Date: 20020109
Docket No.: S.P. 1205-001750

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: MacLean v. MacLean, 2002 NSSC 5]

BETWEEN:

JOHN GARFIELD MacLEAN

Applicant

- and -

DONNA JOYCE MacLEAN

Respondent

D E C I S I O N

REVISED DECISION: **The text of the decision has been corrected according to the erratum released on January 10, 2002.**

HEARD BEFORE: **The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia at Pictou, Nova Scotia (Chambers) on November 28th, 2001.**

ORAL DECISION: **November 28th, 2001**

WRITTEN RELEASE OF ORAL: **January 9th, 2002**

COUNSEL: **Roseanne Skoke for the Applicant**

Dena Bryan for the Respondent

GOODFELLOW, J: (Orally)

BACKGROUND

[1] Donna Joyce MacLean, now 46, and John Garfield MacLean, now 47, were married July the 20th, 1974 and separated 24 years later on April the 18th, 1998. They have two independent children, now 26 and 24. They were divorced the 12th of May 2000. The Corollary Relief Judgment provided a property settlement and spousal support payable to Donna MacLean of $1,000.00 per month commencing the 15th of June 2000.

APPLICATION - RELIEF SOUGHT

[2] John MacLean files this Application seeking:
(a) termination of spousal support;
(b) termination of the existing garnishee.

DIVORCE ACT

[3] The relevant provisions of the *Divorce Act* are sections 17(l) (3) (4.1) (6) (7) and (10).

FINDINGS

[4] (a) Mr. MacLean alleges the $10,000.00 payment to Donna MacLean pursuant to the Corollary Relief Judgment was meant to advance her obligation of "self-sufficiency." I have read the Corollary Relief Judgment transcript. I readily conclude that Mr. MacLean's solicitor wanted it on record that by consenting to the spousal support her client was not consenting to such continuing forever and that all rights to apply for variation/recission were preserved. Mrs. MacLean's solicitor agreed and the end result there was simply a recognition that in the future section 17 of *The Divorce Act* would prevail. Factually, I conclude Mrs. MacLean did not squander the lump sum which substantially, if not entirely, recognized the realities of the indebtedness that existed, the equalization payment relating

to property and debt settlement.

(b) Mr. MacLean seeks relief on the basis that Donna MacLean has entered into a common-law relationship since the Corollary Relief Judgment. In March of 2001Donna MacLean moved in and commenced a common-law relationship with her boyfriend, Scott Grant, with whom she had a relationship at the time of the divorce.

[5] I will recite perhaps a provision of the Supreme Court of Canada case, *L.G. v. G.B.,* [1995] 3 S.C.R. 370 where it was clearly recognized as a distinct possibility, if not probability, was foreseeable. In my view, when you enter into a relationship, it is really the consequences of that relationship that are relevant. Some people enter into a relationship, I think it was in *Loughran v. Loughran* (2000), 182 N.S.R. (2d) 143, the lady moved into a relationship and ended up as a result being in debt, increasing her need and came for spousal support. Well, I concluded she was not entitled to spousal support purely because she entered into a common-law relationship that cost her money.

[6] In any event, Mr. Grant owns his own home. It is a mobile home and some land and his 2000 Income Tax Return disclosed his income of $31,855.91. It is noted that he has two children, one at university and I think the other one is 11 or 12 years of age. Mr. Grant supported Donna MacLean's return to school in September 2001. His support is fundamental to her present plans to seek self-sufficiency. Donna MacLean's entry into a common-law relationship does not provide, in these circumstances, a basis for a recission of her entitlement to spousal support. This Application for recission on the basis of a common-law relationship is far too premature. When Mr. MacLean filed his Application, the common-law relationship was of approximately three months duration and even now, it is only about nine months duration.

[7] The existence of a common-law relationship is not by itself determinative of a basis for recission of spousal support entitlement. It depends entirely on the totality of the circumstances including the duration, the benefits and liabilities that flow from a relationship, whether or not the duration of cohabitation established a legal obligation on both common-law spouses, etc. I make it clear that even if the parties had cohabited for the prerequisite period for a legal obligation of mutual support, such of itself

would not be definitive. Generally speaking, Applications to Vary, based on the former spouse entering into a common-law relationship, should not be taken until a stable clearly beneficial relationship has existed for a considerable period of time. In many cases, the duration, the starting point for this to become a meaningful factor for variation would be when circumstances reached the position that they lived together long enough to create the mutual legal obligation of support.

[8] Far too often parties apply prematurely for a number of reasons to rescind spousal support before the "circumstances warrant." In *Bray-Long v. Long* (2000),181 N.S.R., (2d) 327 at page 349:

> All too often, once a recipient spouse receives employment even where it is probationary or of limited duration, the court finds itself having to address an application.

Having said that, this Application comes about primarily because there is a lack of communication between the parties. A lack of any knowledge or appreciation of their respective circumstances. I think in the final result that this Application is hopefully going to be beneficial to both the parties in that at least it will now provide some measure of certainty and I agree that Mr. MacLean has paid for roughly a three-year period since separation but as Ms. MacLean's counsel points out, it is relatively close to the Corollary Relief Judgment. At least I think we now have a far better grasp, both parties do, of their respective situation. It often takes five to six years for the previously non-full-time employed spouse to obtain a sufficient degree of re-training job and/or third party relationship, the stability sufficient to address the economic consequences upon that party arising from the breakdown of the marriage.

[9] Mr. MacLean advances that Donna MacLean's employment is a basis for recission, it is a factor for consideration but it is clear in this case that her employment was limited to employment of $6.12 an hour, 40 hours a week, roughly a $12,000.00 per annum. It shows a work ethic, it shows a willingness to work but it is not adequate to reach a level that would give her any degree of compensation for the disadvantages that befall her from her contribution through this marriage of 24 years.

[10] What we have is a program that is advanced by Ms. MacLean, it is set out in her Affidavit in some detail and I will summarize. Before I do that, perhaps I will deal with the income situation. The income situation at the moment, the record is clear that Mr. MacLean's income in:

1996	$72,990.94
1997	$76,669.68
1998	$78,814.00
1999	$74,881.00
2000	$69,229.00

The Corollary Relief Judgment while it recites his 1999 income of $74,881 the thoroughness of counsel convinces me that when the Corollary Relief Judgment was issued in May, the 12th of May 2000 there was a measure of recognition that his income was not as high as the $74,881 and they simply recited his last income-tax return. With respect to the change in his income, I find there is a change in his income from somewhere approximately $70,000 to I would fix his income now at $60,000.00 based upon the year to date and the fact that he has had a workers' compensation payment for about six weeks which was not taxable so that for the general purpose of taxable I fix it now to be $60,000.00.

[11] Returning now to the program that Donna MacLean has already embarked upon, as I have said she left work to go to school and has the full support of her partner, Mr. Grant. She has been in school since September 2001 and by initial impressions is doing quite well. In summary, she has responsibly discussed the plans with her common-law spouse, Scott Grant, she has agreed, or making an effort at least, whether she can keep it up, I do not know, but working part-time but as a consequence of going to school she has lost her health care coverage and lost in essence her income of $12,000. It is down to a relatively small amount of about $150 a month. She is attending Nova Scotia Community College, Monday to Friday from 9:00 to 3:30 and anticipates completing her grade 11 by Christmas. Her math, in the spring term she hopes to graduate in June of 2002 with her grade 12 diploma. On the completion of her grade 12 diploma she will of course be working in the summers and

then she plans to enroll in a two-year human resources human services program with the Nova Scotia Community College and I have been provided with full and complete details and it is education that leads to the possibility of employability in the social worker counselling field. I remember a case I had once of where the wife wanted to read charts, astrological charts, and in one year had made less than $100 and wanted to follow her astrology career which obviously was unrealistic but here, it seems to me a reasonable program. The program will take her to June of 2004 and if I am dealing with termination, you generally recognize it takes a period of time afterwards so that when I deal with the question of a termination date, I am going to deal with one that will be to and inclusive of August of 2004.

[12] I have some concerns about how certain this projection is but I am impressed by Donna MacLean. It seems to me that the only real salvation, real prospect of relief for Mr. MacLean, is to keep his fingers crossed and hope that she does reach this stage because that is the ultimate answer for both of them.

[13] Now with respect to support in the meantime, circumstances have changed. He has somewhat less income but I think he wants to be very - I consider him very fortunate that Mr. Grant is providing such a high level of support to Ms. MacLean. It will permit her on a present projection to work during the summers and cover tuition costs, a magnitude of $3,200, books and that, that might otherwise, and if Mr. Grant was not supportive, might otherwise be a wise investment on Mr. Maclean's part. Without his support, the Court would have to take a careful look at additional lump sum assistance by Mr. MacLean for her program. He suggests a reduction from a $1,000.00 because his income is now reduced from approximately $70,000.00 to $60,000.00 but quite frankly it is tax deductible. One thousand ($1,000.00) dollars a month is a gross cost to him, I do not have the figures in front of me, but is probably less than $700.00 a month net. Given the totality of the circumstances, it is most reasonable that Ms. MacLean have every reasonable opportunity to reach self-sufficiency. If the program is as one can project, a realistic one, then I would say to Mr. MacLean, that if anything $60,000.00 clearly permits you to pay something that is going to cost you approximately $700.00 a month.

[14] The economic disadvantages that flowed to Donna MacLean are dramatic compared to the lack of economic disadvantages that flowed to Mr. MacLean even though he had debts and everything else to contend with.

[15] Now there has been a bit of a problem with respect to time of payments being transmitted because of using the Maintenance Enforcement so I would require that the payments be by postdated cheques for periods of twelve months at a time. But I quite frankly see no basis that on an income of $60,000.00 that $1,000.00 a month tax deductible should be reduced.

[16] Now there is no law that sets out any clearly defined time frame for termination and no magic formula because you have to deal with the totality of the circumstances but generally speaking it has to be recognized that a marriage certificate is not a guarantee of spousal support forever and for life. I have said that in a number of cases. See *Dorey v. Dorey* (1999), 172 N.S.R. (2d) 75 where a termination date for spousal support was granted and *Thompson v. Thompson* (1998) 172 N.S.R. (2d) 50 where a termination date was considered premature. Ms. MacLean's plan I find is most realistic for her to embark upon and one where I am not going to put a review, I am going to put an actual termination of maintenance at the end of the payment due in August 2004. I am mindful of the fact and counsel remind me that s. 17(10) ultimately provides an opportunity if there is a real serious problem, to come in and have that extended so I think that is the highest level of certainty. It gives Ms. MacLean spousal support for six years, a reasonable time frame and opportunity to get on her feet, as she was only 43 years at the time of separation. It is the fairest thing. It means a little toughness for everybody but I will say to you Mr. MacLean I think her circumstances are going to be substantially less then yours on an overall basis. You are going to have, I accept your evidence that there is no, at the present time, no overtime and I accepted your income as being $60,000.00 but you are going to be infinitely better off then her household which has less total income with four people in it.

[17] Now there has been a lack of communication. I think that certainly in June when Ms. MacLean has some final results that she should share those results with Mr. MacLean and by putting a termination date it is my

view that I put an onus upon her, if she wants an extension she is going to have to satisfy 17(10) of the Divorce Act.

[18] This produces the highest level of certainty possible at this time. I do not have a perfect crystal ball but that is the best I can do. If I have overlooked any other matters - Mr. Grant's income was $31,855.91. A plan by Mrs. MacLean is to complete the course by utilizing the spousal support, part time employment and RRSP's if necessary. If for any reason, the present goal is not achievable there are other programs that may have to set your sights a little bit differently but very clearly it has reached the stage where you have to increase your efforts and this program is a good program to become self-sufficient. I think that is it counsel. Now I will hear you on the argument of costs. Are there any major items that I have overlooked?

Ms. Bryan: There is. I was just wanting to clarify her providing her June grades. Is that for each June that she is in school?

The Court: Well I am going to do here but I do not have a good handle of when they come out and that but one of the problems having said as I did that prematurely, but it was timely in the sense that there is no information flow between these people and they are young enough and they should never leave themselves open by failing to provide their respective income tax returns and so, you know they both have good counsel. I do not see why they cannot work toward the ultimate goal and there may be variations. I mean I do not have a crystal ball, she may break up, he may die, Mr. Grant, who knows. She may find for whatever reason she cannot complete that course and has to go on another tangent.

Ms. Bryan: But that was your intention that each June . . .

The Court: I thought at least this coming June so that, because that finishes her GE 12 and she is to provide confirmation of where she stands with respect to that and confirmation if and when she is accepted into the additional program or any other program in September.

Ms. Bryan: That's fine. I do not think Ms. MacLean has a problem at all with providing . . .

The Court: And maybe counsel have a better handle on what it is. It is just that rather the two of them sit out here with the uncertainties and they have to continue to exchange income tax returns because if she changes her mind and gets reasonable employment, I do not know where but ... Anything else Ms. Skoke?

Ms. Skoke: The only other issue My Lord is presently there is a garnishee in place from his place of employment. He has indicated he has no difficulty leaving that it place, that way it comes right of his pay cheque.

The Court: Is the garnishee for the full amount?

Ms. Skoke: Yes.

The Court: It's a $1,000.00?

Ms. Skoke: Yes.

The Court: Is it up to date and current?

Mr. MacLean: Yes.

The Court: So you do not really need post-dated cheques then do you?

Ms. Skoke: Yes and that's why I raised that.

The Court: Thank you.

Ms. Skoke: He indicated he would be prepared to continue that garnishee and that way it would come right of his pay cheque.

The Court: It is painful no matter what but that is less painful. As least, Mr. Maclean will not get to dig a hole for himself. Thank you very much for bringing ... All right you wanted to argue the question of costs.

DISCLOSURE - COSTS

[19] Full disclosure in family matters is a given. Failure of a party to do so will, in most circumstances, result in adverse consequences. Such could include, a deeming of income, deeming of value, possibly contempt, if the failure persists, if an Applicant, possibly dismissal, stay, adjournment/postponement of relief sought, denial of costs, etc.

[20] Failure to comply with this basic prerequisite, full financial disclosure almost automatically will have cost consequences because compliance of such a fundamental requirement should rarely require the Court's intervention - usually, only if there are major practical/time/confidential issues that need to be addressed.

[21] The Court has developed a zero tolerance policy where full financial disclosure could reasonably have been complied with without Court intervention.

[22] This Application was filed the 12th of June 2001 and Donna MacLean responded. The correspondence indicates as early as June 27th, 2001 outlining a plan. I commented earlier that the parties were somewhat in the dark and so I can understand why the Application was taken and

certainly I agree with Ms. Skoke that there is no consideration of costs in any kind of penal sense. Costs normally follow the event, even in family matters and the issue of the $10,000.00 I think was clearly answered by the transcript. The capacity to pay and continue to pay $1,000.00 tax deductible maintenance is clearly indicated on a reduced income of $60,000.00. I agree that the conclusion, particularly if it works out will be very beneficial to both parties but it strikes me that there was a real opportunity to reduce the matter further although I am satisfied counsel made an effort but you know costs generally follow the event and it seems to me to some extent they should here.

[23] Costs in Chambers matters that exceed one hour are now being granted up to $2,500.00 in some cases. It depends on the complexity of the matter, the extent of time required in preparation, cross-examination of parties on Affidavits, etcetera, etcetera. This is certainly a Chambers matter in excess of an hour, it is a family matter and there are pluses and minuses in my determination but overall a success to Ms. MacLean in that the Application to rescind is dismissed.

[24] In addition, full disclosure should be timely. In this case, Ms. Maclean, although successful in defending issue of recission of spousal support, did not provide her up-dated financial information in a timely fashion as should have been and therefore, her costs entitlement fixed at $1,200.00 is reduced to $900.00.

[25] Thank you very much. I will await an Order from counsel.

J.