SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Chapman v. Chapman*, 2018 NSSC 212

Date: 2018-19-07
Docket: No.108254
Registry: Sydney

Between:

Victoria Chapman

Applicant

v.

Malcolm Chapman

Respondent

Judge:	The Honourable Justice Robert Gregan
Heard:	June 13, 2018
Written Release:	**September 7, 2018**
Counsel:	Alan Stanwick, Counsel for Victoria Chapman Hugh McLeod, Counsel for Malcolm Chapman

Introduction

[1] The Parties, Victoria Chapman, age 81, and Malcolm Chapman, age 80, were married on October 15, 2005. At the time of marriage, Ms. Chapman was 68 and Mr. Chapman was 67. The Parties separated in November 2017.

[2] Prior to marriage, the Parties lived common law from June 2004 to October 2005. They cohabitated in a relationship for a total of 13 years. Twelve of those years were in a marriage.

[3] In my view, the marriage can therefore be described as a mid-length marriage.

[4] Ms. Chapman in her Affidavit, described the marriage as a "traditional" marriage.

[5] Ms. Chapman says that she was responsible for day to day cooking and cleaning of the home, and that Mr. Chapman was in charge of "doing outside work".

[6] Mr. Chapman did not comment in his Affidavit or viva voce evidence on whether or not the marriage was a traditional one of not. He did however, acknowledge that he supported Ms. Chapman stating at paragraph 5 of Exhibit 6 (Mr. Chapman Affidavit), that Ms. Chapman very seldom paid for food or maintenance on the home. I therefore find that by inference, that he has acknowledged that there has been some co-dependence and financial support.

[7] Issues

- Is Ms. Chapman entitled to spousal support?
- If Ms. Chapman is entitled to spousal support, what is the appropriate quantum?

Position of Ms. Chapman

[8] Ms. Chapman says that she should be entitled to spousal support because (1) the length of the co-habitation – 13.5 years; (2) the marriage was a traditional one, that included financial interdependence, pooling of resources and sharing of expenses; (3) there is a disparity of income; and (4) Ms. Chapman asks the court to base spousal support on a grossed up income of $4,509.20 per month, or a total annual income of $54,110.40 for Mr. Chapman.

Position of Mr. Chapman

[9] Mr. Chapman takes the position that Ms. Chapman is not entitled to spousal support because (1) Ms. Chapman lives with her daughter rent free and says she uses her remaining monies to meet her needs; (2) Ms. Chapman is entitled to fully subsidized housing, maintenance free housing and repair, snow removal, free medication and tax free benefits for purchases over $100 because of her status as a First Nations person and a member of the Wagmatcook First Nations; (3) Mr. Chapman says that he is responsible for all of the expenses associated with the

matrimonial home and that his DVA pension should be excluded as a matrimonial asset; and (4) Mr. Chapman says that if required to pay spousal support, it should not be on a grossed up basis.

Analysis

[10] The court heard evidence on an interim basis on June 3, 2018.

[11] Because it was an interim hearing, the Parties agreed to proceed by way of cross-examination on Affidavits. I also have reviewed the 7 Exhibits that were marked in these proceedings.

[12] During the hearing, Mr. Chapman asserted that Ms. Chapman had available to her, free housing and subsidies through the Wagmatcook Band.

[13] In response, attached to Ms. Chapman's Supplemental Affidavit – Exhibit 2, was a letter from Brian Arbuthnot, CEO of Wagmatcook First Nations.

[14] Mr. Chapman objected to its admissibility on the basis of hearsay.

[15] I ruled the letter was admissible because; (1) it was relevant to the issue raised by Mr. Chapman asserting that Ms. Chapman was eligible for a number of benefits because of her status as a First Nations member of Wagmatcook; (2) it outlined not only the status of Ms. Chapman's ability to access services, but the letter also set out policy regarding services available to Elders at Wagmatcook First Nations; and (3) Mr. Arbuthnot was writing the letter in his capacity as CEO of Wagmatcook First Nations.

[16] I therefore determined that the letter met the exception to the hearsay rule as set out in **Ares v. Venner** [1970] SCR 608.

[17] The letter recorded the status of Ms. Chapman's application for housing and subsidies and it was made by the author, who in the capacity as CEO of Wagmatcook First Nations, and as well, the author, Mr. Arbuthnot had personal knowledge. Finally, because the letter was written in the capacity of the author as CEO, it was made in the ordinary course of business.

[18] In addition, because the letter was relevant to the issue of services available to Ms. Chapman, I found it necessary.

[19] I also commented that because it was an interim hearing, I found that the probative value of the letter outweighed its prejudicial affect, given that Mr. Chapman would have the ability to cross-examine at a final hearing.

[20] Returning to the main issue of entitlement to spousal support, I find as follows:

- The marriage was a traditional one.

- I find there was an inter-mingling of resources between the Parties as acknowledged by Mr. Chapman. When asked whether or not Ms. Chapman contributed, Mr. Chapman indicated that it was seldom, but did acknowledge there was contribution.
- I accept that Ms. Chapman currently lives with her daughter at the present time, and does not have any other available sources of housing.
- It is not Ms. Chapman's daughter's responsibility to support Ms. Chapman. It is Mr. Chapman's responsibility if entitlement is proven.

[21] The approach the court should take with respect the issue of spousal support can be found in the legislation under the **Parenting and Support Act**. A spouse may apply for spousal support and under section 4:

> In determining whether to order a person to pay support to that person's spouse and the amount of any support to be paid, the court shall consider
>
> (a) the division of function in their relationship;
>
> (b) the express or tacit agreement of the spouses that one will maintain the other;

(c) the terms of a marriage contract or separation agreement

between the spouses;

(d) custodial and parenting arrangements made with respect to the

children of the relationship;

(e) the obligations of each spouse towards any children;

(f) the physical or mental disability of either spouse;

(g) the inability of a spouse to obtain gainful employment;

(h) the contribution of a spouse to the education or career potential

of the other;

(i) the reasonable needs of the spouse with a right to support;

(j) the reasonable needs of the spouse obliged to pay support;

(k) the separate property of each spouse;

(l) the ability to pay of the spouse who is obliged to pay support

having regard to that spouse's obligation to pay child support in accordance

with the Guidelines;

(m) the ability of the spouse with the right to support to contribute

to the spouse's own support.

[22] In addition, while this matter is not a proceeding under the **Divorce Act**, the Parties were married and section 15 of the **Divorce Act** states as follows:

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.

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

(c) any order, agreement or arrangement relating to support of either spouse.

[23] Section 15.2(6) of the *Divorce Act* reads as follows:

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;

(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.

[24] Under the case authorities as well of **Bracklow v. Bracklow,** [1999] 1 SCR 420 and **Moge v. Moge,** [1992] 3 SCR 813, the courts have determined the 3 categories of spousal support on the basis:

- compensatory - which has been described as support to address economical advantages and disadvantages flowing from the marriage and the role adopted during the marriage;
- non-compensatory support which has been described as being to address the disparity between the needs and means of the parties and arising from the marriage breakdown; and
- contractual spousal support obligation either expressed or implied (which does not apply here).

[25] The Court of Appeal in **Richards v. Richards** (212) NSCA 7, directs trial courts that at an interim stage the focus should be on non-compensatory basis of claiming spousal support.

[26] Here, given the disparity of incomes and the fact that Ms.Chapman had to leave the matrimonial home and reside with her daughter, I find there clearly is a need by Ms. Chapman.

[27] Given Mr. Chapman's income as set out in the Exhibits and the evidence, I find that Mr. Chapman has the ability to pay.

[28] I therefore find that there is entitlement to spousal support at this stage of the proceeding. There is some element of compensatory claim but clearly a non-compensatory claim. The court will be provided additional information at a final hearing regarding the strengths of Ms. Chapman's compensatory claim, as well as determining ultimately the issue of division of matrimonial property, which also is a consideration on a final determination of spousal support.

What is the appropriate quantum?

[29] Ms. Chapman asked this court to apply the Spousal Support Advisory Guidelines and a grossed up income for Mr. Chapman. Ms. Chapman says using the grossed up income and the Spousal Support Advisory Guidelines produces a range of spousal support of $597 (low range), $696 (mid-range) and $796 (high range).

[30] Ms. Chapman through her counsel urges the court to order spousal support at the high range ($796).

[31] Mr. Chapman relying on **Rutherford v. Rutherford**, 2004 NSR 148, says that Mr. Chapman's DVA income should be excluded in calculating his taxable income and that the court should only consider Mr. Chapman's CPP and OAS incomes for the purposes of spousal support.

[32] Ms. Chapman urges the court to apply Mr. Chapman's line 150 income and grossed up amount for the Spousal Support Advisory Guideline analysis.

[33] I am of the view that the approach to be used is that as set out by Mr. Chapman's counsel because:

- I reject Mr. Chapman's counsel's assertion that **Rutherford** applies.
- The comments in **Rutherford** cited by counsel for Mr. Chapman at paragraph 75 do not apply to the present case.
- The comments at paragraph 75 of **Rutherford** determine that DVA pension income was not a matrimonial asset.
- The court in this proceeding is not dealing with the division of assets, but rather the issue of interim spousal support.
- In addition, contrary to the assertions of counsel for Ms. Chapman, the court in **Rutherford** <u>included</u> DVA income for the purposes of determining spousal support.
- This approach is consistent with section 19(1)(b) of the Federal Child Support Guidelines which states as follows:

Imputing income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

…

(b) the spouse is exempt from paying federal or provincial income tax;

…

[34] There is therefore, discretion by the court to include non-taxable income for the purposes of providing support.

[35] While the CRA may not consider DVA income as taxable, I consider it available for spousal support purposes.

[36] Furthermore, Mr. Chapman will receive a tax benefit from any spousal support he pays.

[37] I therefore find that the appropriate income for Mr. Chapman for spousal support purposes is $54,110.40 per year. I accept from the evidence, that Ms. Chapman's income for support purposes is $18,748.56.

[38] Nothing from the evidence or submissions of counsel have convinced me that the Spousal Support Advisory Guidelines should not apply. As stated the Spousal Support Advisory Guidelines produce a range of $597 - $696 - $796.

[39] Ms. Chapman's counsel says that the court should impose the high range, but offers not basis for concluding that the high range is appropriate.

[40] It has been emphasized that courts should not automatically default to the mid-range when applying the Spousal Support Advisory Guidelines, but should consider the factors as set out in the Spousal Support Advisory Guidelines.

[41] Here, from the evidence I find that the following factors are present, which should be considered, and in my view, results in the low range being appropriate:

- Mr. Chapman has limited income (ie – fixed income from pensions).
- Reduced ability to increase earning capacity given that he is on a fixed income.
- Ms. Chapman does **<u>not</u>** have significant needs based upon the budget she has produced.
- Mr. Chapman is continuing to service the costs associated with the maintenance of the matrimonial home until the issue of property division has been determined.

[42] I will therefore order spousal support in the amount of $597 per month, payable to Ms. Chapman through the Director of Maintenance Enforcement, commencing June 1, 2018.

[43] The issue of retroactive spousal support shall be determined at a final hearing, along with the issue of determining the issue of division of matrimonial property.

[44] The issue of costs shall be determined in the cause.

Gregan, J.