

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Robaczewski v. Larson*, 2016 NSSC 318

Date: 2016-01-11

Docket: No. 1201-069072

Registry: Halifax

Between:

Anna Malgorzata Robaczewski

Petitioner

v.

John Frederick Larson

Respondent

LIBRARY HEADING

Judge: The Honourable Justice C. LouAnn Chiasson

Heard: September 6, 2016

Summary: The Applicant sought interim spousal support after the Respondent ceased making voluntary support payments to her. The Respondent requested the application be dismissed as a result of his inability to pay. The Respondent was ordered to pay interim spousal support of \$2,000 per month.

Key words: Interim Spousal Support

Legislation: Divorce Act, R.S.C. 1985, C.3 (2nd Supp.), s.15.2

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Judge: The Honourable Justice C. LouAnn Chiasson

Heard: September 6, 2016, in Halifax, Nova Scotia

Counsel: Diana Musgrave for the Petitioner
Kenzie McKinnon, QC for the Respondent

By the Court:

[1] Ms. Robaczewski filed a motion for interim spousal support seeking support from her estranged spouse, John Larson. This motion was brought pursuant to sections 15.2 of the *Divorce Act* (R.S.C., 1985, c. 3 (2nd Supp.)):

Spousal Support Orders

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.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim 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, pending the determination of the application under subsection (1).

Terms and conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

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.

Spousal misconduct

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

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.

BACKGROUND

[2] The parties were married on August 2, 1980. They had one daughter who is now an adult and living independently. The parties separated in November 2014.

[3] Mr. Larson operated various businesses during the course of the marriage. He sold his interest in a company in 2011 and remained on the payroll as a consultant. The contract related to his consulting income ended in April 2016. The Consulting Agreement provided for a numbered company (referred to as “Company 473”) operated by Mr. Larson to receive income of \$75,000 per year as well as a car allowance of \$12,000 per annum.

[4] At the time of the sale of the business, Mr. Larson purchased a building under Company 473. The building is comprised of fourteen rental units. Some information related to Company 473 has been disclosed to counsel for Ms. Robaczewski.

[5] The Statement of Property filed on behalf of Mr. Larson discloses the existence of two numbered companies as well as a Family Trust. Company 473 owns the fourteen unit apartment building. The other numbered company is

referred to as “Company 740”. Both companies are wholly owned by the John Larson Family Trust.

[6] Ms. Robaczewski operates a small craft business which nets nominal income. Both parties are close to retirement age. Mr. Larson had voluntarily paid spousal support of \$3,000 per month up to May 2016 when he terminated all payments to Ms. Robaczewski. As a result, Ms. Robaczewski has brought this motion for interim spousal support.

ISSUES

[7] Counsel for Mr. Larson concedes that Ms. Robaczewski is entitled to interim spousal support. The issue for determination is Mr. Larson’s ability to pay support. Mr. Larson’s position is that his spousal support was based entirely on his consultant income and, as a result of this income not being available to him as of April 2016, he has no means to pay ongoing support. Ms. Robaczewski’s position is that Mr. Larson has had de facto control over the numbered companies and the Family Trust and does have the means to continue to pay spousal support.

LAW & DISCUSSION

[8] The relevant statutory authority in relation to this application is s. 15.2 of the *Divorce Act, supra*.

Spousal Support Orders

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.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim 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, pending the determination of the application under subsection (1).

[9] Section 15.2(4) sets out the factors to be considered by the court in making an order for interim support:

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.

[10] Entitlement to spousal support is not contested. The parties were married for thirty four years in a traditional marriage. Mr. Larson was the primary breadwinner throughout the marriage. Ms. Robaczewski is 64 years of age and has not worked full time for over 25 years.

[11] Ms. Robaczewski argues that Mr. Larson's ability to pay spousal support is not limited to the monies received from the consulting contract. Her position is that Mr. Larson has an ability to pay spousal support to her on an ongoing basis. She argues that the companies in Mr. Larson's control are able to provide an income stream to Mr. Larson from which spousal support would be payable.

[12] Counsel on behalf of Mr. Larson advised the court that Mr. Larson's income and the income available to the corporate entity was one and the same. He took no issue with the fact that the corporate veil was to be pierced to the extent that monies attributable to the corporate entity could also be attributed to Mr. Larson. The difficulty, from Mr. Larson's perspective, is that the corporate entity was not profitable and therefore there is no money available to pay spousal support.

[13] Both numbered companies are wholly owned by the John Larson Family Trust. Mr. Larson unilaterally decided when to declare dividends from the companies and when to make distribution(s), if any, to the beneficiaries under the Family Trust. Mr. Larson, however, did not have full legal authority to make distributions under the Family Trust without the agreement of Ms. Robaczewski.

[14] Both parties are listed as trustees of the John Larson Family Trust. The Trust Agreement (attached to Mr. Larson's Statement of Income) confirms that the trustees may distribute income and capital out of the Family Trust at their discretion. Mr. Larson has distributed monies from the Family Trust as he saw fit and believed himself to be the "principal trustee". The Trust Agreement, however, does not provide any distinction related to "principal trustee". Ms. Robaczewski

had equal authority under the terms of the Family Trust at the time of the hearing. Mr. Larson confirmed in *viva voce* testimony that Ms. Robaczewski remained a trustee of the Family Trust at the time of the hearing. Until a final determination of this matter, Ms. Robaczewski will remain a trustee of the Family Trust.

[15] Mr. Larson indicated that Company 740 received \$420,656 of the proceeds of the sale of his business over the years from 2012 through 2016. His Statement of Income, however, discloses that Company 740 has no fair market value as of April 29, 2016. He provided evidence that Company 740 has lent monies to Company 473 and that he withdrew \$150,000 to purchase a residence for himself post separation.

[16] The corporate entities are intertwined. Monies are moved between them as seen fit by Mr. Larson. The extent of the monies available through the companies will be the subject of a more thorough vetting at the time of the final disposition of this matter. Given the limited evidence on an interim hearing, I do find that monies are available to Mr. Larson through those companies to continue to pay spousal support to Ms. Robaczewski.

[17] The principles enunciated in the case of *Richards v. Richards*, 2012 NSCA 7 are applicable to the current interim motion. As stated by Justice Bryson at paragraphs 45 and 46 of the decision:

[45] Like Justice Greckol, I would prefer to base an imputation of income on the “means factor” in s. 15.2(4) of the Divorce Act. Means is a broad term and should be generously interpreted to give effect to the statutory purposes of spousal support. Certainly, “means” would include all financial resources, capital and income, as well as earning capacity. In this case, that would extend to a salary that Mr. Richards could receive from JEL with Ms. Richards’ consent – effectively given by her resort to the court.

[46] In my view, the most equitable way of resolving the interim support application is to return the parties as much as possible to the status quo before Mr. Richards “turned off the tap”. That takes into account the factors in ss. 4 and 6 of s. 15.2 of the Divorce Act and does least violence to the circumstances of the parties and JEL. The Divorce-Mate NDI calculation provided by the appellant was not challenged by Mr. Richards (A.B. p. 714). It shows that a gross income of \$157,275, would yield spousal support payments of \$76,957 and a net disposable income to both parties of \$55,187. One hundred and fifty-seven thousand dollars is approximately the gross amount of both parties’ 2009 Line 150 taxable income. In all the circumstances, I would impute income to Mr.

Richards of \$157,000 and would order spousal support of \$72,000 per year or \$6,000 per month commencing as of November 1, 2010. However, I would defer making an order for two weeks to allow the parties to consider whether it would be preferable to have funds paid as dividend income which as directors they could jointly authorize and which could be embodied in the court's order.

[18] Counsel for Mr. Larson attempted to distinguish the facts of the *Richards* case by noting that Mr. Larson had not “turned off the tap” but rather his consulting income was eliminated. I do not accept that the spousal support was based solely on Mr. Larson's consulting income. Mr. Larson's means must be considered in determining the quantum of spousal support payable. It is a much broader scope than simply examining his consulting income in isolation.

[19] Cromwell J.A. (as he then was) in *Fisher v. Fisher*, 2001 NSCA 18, stated at paragraph 82:

“The fundamental principles in spousal support cases are balance and fairness. All of the statutory objectives and factors must be considered. The goal is an order that is equitable having regard to all of the relevant considerations. As was stated in Bracklow, *supra*, at § 36:

... There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.”

[20] A thorough analysis of means will need to occur at the final disposition of this matter. In the interim, however, I am prepared to find that Mr. Larson has the means to pay spousal support. In examining the evidence before me there are indications that all expenses which are paid for by the company may not be deducted in their entirety as business expenses without any personal benefit.

[21] For example, I find that the life insurance premiums of \$15,000 per annum in relation to a whole life policy in favour of Company 743 are excessive. It is akin to a savings vehicle. Mr. Larson confirmed on cross examination that this policy has a cash surrender value of approximately \$50,000 at the present time. This is not a service based business which requires significant insurance in order to ensure that liabilities can be met if Mr. Larson were to pass away. This is a company which owns a rental building. Presumably any mortgage on the building can be life insured at a much lower rate on a term life policy. The whole life policy serves no appropriate business purpose and is more akin to a corporate savings account.

[22] There are monies available to Mr. Larson as a result of some of his personal expenses being paid for through the company. One example is the ability to write off the cost of his motor vehicle. There is also money available to Mr. Larson through his CPP, London Life RRIF, OAS, as well as other benefits derived through the corporate entities.

[23] Counsel on behalf of Mr. Larson indicated that the parties are nearing retirement age and will need to adjust their expenses to live within their means. This is predicated on an equal division of assets which will occur at some point in the future. The parties do not have an equality of assets currently within their control. They do not have an equality in terms of bargaining power in relation to the receipt and the distribution of monies. Although it may well be the case that the parties will have to live off their capital once the property has been divided, that is not the case before the court on this interim application.

[24] The ability to pay interim spousal support has been impacted to some extent by the cessation of the consulting contract. As a result, interim spousal support of \$2,000 per month will be paid by Mr. Larson to Ms. Robaczewski. This spousal support should be secured by life insurance or by some other means acceptable to the parties.

[25] Mr. Larson was cross examined in relation to potential changes to the beneficiary designation of various assets (i.e. his TFSA account, RIF, etc.). Mr. Larson should ensure that the beneficiary designations remain Ms. Robaczewski pending agreement or court order. He stands in a fiduciary position in relation to these matrimonial assets and must preserve Ms. Robaczewski's interests pending division of property and further adjudication in relation to spousal support.

Chiasson, J.