COURT OF APPEAL FOR ONTARIO

CITATION: Nettleton v. Nettleton, 2020 ONCA 753
DATE: 20201127
DOCKET: C66888

Feldman, Simmons and Harvison Young JJ.A.

BETWEEN

Arnold Alfred Nettleton

Applicant (Respondent)

and

Carol Ann Nettleton

Respondent (Appellant)

Paul Buttigieg, for the appellant

Jenna Beaton and Brigitte Barsalou, for the respondent

Heard: November 2, 2020 by video conference

On appeal from the order of Justice Alan P. Ingram of the Superior Court of Justice, dated December 17, 2018, with reasons at 2018 ONSC 7262.

Simmons J.A.:

Introduction

[1] The appellant, former wife, appeals from a December 2018 change order reducing the amount of spousal support payable to her under a 2005 separation agreement.

[2] The respondent, former husband, brought the change motion following his retirement on December 31, 2016 at age 67. Although the 2005 separation agreement contemplated a future variation in spousal support following the husband's retirement, the appellant relied on her lack of income and an early pension payout of $581,228.32 which the respondent received soon after the parties' 2004 separation to resist any reduction in spousal support.

[3] On the change motion, the husband relied on the fact that his future pension entitlement had been equalized under the parties' separation agreement. In any event, the balance of the pension payout he had subsequently received is in a Locked-in Retirement Account ("LIRA") from which he planned to begin making withdrawals at age 72.

[4] The trial judge reduced the appellant's spousal support from $2,750 per month to $2,181 per month commencing January 1, 2017 and to $1,009 per month commencing January 1, 2018 based on the respondent's actual income in those years. He also ordered the respondent to provide income tax returns to the appellant by June 30 each year so spousal support could be adjusted to the high-end amount payable under the Spousal Support Advisory Guidelines ("SSAGs") in future years. Further, 42.2 percent of LIRA withdrawals would be included in the respondent's income for the purpose of calculating spousal support once such withdrawals began.

[5] The issues on appeal include whether the trial judge erred in failing to impute income to the respondent based on a $167,818 cash component of the pension payout the respondent received in 2009; in failing to impute income to the respondent immediately following his retirement based on the highest permissible LIRA withdrawals; and in failing to consider the continuing economic hardship suffered by the appellant from the marriage breakdown.

[6] For the reasons that follow, I would dismiss the appeal.

Background

[7] The parties were married in 1981, separated in 2004 and divorced in 2014. They had one child born in December 1985.

[8] In May 2005, the parties entered into a separation agreement. Under the terms of the separation agreement, the respondent was required to pay the appellant $2,750 per month on account of spousal support and $800 per month on account of child support based on an income of $103,860 per year. The amount payable for spousal support was subject to variation based on a material change in circumstances, whether foreseeable or not. The separation agreement also provided that spousal support “will be varied upon the husband's retirement based upon the needs and financial circumstances of both parties at that time” (“the retirement adjustment clause”).

[9] In addition to spousal and child support, the separation agreement required the respondent to pay to the appellant two amounts on account of equalization of net family properties: i) $80,051 representing 50 percent of the respondent's pension valued at $160,103 as of the date of separation using a projected retirement age of 63.5 years; and ii) $78,641.50 representing equalization of the remaining assets.

[10] However, when the respondent was only 57 years of age, the plant where he worked was closed as a result of corporate restructuring, and his pension plan was terminated as of September 2006. He found other work within approximately six weeks. In 2009, he received the pension plan payout totaling $581,228.32. He transferred the maximum eligible amount, $419,505.44, into a LIRA[1] and received a cash payout for the balance, including interest, totaling $167,818.

[11] The respondent's obligation to pay child support terminated as of December 31, 2007. Following that date, the respondent paid the appellant $3,464 per month ($1,600 bi-weekly) for her support. As the separation agreement was not amended, the appellant received $714 of the monthly payment tax free.

[1] Close to the date of trial, the LIRA had a value of approximately $570,298.98.

[12] In 2014, upon reaching the age of 65, the respondent applied for a divorce. No changes to the existing arrangements for spousal support under the separation agreement were made at that time.

[13] In mid-2016, the respondent notified the appellant he intended to retire at the end of the year. The parties were unable to agree on a variation of spousal support. Accordingly, in March 2017, the respondent reduced his monthly spousal support payments to $671 based on his calculations of the amount payable under the SSAGs, having regard to his then existing retirement income and the appellant's income (Canada Pension Plan ("CPP") and rent she received from renting a basement apartment in her home).

[14] The appellant then filed the separation agreement with the court for the purpose of enforcement. In response, the respondent brought a change motion in April 2017 requesting that the spousal support payable under the separation agreement be reduced to $671 per month effective January 1, 2017.

[15] In her response to the change motion, the appellant requested that spousal support continue at $2,750 per month, the amount specified in the separation agreement. In addition, she requested that support for the years 2014-2016 be recalculated based on the respondent's income in those years, yielding an order for retroactive support in the amount of $85,404.

[16] The appellant deposed that she was 64 years of age and not in receipt of any income other than spousal support, CPP and limited rental income. Further, she claimed she had been unable to generate any employment income post-separation due to the "marriage breakdown, age, health and lack of job opportunities at that time." She noted that the respondent shared accommodation with his girlfriend who the appellant believed earned an income in excess of $100,000 per year. Further, although the respondent had not disclosed his pension payout when it was received, his material disclosed he had a substantial fund from which he could draw income.

The trial judge's decision

[17] The change motion was heard in November 2018 and the trial judge's decision was released in December 2018. The trial judge began the analysis section of his reasons by observing that two provisions in the parties' separation agreement justified a reduction in support: the material change clause and the retirement adjustment clause.

[18] The trial judge then turned to the question whether any of the respondent's pension accounted for in the equalization should be used in calculating spousal support. Two actuaries testified regarding this issue.

[19] In the trial judge's view, the appellant's actuary effectively imported an "if and when" clause into the separation agreement. Such a clause typically permits

an adjustment to the pension valuation once the actual retirement date is known rather than basing the payment on a projected retirement date. Treating the actual pension payout date as a retirement, the appellant's actuary concluded that only 57.8 percent of the pension had been equalized and 42.2 percent of income could be used for support calculations.

[20] However, the respondent's actuary was critical of the appellant's actuary's approach, in particular: his use of hindsight, which could promote litigation of separation agreements; and his failure to recognize that the actual date of retirement was 67 and that the respondent would not begin to receive LIRA payments until age 72. Taking these factors into account, the respondent's actuary found 85.95 percent of the commuted value of the pension had been equalized leaving 14.05 percent available for support calculations.

[21] Following these observations about the evidence, the trial judge moved on to the issue of retroactive support and declined to award it. He found that the respondent had "more than followed" the separation agreement. In this regard, he noted that the respondent continued to pay support during the short period he was unemployed; raised the quantum of spousal support when he was no longer required to pay child support in a manner that permitted the appellant to receive a tax free component; and assisted the appellant in purchasing a home by co-signing her mortgage and providing her with $10,000 for moving expenses.

[22] In the background section of his reasons, the trial judge had observed that the separation agreement did not require notice of changes in income in relation to spousal support. The appellant provided no explanation for her delay in seeking an adjustment to spousal support even though she had considered doing so in 2014 at the time of the parties' divorce. Further, the trial judge found that, given that the respondent's retirement income at the time of trial was approximately $36,000 per year, the respondent would suffer financial hardship from a retroactive order. He ordered that the effective date of any change order be January 1, 2017.

[23] Turning to the quantum of spousal support, the trial judge noted that in the retirement adjustment clause the parties had agreed that variation would be based "on needs and financial circumstances".

[24] The trial judge was critical of the wife for running up debts and failing to prepare for the time when her support would be reduced. Nonetheless, he concluded that she had demonstrated a need for support. On the other hand, he found the respondent had made prudent financial decisions and therefore had the ability to pay support. He concluded that such support should be paid at the high end of the SSAGs.

[25] Although the respondent was willing to have a notional 14.05 percent of a minimum yearly LIRA withdrawal ($4,377) imputed to him for spousal support calculations, the trial judge declined to do so. Rather, he accepted that the

respondent's plan to maximize the LIRA by holding off on withdrawals until age 72 would benefit both parties. However, the trial judge ruled that once the respondent started receiving LIRA income, 42.2 percent would be considered available for calculating spousal support. The trial judge gave the following reasons for this conclusion:

- the retirement adjustment clause stipulated varied spousal support should be based on the needs and financial circumstances of both parties;
- the appellant clearly met the test for need; and
- in *Boston v. Boston*, 2001 SCC 43, [2011] 2 S.C.R. 413 at para. 65, the Supreme Court of Canada concluded that double recovery may be permitted based on need as well as compensation.[2]

[26] The trial judge found the respondent's total income for 2017 was $57,371 (including final employment income from 2016) and approximately $37,300 for 2018. Based on these findings, the trial judge ordered that spousal support be paid as follows, subject to credit for amounts previously paid for the relevant periods:

- commencing January 1, 2017, $2,181 per month; and
- commencing January 1, 2018, $1,009 per month.

[27] The trial judge further ordered that the respondent provide income tax returns and notices of assessment to the appellant by June 30 each year to allow for adjustment of spousal support using the high SSAGs figure and including

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[2] See *Boston*, at paras. 64-65. In general, *Boston* requires a court to focus on the unequalized portion of a payor's pension when considering spousal support. However, double recovery can be permitted in some circumstances.

42.2 percent of the respondent's LIRA withdrawals in income for the purpose of support calculations.

Discussion

[28] In oral argument, the appellant focused her submissions on three alleged errors by the trial judge, each of which she argued constituted a material misapprehension of the evidence and an error of law. Underlying all of these submissions, however, was the premise that the parties had a 23-year, long-term, essentially traditional marriage and that, while the respondent enjoyed an economic windfall rooted in the marriage arising from the early pension payout, the appellant suffered, and continues to suffer, economic hardship arising from the breakdown of the marriage. Before turning to the appellant's specific arguments, I set out the applicable standard of review.

(1) Standard of Review

[29] The standard of review on support issues is highly deferential. Appellate courts should not interfere with support orders unless the reasons "disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong": *Hickey v. Hickey*, [1999] 2 S.C.R. 518, 172 DLR (4th) 577, at paras. 11-12.

(2) Did the trial judge err by failing to take account of the 2009 cash payment?

[30] The appellant's first argument was that the trial judge erred in failing to consider the whole of the evidence by failing to take account of the cash pension payment of $167,818 the respondent received in 2009. She inferred from his reasons that the trial judge accepted that only 57.8 percent of that amount was equalized under the parties' separation agreement. Given that the respondent's employment was terminated in 2006, he would have recognized that his pension would be wound up and he should have given notice of his impending change in income as required under the child support provisions of the separation agreement. In any event, the windfall early payout was rooted in the marriage.

[31] Particularly in the face of the economic hardship she suffered, the appellant submits that the trial judge should have granted her a remedy. For example, the trial judge could have imputed one third of 42.2 percent of the cash pension payment to the respondent for each of the years 2017, 2018 and 2019. Such an approach is justified under s. 19(1)(f) of the *Child Support Guidelines*, O. Reg. 391/97, (the "Guidelines"), which permits a court to impute income when a spouse has failed to disclose income when under an obligation to do so and by analogy to the Pattern of Income provision (s. 17(1)) of the Guidelines that permit the spreading of income over three years.

[32] I would not accept these arguments. The trial judge was well aware of the $167,818 pension payout the respondent received in 2009. He noted that the amount netted to about $96,000 after tax and that the respondent gave evidence about what he had done with the money. Bottom line: at the time of trial in 2018, the money was long gone and did not form part of the respondent's current income.

[33] Additionally, the trial judge was aware that the spousal support provisions of the separation agreement did not require ongoing income disclosure and that the appellant had not requested such disclosure. The trial judge was also aware that the respondent had an obligation to make financial disclosure to the appellant while he was under an obligation to pay child support, which ended in 2007. On our review of the record, there is no evidence to support a finding that the respondent knew what would be happening with his pension while he was still under an obligation to pay child support.

[34] As for the appellant's submissions concerning the $167,818 being largely unequalized and a substantial windfall rooted in the marriage, I am not satisfied the trial judge accepted the appellant's actuary's opinion concerning the unequalized portion of the pension. Rather, when he adopted the 42.2 percent future LIRA payment ratio, he acknowledged that to some extent he would be "double dipping" (in other words ordering that support be paid from a portion of the respondent's pension that had already been equalized). The basis for doing so was because of the appellant's need and the respondent's ability to pay.

[35] In the end, I am not satisfied that, on the facts of this case, the trial judge made any error in failing to reach back nine years to impose some form of retroactive support order to account for the fact that, in 2009, the husband had received a one-time cash pension payout, a significant portion of which had already been subject to equalization.

(3) Did the trial judge err by misapprehending the actuarial evidence concerning the respondent's projected LIRA income?

(4) Did the trial judge err by failing to consider the whole of the evidence including the economic hardship suffered by the appellant and the tools available for imputing income?

[36] The appellant's second and third arguments are interrelated. They will therefore be considered together.

[37] As her second argument, the appellant contends that the trial judge erred by failing to recognize that some of the actuarial evidence was premised on the respondent making only minimum annual LIRA withdrawals (or subsequently Registered Retirement Income Fund ("RRIF") withdrawals). The appellant submits that the trial judge failed to recognize that the respondent's access to his LIRA (and later his RRIF) was not limited to the minimum withdrawal amount. Rather, he could withdraw higher amounts annually, and do so immediately, as regulated by the Financial Services Commission of Ontario. As a result, the appellant submits that the trial judge erred by failing to recognize that the respondent could

withdraw more than the annual minimum from his LIRA and could have commenced doing so as soon as he retired.

[38] As her third argument, the appellant contends that, in all the circumstances of this case, the trial judge erred in failing to recognize it was open to him to immediately impute annual LIRA (or RRIF) withdrawals to the respondent. The appellant submits that this was necessary in order to relieve the economic hardship being suffered by the wife due to her lack of income, a factor that had been compounded by the husband's failure to give notice of the 2009 cash payment he received. Particularly since the respondent was sharing living expenses with a partner and had failed to disclose the partner's income, the appellant submits the trial judge's failure to impute a higher level of income to the respondent and/or to order support in excess of the high end SSAGs was not only the result of misapprehensions of the evidence but clearly wrong.

[39] I would not accept these arguments. On my reading of his reasons, the trial judge was fully aware of the fact that there was a minimum withdrawal threshold for the LIRA once the respondent turned 72 and that it was open to him, as trial judge, to impute income to the respondent before the respondent began making LIRA or RRIF withdrawals.

[40] The trial judge recognized the minimum nature of the LIRA withdrawal requirements when he noted at para. 53 of his reasons that the respondent "will

be forced to take out a minimum of 5 percent annually upon reaching age 72." He also implicitly acknowledged his ability to immediately impute income to the respondent when he declined the respondent's suggestion that 14.05 percent of a notional annual pension income, calculated by the respondent's actuary ($4,377), be imputed immediately. As I have said, the trial judge declined this suggestion because he concluded the respondent's plan to hold off on withdrawals until age 72 would ultimately benefit both parties.

[41] The trial judge was also well aware of the appellant's dependence on the respondent for income and her demonstrated need for support. He said so explicitly in his reasons. However, he also noted that the appellant had used her equalization payment to purchase a house, that she still had the house at the time of trial and that she had taken no steps to prepare for the respondent's retirement and resulting reduction in his income and ability to pay spousal support.

[42] As a result of these circumstances, the trial judge ordered an amount for support premised on the respondent's actual income, but at the high end of the SSAGs and including 42.2 percent of the respondent's LIRA income to calculate spousal support once the respondent began receiving it. The decision to order high end SSAGs support recognized the long-term nature of the marriage as well as the appellant's needs. The decision to include 42.2 percent of the respondent's actual LIRA withdrawals in his income to calculate spousal support responded to the appellant's economic hardship by double-dipping, at least to some extent. The

decision not to impute LIRA income earlier or at a higher level than the respondent's actual withdrawals reflects the trial judge's overall assessment of the parties' circumstances. I find no error in principle or misapprehension of the evidence in the trial judge's reasons nor do I consider his order clearly wrong.

Disposition

[43] Based on the foregoing reasons, I would dismiss the appeal. As agreed by the parties, I would make no order for costs of the appeal.

Released: "K.F." November 27, 2020

"Janet Simmons J.A."
"I agree. K. Feldman J.A."
"I agree. Harvison Young J.A."