SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *MacLeod v. MacLeod*, 2017 NSSC 237

Date: 2017-09-07
Docket: *SFSNMCA* No. 1206-5360
Registry: Sydney

Between:

Colin MacLeod

Applicant

v.

Elizabeth MacLeod

Respondent

Judge:	The Honourable Justice Lee Anne MacLeod-Archer
Heard:	August 14, 2017, in Sydney, Nova Scotia
Written Release:	September 7, 2017
Counsel:	Hugh McLeod for the Applicant Nicole Campbell for the Respondent

By the Court:

[1] On December 12, 2016 Mr. MacLeod filed an application to vary, asking the court to terminate spousal support effective October, 2016.

Background

[2] The parties were married for 30 years and have two grown sons. The order Mr. MacLeod seeks to vary is a consent corollary relief order (CRO) issued on January 11, 2010. The order requires Mr. MacLeod to pay spousal support in the sum of $1,200.00 per month, commencing December 1, 2009, and continuing until further order of the Court. The CRO does not mention retirement and its effect on support, nor does it set a termination date.

[3] The order also requires Mr. MacLeod to provide medical/dental coverage for Ms. MacLeod so long as he is able, and "in accordance with the policy". In the event he is unable to provide such coverage he "shall pay to the Petitioner, Elizabeth Amelia MacLeod, the additional sum of One Hundred and Fifty Dollars ($150.00) per month spousal support, payable on the first day of the month after the Petitioner has become ineligible to receive benefits under the Devco Plan".

[4] At the time the CRO was issued, Mr. MacLeod was living and working in Fort McMurray, Alberta as a sheet metal worker/pipe insulator. He was laid off and moved back to Cape Breton at the end of October, 2016, at which time he stopped paying spousal support. He turned 60 years of age in October, 2016. Ms. MacLeod is 62 years of age.

Position of the Parties

[5] Mr. MacLeod cites three changes which he says support his request to terminate support:

1. He was laid off twice after the Alberta forest fires, thus there is uncertainty in availability of work;
2. He had an eye stroke in November, 2015 which led to a 50% loss of vision in his right eye;
3. His elderly mother is suffering from dementia and needs him to care for her at home in Cape Breton.

[6] In addition to these claims, Mr. MacLeod says his body is worn out and that he cannot work any other job. He considers himself "retired".

[7] Ms. MacLeod opposes the application. She says she still needs support, and that Mr. MacLeod can afford to pay.

[8] She also asks the court to enforce clause 4 of the CRO, which requires that Mr. MacLeod pay her $150.00 per month in lieu of health coverage.

Issues:

1. Has there been a change in the condition, means, needs or other of circumstances of either party ?
2. If there has been such a change, how does that impact Mr. MacLeod's spousal support obligation ?
3. Should clause 4 of the CRO be enforced ?

ISSUE 1: Has there been a change in the condition, means, needs or other of circumstances of either party ?

The Legislation

[9] The parties are divorced, so s.17 of the **Divorce Act** [R.S.C. 1985, c. 3 (2nd Supp.)] applies:

Order for Variation, Rescission or Suspension

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 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**.

[10] In ordering an original support order, a court must consider s.15 which states:

Objectives of Spousal Support Order

> **15 (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;
>
> **(c)** 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.

[11] These factors are also relevant to variation of spousal support.

Caselaw

[12] Mr. MacLeod cites and relies upon the Supreme Court decision in **Pelech v Pelech** [1987] 1 SCR 801 in support of his claim. That case is not helpful. It it was decided under the former ***Divorce Act*** provisions, so the test of "fit and just" is no longer applicable. And it deals primarily with the issue of whether a court should vary an agreement for spousal support reached between the parties with legal advice. The Supreme Court concluded that, absent an unconscionable bargain, such

agreements should be respected. In the case before me, although the 2010 CRO was reached by agreement, neither party argued that it is unconscionable.

[13] Ms. MacLeod cites and relies upon **MacDonald v MacDonald**, 2017 NSCA 34 in which the Court of Appeal upheld a trial judge's decision to order indefinite spousal support after a 21 year marriage. An end date could not be foreseen at the time of the hearing, so no termination date was set. Ms. MacLeod argues that similar circumstances exist here. That case is not on point either, because it deals with an original order for support rather than a variation application based on retirement.

[14] I have reviewed a number of cases dealing specifically with early retirement. In **Wambolt v Wambolt**, 2008 NSSC 52 the parties had been married for 21 years and had two children who were in university. The wife suffered from multiple sclerosis (MS). The payor retired at 48 and applied to terminate or reduce spousal support. Justice Dellapina stated:

> **41** While the Applicant may be free to retire whenever he choose, he cannot voluntarily choose to be underemployed and thereby avoid his spousal support obligations (see *Bullock v. Bullock* [2014] O.J. No. 909, 2004 CarswellOnt 919 (Ont. S.C.J.)). I find his decision to retire to have been unreasonable considering his relatively young age and his spousal support obligation to the Respondent.

[15] Justice Jollimore cited **Wambolt** (supra) with approval in the case of **Harris v Harris, 2010 NSSC 410** in which she found there was no change in circumstances to justify variation. In that case, the 57 year old payor retired voluntarily and stopped paying spousal support. The parties had separated after a 22 year traditional marriage. The wife suffered ill health but worked part-time. Jollimore, J. found that Mr. Harris' decision to retire early was influenced by health problems, but not dictated by them. The same is true in the case before me.

[16] In **Bullock v Bullock** [2004] OJ No.919 the payor retired two months short of his 62nd birthday and applied to terminate spousal support under a consent CRO. He'd been self-employed and claimed that he stopped working due to a downturn in business. However, the court found that his retirement was voluntary; he had no need to work because he and his second wife could live comfortably off a settlement she'd received. His retirement was not a material change in circumstances.

[17] Likewise, in **Innes v Innes**, 2013 ONSC 2254 and **Cossette v Cossette,** 2014 ONSC 4667 (affirmed 2015 ONSC 2678) the court found that the payors retired voluntarily. In **Innes**, the parties had been married 26 years. The husband retired at age 62. His income had increased significantly after support was ordered, while the wife's income decreased because she retired at age 55. The husband did not disclose his increased income to the former wife, and she never applied to vary. The court dismissed the payor's application, finding there was no material change in circumstances.

[18] In reaching that decision, Mulligan J. considered a number of cases, including **Willick v Willick** [1994] 3SCR 670 which sets the standard for finding a change in circumstances in spousal support cases:

> [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. [emphasis added]

[19] **Willick** (*supra)* was also cited in **Rondeau v Rondeau,** 2011 NSCA 5, where the court allowed the wife's appeal. The trial judge allowed the 61 year old payor's application to terminate spousal support based on his age, his wish to save money for his retirement, and the fact that he'd paid support for nine years already. The court of appeal held that none of these factors alone amounted to a material change in circumstances.

[20] The court of appeal also found that Dr. Rondeau's health problems were not serious enough to justify variation. In fact, his income that year was expected to be significantly higher than when spousal support was originally awarded.

[21] In reviewing the caselaw dealing with early retirement and its impact on spousal support, several principles seem clear:

- Ill health may provide a reasonable reason to retire early, but medical evidence of disability will generally be required;
- When making the decision to retire, payor spouses must consider their financial obligation to former spouses;
- Disclosure of both parties' assets and household income must be made in order for the court to assess the means and needs of the parties;

- Mere passage of time and reaching a particular age does not constitute a material change of circumstances, absent other factors;
- The desire to reduce debt and/or save money in anticipation of retirement does not constitute a material change in circumstances;
- A material change can only be determined on facts that exist or are known at the time of the application, not on speculation or anticipated changes;
- Reasons for early retirement are relevant to the question of whether there has been a material change in circumstances.

Change in Circumstances

[22] Ms. MacLeod acknowledges that there have been changes in Mr. MacLeod's life, but not material changes which would justify variation under s.17(4.1). She argues that Mr. MacLeod can still pay support, and that she still needs and is entitled to receive support. I agree.

Condition

[23] Mr. MacLeod suffered a "central retinal vein occlusion causing central field loss in the right eye" in November, 2015. He advanced no evidence from his employer or union about the impact of his condition on his employability. He worked for almost a year after his eye stroke, and moved back to Cape Breton in October, 2016 when he turned 60.

[24] Ms. MacLeod has had both hips replaced. She has not worked in the past ten years. According to her doctor's letter, she suffers from nerve pain, as well as diabetes, anxiety, fibromyalgia and arthritis, and she is prescribed medication for a number of these conditions.

Means - Ms. MacLeod

[25] Ms. MacLeod has income from Worker's Compensation (WCB) and Canada Pension. Her total income is about $17,400.00 annually.

[26] Mr. MacLeod argues that Ms. MacLeod could return to work to support herself. I reject that suggestion. T he letter from her physician states it is unlikely that she would be able to return to work, an opinion which I accept.

[27] Ms. MacLeod testified that she gave up cable television and contents insurance because she cannot afford it. She has also fallen behind in her rent. She says she cannot afford her medications, so she has been doing without several of them.

[28] In her budget, Ms. MacLeod lists some discretionary items which can be reduced, and the amount claimed for food is high ($850.00/m for one person) but otherwise, her budget is reasonable. She lists $20.00 per month for drugs, but this amount will increase now that she is no longer eligible under Mr. MacLeod's plan. Her prescription medications will cost at least $365.00 per month.

[29] Pursuant to the CRO, Ms. MacLeod retains all benefits and proceeds relating to her WCB claim, including retroactive benefits and payments. She received a lump sum payment of approximately $87,000.00 in 2010.

[30] She says that when she received the lump sum from WCB, she paid off debt totalling $31,000.00, a large portion of which she classifies as matrimonial debt, but which is not mentioned in the CRO. She did not say (and was not asked) what she did with the rest of the WCB money, but her tax returns show that from 2013 through 2015 she reported only Canada Pension disability benefits as income. She's been receiving monthly WCB benefits since early 2017, so she presumably used the balance (approx.$56,000.00 based on her evidence) to support herself for the past seven years.

[31] Ms. MacLeod filed a statement of expenses which shows a debt payment to MGM (Trustees in bankruptcy) so if she had any money left from the WCB payout when she filed for bankruptcy, the Trustee would have a claim to it.

Means - Mr. MacLeod

[32] The CRO does not state what income Mr. MacLeod was earning when it was issued. However, a review of his tax information shows that in 2009 and following years he earned:

2009	$117,600.00
2010	$ 108,266.00
2011	$ 116,029.00
2012	$ 136,936.00

2013	$ 119,793.00
2014	$ 155,752.00

[33] Mr. MacLeod's spousal support obligation was set at $1,200.00/month in the CRO. Despite increases in his income, that sum was never varied. He was not required to provide ongoing disclosure of his annual income to Ms. MacLeod.

[34] Under the CRO, Mr. MacLeod retains his Devco pension benefits, and any pension accumulated through his employment in Alberta.

[35] Mr. MacLeod owns a home in Alberta and land in Cape Breton, the latter of which is referenced in the CRO. His stepdaughter occupies the home in Alberta. She pays the mortgage and occupation costs, and he says he will sell it to her for what is owed on the mortgage. No value for the home was provided, nor was the mortgage balance disclosed, so it is unclear whether there is any equity in the home.

[36] Mr. MacLeod also has investments, though again, the amount was not disclosed. What is clear from the evidence is that after separation, he contributed at least $28,000.00 to his RRSP.

[37] As well, Mr. MacLeod filed bank statements showing that as of November 30, 2016, he had a bank balance of $5,161.32.

[38] Currently, Mr. MacLeod receives pension income of $1,140.00/month, amounting to $13,680.00 per annum. He also receives Employment Insurance (EI) in the amount of $537.00 weekly, less $132.00 every two weeks to claw back his pension. Mr. MacLeod is eligible for Canada Pension Plan (CPP) benefits, but has opted not to claim them because it would reduce his EI benefits, and his CPP monthly pension will be higher if he waits until age 65 to collect.

[39] Mr. MacLeod started working in Alberta in 2001. He retired in 2016. He earned pension credits throughout those 15 years. No evidence was led on the value of his pension when the parties divorced, so for purposes of assessing his current income for purposes of paying spousal support, I have attributed half of his pension income to pre-divorce credits, and the other half to post-divorce credits. I have therefore excluded half of his current pension income (approx. $6,840.00 per annum) from my calculations based on **Boston v Boston** [2001] 2 S.C.R. 413.

[40] This leaves Mr. MacLeod with income of $31,332.00 to pay spousal support. Clearly, his income (especially net of pre-divorce pension benefits) is not lower than Ms. MacLeod's income as claimed.

[41] When his EI claim runs out in January, 2018, there are various other ways Mr. MacLeod can generate more disposable income. He can:

- return to work;
- find other work commensurate with his skills and experience;
- reduce his discretionary spending;
- pay off his line of credit with his RRSP's;
- rent his home in Alberta for more than what he owes on the mortgage;
- sell his Alberta home to liquidate any equity;
- collect CPP benefits;
- draw funds from his LIRA or RRSPs.

[42] This list does not even contemplate what support his new wife can provide to Mr. MacLeod, because I have no information with respect to her income and ability to work. This should have been provided to the court.

Needs

[43] No evidence was led to explain the basis for Ms. MacLeod's support claim in 2009. However, there is evidence that the parties have two grown sons, and that although Ms. MacLeod returned to work when the oldest child was five years old, she suffered a work injury a decade ago which left her disabled. It appears that her spousal support claim was based on both compensatory and non-compensatory factors. She was off work and awaiting her WCB payout, and Mr. MacLeod was working in Alberta, when the CRO was granted.

[44] Mr. MacLeod is living rent free with his mother. He testified that he shares expenses, and that he pays for home improvements because the home will eventually be his. Although his current budget shows a deficit of $572.16 per month, that figure is based on a much lower annual income than Mr. MacLeod actually has available to him.

[45] In his statement of expenses, Mr. MacLeod shows a monthly payment on his line of credit (LOC). This is the only debt shown. He did not provide a balance for the LOC. In his evidence, he said he planned to use his RRSPs to pay down approximately $15,000.00 in credit card debt, but there is no evidence of a separate debt. Mr. MacLeod tendered credit card statements to demonstrate his expenses,

but those statement reveal that he pays the balance in full monthly. I therefore conclude that his only outstanding debt is the LOC.

Other Circumstances

[46] Ms. MacLeod has been disabled for over a decade. She will not achieve self-sufficiency at her age, and with her health problems.

[47] Ms. MacLeod never applied to vary spousal support after 2010. Had she done so, the amount might have been adjusted in accordance with the **Spousal Support Advisory Guidelines (SSAG),** which provide a much higher range of support than what Mr. MacLeod was paying between 2010 – 2016.

[48] Ms. MacLeod has not recovered financially from the breakdown of the marriage to the same extent that Mr. MacLeod has. He just passed his peak earning years, during which he was able to plan for his retirement. There is no evidence that Ms. MacLeod has any retirement funds available to her, or that she has any assets which could generate income.

Reasons for retirement

[49] Because Mr. MacLeod retired at age 60 while he had an outstanding spousal support obligation, the reasons for his retirement are relevant. This was an early, voluntary retirement, and not one forced by ill health. The letter from Dr. Dube does not express an opinion with respect to Mr. MacLeod's employability. It simply notes that he should avoid "climbing ladders and performing other tasks that require balance". Despite this, he worked in his trade for eleven months after his eye stroke, and retired the same month he turned 60.

[50] Though he claims that his body is worn out, there is no evidence that Mr. MacLeod cannot work at all. I find that he retired by choice, not by reason of disability or lack of work.

[51] I also reject his claim that he retired to provide care for his mother, and that her needs are so great that it precludes outside work. First, his evidence suggests that his wife is actually the primary caregiver. Secondly, he acknowledges that it's time to make a decision with respect to his mother's long-term care. It's unlikely that she can live at home much longer, given her dementia and a recent fall. If she moves to a nursing home, Mr. MacLeod's assistance will no longer be required in the home.

[52] Mr. MacLeod's decision to retire at age 60 is his choice. But he retired while still having a financial obligation to his former spouse of 30 years. There are several options for increasing his income which Mr. MacLeod has not exercised to date. Despite those options and his obligations under the CRO, he stopped paying support in October, 2016. The logical conclusion is that his retirement is designed to terminate Ms. MacLeod's support claim.

ISSUE 2: If there has been such a change, how does that impact Mr. MacLeod's spousal support obligation ?

[53] Given my conclusion above, I need not consider this question.

[54] However, even if I had found a material change based on Mr. MacLeod's retirement, I would impute income to him for purposes of spousal support, at $22,000.00 (minimum wage). I would also add in CPP and the full amount of his pension based on Ms. MacLeod's need, in accordance with **Boston** (*supra*). This would leave Mr. MacLeod with an annual income of around $44,000.00, from which spousal support of $1,000.00 per month can easily be paid.

ISSUE 3: Should clause 4 of the CRO be enforced ?

[55] Clause 4 of the consent CRO requires Mr. MacLeod to pay Ms. MacLeod the sum of $150.00 per month if he's unable to provide health insurance coverage for her. Clearly when this was agreed, Ms. MacLeod had healthcare expenses which were expected to cost at least $150.00 per month if uninsured.

[56] Mr. MacLeod's health plan is no longer available to Ms. MacLeod, effective July 7, 2017. I direct that he pay her $150.00 per month in addition to the spousal support ordered, commencing August 1, 2017 and continuing until further order of the court.

Conclusion

[57] The application to reduce or terminate support is dismissed. Mr. MacLeod will pay additional support of $150.00 per month as required under clause 4 of the CRO. If counsel wish to be heard on costs, a time may be scheduled upon request.

MacLeod-Archer, J.