decided to retire. It is clear from his evidence that he had some optimism that following retirement, he could replace his income in its entirety by combining pension earnings with other private sector earnings. He has not yet been able to do so, however.

[42] For Mr. Rowe's argument to succeed, I must conclude that notwithstanding the strong and clear language of the parties' separation agreement, something "outside the parties' reasonable contemplation" has occurred to undermine the integrity of the settlement. As stated in paragraph 88 in *Miglin*, I must *inter alia* conclude that "these new circumstances were not reasonably anticipated by the parties and have led to a situation that cannot be condoned". The burden is on the Applicant to demonstrate that is so.

Conclusion

[43] I am satisfied that he has not done so. In coming to this conclusion, I have considered the:

> (1) strong, unambiguous language of the agreement arrived at after extensive negotiation;
>
> (2) the fact of legal representation by both parties at the time the agreement was signed;

(3) the sophistication of the parties;

(4) the value of this agreement to both parties;

(5) a related issue, the consequences for Ms. Rowe if the agreement is not upheld; and

(6) the changes in circumstances identified.

[44] Mr. Rowe candidly admits that in October 2008, several months before he signed the separation agreement, he initiated the pension process but withdrew the necessary paperwork within a week or two. He says that at that time, he felt he could do another five years in the Navy but when it became obvious in early 2009 that extended postings at sea would be required, he was unwilling to remain in the Navy.

[45] It is argued on behalf of Mr. Rowe that his decision to retire was reasonable, given the length of his prior service and the conditions under which this service would have continued. His desire to retire is understandable but that does not necessarily make it reasonable given his responsibilities. Certainly, if he arranged his personal affairs so that he could meet the obligations he assumed under the terms of the separation agreement in some other way than who is to complain ? The decision of Mr. Rowe to retire was solely one within his control. He cannot seek to avoid the responsibilities he assumed only several months before this decision on that basis. It is reasonable to conclude that in return for the responsibilities he assumed under the agreement, he received benefits.

[46] Although Mr. Rowe's circumstances have changed from those that existed in January 2009; there has not been a change in circumstance that was not reasonably foreseeable. Even if I were to decide this change was not reasonably foreseeable, he still will not overcome the significant legal challenge, of persuading the court to disregard the clear language of the parties' separation agreement, given all of the circumstances.

[47] The application to vary the corollary relief judgment is dismissed.

J.