COURT OF APPEAL FOR ONTARIO

CITATION: Choquette v. Choquette, 2019 ONCA 306
DATE: 20190417
DOCKET: C65197

Watt, Miller and Nordheimer JJ.A.

BETWEEN

Kevin Ronald Choquette

Applicant (Respondent)

and

Yvonne Elizabeth Choquette

Respondent (Appellant)

Gary Joseph and Meghann Melito, for the appellant

Harold Niman and Meysa Maleki, for the respondent

Heard: November 15, 2018

On appeal from the order of Justice Kenneth G. Hood of the Superior Court of Justice, dated March 1, 2018, with reasons reported at 2018 ONSC 1435.

B.W. Miller J.A.:

[1] In 1994, the parties separated after a marriage of 15 years, divorcing two years later. After a trial in 1996, the respondent, Mr. Choquette, was ordered to pay spousal support in the amount of $4,750 per month on an indefinite basis. The award was premised on the appellant, Ms. Choquette, quickly returning to the workforce. The appellant did not do so, and the respondent continued to pay spousal support for 22 years. In 2016, in anticipation of his retirement, the respondent brought a motion to change the spousal support order, asking that spousal support be terminated. The appellant brought a cross-motion to increase support to $15,000 per month.

[2] The motion judge allowed the respondent's motion and ordered spousal support terminated effective October 5, 2016. Costs were awarded against the appellant in the amount of $50,000. The appellant appeals.

[3] For the reasons given below, the appeal is dismissed.

Background

[4] When the parties married, they each had degrees in commerce and were employed commensurate with their education. The appellant left work when their first child was born. She returned to work briefly after their first child turned four, and ultimately stopped working outside the home. By then, the respondent was working in the securities business and earning a very good income for the family.

[5] At the date of trial in 1996, there were two children of the marriage, aged 13 and 6. The appellant's care of the children, particularly the eldest, was a significant issue at trial. The respondent was awarded custody of both children and thereafter the appellant had effectively no involvement with the older child, and limited access to the younger. In 2000, that limited access was further reduced to two hours per week every second week, on a supervised basis only. From that point, the appellant's involvement in the children's lives more or less ceased.

[6] By the time of the 1996 trial, the respondent had become a bank analyst with a brokerage firm and had earned approximately $390,000 the previous year. Later in his career he would earn well in excess of $1 million per year. The appellant was not employed at the time of trial, but had obtained a CMA accounting designation after separation as well as a real estate agent's licence. She testified that she planned to become self-sufficient.

[7] The respondent had initially appealed the support order to this court, raising a concern that it did not satisfy the objective of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), in encouraging the appellant to become self-sufficient. However, this court was satisfied with the trial judge's finding on the evidence that the appellant would "return to the workplace and move relatively quickly towards self-sufficiency." Although the appellant had been out of the professional workforce for 10 years during the marriage, she had business experience, had since obtained further professional qualifications and did not have child care responsibilities. This court further stated:

> [T]he husband's concerns that the wife may not become self-sufficient as quickly as anticipated by the trial judge are better dealt with on a variation application brought in that eventuality. The non-happening of an anticipated event can constitute a material change in circumstances within the meaning of the *Divorce Act*. [Citations omitted.]

[8] The appellant never re-entered the workforce. Her income has been almost exclusively from spousal support. She has purchased rental properties, some of which operate at a loss, and also has an organic farming business that also operates at a loss. She now has a net worth of $781,112, after leaving the marriage with a net worth of approximately $200,000.

[9] The respondent brought the current motion seeking to terminate support.

[10] Before the motion judge, the appellant argued that she was frustrated in her attempts to find work because of the residual impact of having been out of the workforce and at home with the children for ten years during the marriage. Additionally, she suffered further disadvantage from having relocated to Toronto, where she had no business contacts, which she did for the benefit of the respondent's career and to the detriment of her own. She also sought to introduce evidence that she suffered from depression, which prevented her not only from obtaining meaningful work, but also from even looking for work.

[11] The motion judge, however, found that the appellant never obtained employment, despite having marketable skills, because she never made any serious attempt to do so. Although she argued before the motion judge that she had been incapable of working or obtaining employment because of depression and disability, and obtained an adjournment of the motion in order to provide evidence to that effect, she ultimately provided no evidence. The motion judge found her not to be credible.

[12] The motion judge concluded "[t]he only order that can be made to promote her self-sufficiency would be a termination of support". He further stated:

> I am mindful that this order may create economic hardship for Mrs. Choquette, because she does not appear to be self-sufficient at present. However, the question I must address in this case is whether she remains entitled to spousal support from her former spouse. In my view, having regard to the provisions of the *Divorce Act*, it is clear she is not.

[13] The appellant appeals both the decision and the award of costs against her in the amount of $50,000.

Issues

[14] The appellant advances several grounds of appeal that can be organized as follows. She argues that the motion judge erred:

(1) by giving the objective of self-sufficiency pre-eminence over other objectives of spousal support in the *Divorce Act*;

(2) in finding that the appellant is not entitled to support on a compensatory basis;

(3) in finding that the appellant was not entitled to share in the post-separation increase in income; and

(4) by terminating support rather than reducing it or imputing income.

Analysis

[15] In *Johanson v. Hinde*, 2016 ONCA 430, at para. 1, this court recently emphasized the deferential standard of review owed to factual findings of trial judges in family litigation:

> The deferential standard of review of decisions of trial judges on questions of fact, and questions of mixed fact and law, is designed to promote finality and to recognize the importance of trial judges' appreciation of the facts. If anything, this is more accentuated in family litigation.

Deference was also emphasized in *Hersey v. Hersey*, 2016 ONCA 494, at para. 12:

> Absent an error in principle, a material misapprehension of evidence or an award that is clearly wrong, this court must not overturn a support order because it might have reached a different result or balanced factors differently.

Issue 1: Giving pre-eminence to the objective of self-sufficiency

[16] The trial judge had determined that the appellant was capable of becoming self-supporting relatively quickly. That finding was relied on by this court in dismissing the respondent's appeal of the support order. This court anticipated that the appellant's failure to return to the paid workforce would constitute a material change in circumstances, which the motion judge found to be the case. Given the motion judge's finding that there had been a material change in circumstances, the remaining question was whether there should be a variation in support, or whether support should be terminated.

[17] The appellant argued that, at this stage of the analysis, the motion judge erred in placing too much weight on the objective of self-sufficiency as applied to her circumstances. Section 17(7) of the *Divorce Act* does not create a requirement that a former spouse become self-sufficient. It merely directs that a support order should, among other objectives, *encourage* a former spouse to become self-sufficient, and only "in so far as practicable."

[18] The appellant is not self-sufficient and argues that to the extent that it ever was practicable that she become self-sufficient, it is not now, 22 years later. She is 62 years of age, her professional qualifications are stale and her former professional experience is irrelevant. Termination of support, she argues, cannot encourage her to become self-sufficient, because that objective cannot be realized.

[19] It does not follow, from that submission, that an unreasonable emphasis was placed on the objective of self-sufficiency. In determining whether support ought to be terminated, while self-sufficiency was a factor of particular importance, the motion judge specifically assessed each of the objectives under s. 17(7) of the *Act*.

None of the objectives spoke in favour of continued support. With respect to the recognition of economic advantage or disadvantage arising out of the marriage, the motion judge found that any disadvantage to the appellant had been compensated for by the length of the support. With respect to apportioning financial consequences for child care, the motion judge noted that all responsibility for child care, post-trial, was borne by the respondent. With respect to economic hardship faced by the appellant, the motion judge determined that any economic hardship arising from the breakdown of the marriage had long been addressed through the provision of support, and any current economic hardship was not a result of the marriage or its breakdown, but her own choices. As this court noted in *Walsh v. Walsh*, 2007 ONCA 218, 36 R.F.L. (6th) 262, at para. 13, "[u]nless, it can be said that the judge gave unreasonable emphasis to the self-sufficiency factor, this court has no basis for interfering."

Issue 2: Compensatory nature of support

[20] The appellant argues that the motion judge committed a palpable and overriding error in finding that the trial judge did not award spousal support on a compensatory basis - to compensate for her lost economic opportunities caused by the marriage - and in finding that she was in any event fully compensated by the support order.

[21] The appellant was home with the children for 10 years and not in the workforce. The respondent argues that the appellant's parenting of the children was not merely ineffectual, but a source of significant and long-lasting harm to both children, particularly the eldest. But whatever her deficiencies as a parent, the fact remains that the appellant did remove herself from the workforce for 10 years to care for the children. The appellant argues that the support order made by the trial judge was intended in part to compensate the appellant for foregone economic opportunities, and in part to address her needs.

[22] The principles of compensation are addressed under s. 15(7)(a-c) and s. 17(7)(a-c) of the *Divorce Act*: *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, at p. 860. The motion judge and the trial judge each considered these factors in detail. The motion judge was alive to the fact that the appellant withdrew from paid work outside the home, that the appellant had significant child care responsibilities, and that the appellant's child care obligations were sharply reduced at the time of separation and eliminated entirely by 2000, when all of the burdens of parenting were on the respondent.

[23] Even assuming, without deciding, that the motion judge's characterization of the basis for spousal support ordered by the trial judge was an error, it would have been neither palpable nor overriding. The trial judge did not expressly state the basis of the support order, but he did anticipate that it would be varied "relatively quickly" as the appellant moved to self-sufficiency. Furthermore, even assuming the order was made in part on a compensatory basis, as the respondent argues, that would not entitle the appellant to support in perpetuity. Although the Spousal

Support Advisory Guidelines had not been enacted at the time of separation, they do provide a measure of what is a reasonable quantum and duration of support: *Gray v. Gray*, 2014 ONCA 659, 122 O.R. (3d) 377, at para. 42. In these circumstances, the high end for length of support would be 15 years. The respondent paid support for 22 years. Even if the appellant is correct and the motion judge ought to have characterized the basis of the spousal support ordered by the trial judge as entirely compensatory in nature, this would not affect the result.

Issue 3: Entitlement to share in the post-separation increase in the respondent's income

[24] The appellant argues the motion judge erred in not finding that the appellant was entitled to share in the respondent's substantial post-separation increase in income. She argues that she indirectly contributed to his ability to earn high income, because her sacrifices during the marriage enabled it.

[25] I would not accede to this ground of appeal. The support order made no provision for support to be indexed to any increases in income. This makes sense as the trial judge anticipated that the support order would soon be varied to account for the appellant's return to the workforce. Furthermore, given the motion judge's finding that the appellant made no attempt to become self-sufficient, it is entirely appropriate that she not be entitled to participate in his increase in income: *Walsh v. Walsh* (2006), 2006 CanLII 20857 (ON SC), 29 R.F.L. (6th) 164, at para. 42, rev'd in part, on other grounds, 2007 ONCA 218.

Issue 4: Was variation preferable to termination?

[26] The appellant argues that the remedy ordered – termination of support – is unnecessarily harsh. There were other, more appropriate, alternatives open to the motion judge, such as imputing to the appellant the income that she ought to have earned had she returned to the workforce, and reducing ongoing support accordingly. It would have been more appropriate, she argues, to impute income because there is no evidence that she could have become self-sufficient (in the sense that she could have achieved the standard of living enjoyed by the parties at the date of separation) even if she had made reasonable efforts to do so.

[27] The appellant concedes that where there is a lack of effort to achieve self-sufficiency, it can be appropriate to reduce support to incentivize a recipient to make appropriate efforts towards self-sufficiency: *Juvatopolos v. Juvatopolos* (2004), 2004 CanLII 34843 (ON SC), 9 R.F.L. (6th) 147 (Ont. S.C.), at para. 27, aff'd (2005), 2005 CanLII 35677 (ON CA), 19 R.F.L. (6th) 76 (Ont. C.A.). But she argues that it is too late in the day for her. She is not now capable of supporting herself at the standard of living the family enjoyed during the marriage, no matter what the incentive.

[28] The respondent argues that the motion judge found that to the extent the appellant may suffer financial hardship as a result of termination of support, this is not the result of the marriage or its breakdown, but of her own improvident choices.

[29] The motion judge considered that the appellant is not without significant resources, notwithstanding that the respondent has amassed considerably more. But the motion judge found that the mere fact that there is a disparity between the resources of the appellant and the resources of the respondent does not, in the circumstances of these parties, supply a juristic reason to continue support. I agree that the result appears harsh, given the resources available to the respondent. But the motion judge was entitled to make the order that he did, and there is no basis on which we should interfere with it.

DISPOSITION

[30] I would dismiss the appeal and deny leave to appeal the costs order. I would award the respondent costs of the appeal in the agreed amount of $15,000 inclusive of disbursements and HST.

Released: “DW” APR 17 2019

“B.W. Miller J.A.”
“I agree. David Watt J.A.”
“I agree. I.V.B. Nordheimer J.A.”