NOVA SCOTIA COURT OF APPEAL
Citation: *MacDonald v. MacDonald*, 2017 NSCA 34

Date: 20170503
Docket: CA 455485
Registry: Halifax

Between:

John Edward MacDonald

Appellant

v.

Melissa Elizabeth MacDonald

Respondent

Judge:	The Honourable Justice Joel E. Fichaud
Appeal Heard:	March 28, 2017, in Halifax, Nova Scotia
Subject:	Spousal support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 15.2
Summary:	The parties had lived together for almost 21 years, the last 14 as husband and wife. They have two adolescent children. Mr. MacDonald earns approximately $107,000 annually and Mrs. MacDonald earns about $57,000 from a full-time job. On the divorce, the judge ordered Mr. MacDonald to pay spousal support of $500 monthly indefinitely.
Issues:	Mr. MacDonald challenged the judge's rulings on entitlement, quantum and duration of spousal support.
Result:	The Court of Appeal dismissed the appeal. The judge made no error in his determination that Ms. MacDonald was entitled to spousal support on compensatory and non-compensatory bases. The quantum was supported by the evidence, and was consistent with the Spousal Support Advisory Guidelines. As to duration, an indefinite term does not mean that spousal support is payable forever. The parties had a long-term

relationship, and their circumstances supported the judge's conclusion that a reasonable culmination date for Ms. MacDonald's transition to self-sufficiency was not predictable at the date of trial. The judge's conclusion that the term be indefinite was an appropriate exercise of the judge's discretion.

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Judges:	Fichaud, Saunders and Oland, JJ.A.
Appeal Heard:	March 28, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Fichaud, J.A., Saunders and Oland JJ.A concurring
Counsel:	Roseanne M. Skoke for the appellant M. Ann Levangie and Sandra McCulloch for the respondent

Reasons for judgment:

[1] Mr. and Ms. MacDonald lived together for almost 21 years, the last 14 as husband and wife. Then they divorced. They have two adolescent children. Ms. MacDonald has full-time employment, is financially constrained, but not impoverished. Mr. MacDonald earns significantly more, but pays child support based on their income differential. The judge of the Supreme Court dealt with the divorce, division of net worth, parenting and child support. He also ordered that Mr. MacDonald pay $500 monthly spousal support indefinitely.

[2] Mr. MacDonald appeals only the spousal support. He says Ms. MacDonald is self-sufficient and challenges the judge's rulings on entitlement, quantum and duration.

Background

[3] Mr. and Ms. MacDonald formed a relationship in August 1991 while in school, began to cohabit in March 1994, and married in October 2000. They have a son born in November 2004 and a daughter born in July 2006. The family lived in Pictou County.

[4] Mr. MacDonald, aged 45, is a graduate of St. Francis Xavier University. He worked with Sobeys until August 2011, and then with Nova Scotia Power where he is now a Supply Chain Manager. The judge found that his annual earnings were $107,316 (base salary plus average bonuses).

[5] Ms. MacDonald is 42. She completed high school in New Glasgow, followed by a secretarial course. Since 2005, she has worked for Canada Post, first as a part-time mail carrier and, since 2013, as a unionized full-time mail carrier. The judge found her annual income to be $56,997.70.

[6] The MacDonalds separated on January 1, 2015, but continued to live separately in the matrimonial home through September 2015. On October 1, 2015, Mr. MacDonald moved to his own home in Little Harbour.

[7] On August 31, 2015, Ms. MacDonald petitioned for divorce. They each filed motions for interim relief. After hearing the motions, and on the parties' consent, Justice Scaravelli issued an Interim Order dated October 1, 2015. The Interim

Order provided for joint custody and shared parenting, child support of $591 monthly payable by Mr. MacDonald to Ms. MacDonald, possession of the matrimonial home to Ms. MacDonald, and division of assets and liabilities.

[8] Starting December 1, 2015, Mr. MacDonald voluntarily increased child support to $629 monthly, based on his income.

[9] On February 2, 2016, Justice Glen McDougall heard the divorce proceeding. Each party was represented by counsel. On May 11, 2016, Justice McDougall issued a decision (2016 NSSC 124), followed by a Divorce Order and Corollary Relief Order both dated August 15, 2016.

[10] The Divorce Order changed Mrs. MacDonald's surname to her pre-marital name, MacPhee. For consistency with the pleadings, the reasons of the judge under appeal, and her own factum in the Court of Appeal, I will refer to her as Ms. MacDonald. The Corollary Relief Order provided terms for joint custody and shared parenting of the children, and divided the matrimonial assets and liabilities. The Order said Mr. MacDonald would pay prospective child support of $643 monthly for the two children, based on the net of the parties' incomes.

[11] The parties had disputed spousal support. Ms. MacDonald had claimed entitlement on both compensatory and non-compensatory bases. Mr. MacDonald had replied that Ms. MacDonald was self-supporting with a secure full time job, and not entitled to any spousal support. Justice McDougall agreed with Ms. MacDonald. Later I will discuss the judge's reasons. The Corollary Relief Order said:

> 17. John MacDonald must pay spousal support to Melissa MacDonald in the amount of $500 each month. Support payments are due on the first day of each month and shall commence on June 1, 2016 and shall continue indefinitely (duration not specified) on the first day of each month thereafter.

[12] On September 14, 2016, Mr. MacDonald appealed to the Court of Appeal.

Issues

[13] Mr. MacDonald's Notice of Appeal lists eight grounds, factual and legal, all related to spousal support. I re-order these into three categories of submissions: whether the judge committed an appealable error in determining (1) that Ms. MacDonald was entitled to spousal support, (2) the quantum of spousal support, and (3) the indefinite duration of spousal support.

Standard of Review

[14] In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, Justice L'Heureux-Dubé for the Court said:

> 10 When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> 11 Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong.
> …
>
> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[15] Justice L'Heureux-Dubé's passage has governed this Court's standard of review in matrimonial matters, including support, property division, custody and access: *Staples v. Callender*, 2010 NSCA 49, para. 7; *Baker v. Baker*, 2012 NSCA 24, para. 20; *Doncaster v. Field*, 2014 NSCA 39, paras. 27-28; *Weatherby v. Muise*, 2015 NSCA 42, para. 14; *White v. White*, 2015 NSCA 52, paras. 4-5; *MacDonald v. MacDonald*, 2017 NSCA 18, para. 17.

First Issue: Entitlement to Spousal Support

[16] The trial judge referred to the objectives of spousal support in s. 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), and the principles from *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. He concluded that Ms. MacDonald had established entitlement under both the compensatory (or clean-break) and non-compensatory (mutual obligation) models discussed in *Bracklow*, paras. 25-33. There is no issue of contractual support.

[17] Spousal support addresses the equitable sharing of the economic consequences of a marriage and its breakdown, as discussed by Justice L'Heureux-Dubé in *Moge*, pp. 848-870.

[18] Justice McDougall (paras. 75-77) cited evidence that Ms. MacDonald had subordinated her career advancement to the family's primary care, which better positioned Mr. MacDonald to advance his career. The judge found:

> [79] … I do, however, find that Ms. MacDonald made sacrifices over the parties' nearly twenty-one years of cohabitation for the benefit of Mr. MacDonald and the family as a whole. …

[19] On the appeal, Mr. MacDonald challenges what he considers as the judge's undue extrapolation of *Moge*'s principles, particularly respecting the impact of child care. His factum says:

> 5. Although **Moge** has served to redress some of the injustices that have occurred to women; it has also created an imbalance of power in favor of women at time of divorce.
>
> …
>
> 85 (a) there is no evidence to support the finding that the Wife "made sacrifices over the parties nearly twenty-one years of cohabitation for the benefit of Mr. MacDonald or the family as a whole["]. To bear children is not a sacrifice, it is a privilege.

[20] In my view, nothing turns on whether the bearing and care of children is a "privilege". Nor are the concepts of sacrifice and privilege mutually exclusive. I will term it a commitment. I disagree that Justice McDougall extrapolated *Moge*'s principles. I reject the suggestion that the consequences of a parent's commitment to child and family lie outside the calculus of spousal support. In *Moge*, Justice L'Heureux-Dubé repeatedly said, and cited authority saying that spousal support

may compensate the primary care-giving spouse for a resulting retardation of career advancement. For instance:

> The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage. [pp. 867-68]

[21] There was evidence to support the judge's finding of Ms. MacDonald's commitment to family and its consequences for her career. Ms. MacDonald had at least one foregone opportunity with the RCMP, after she passed the entry exam. From 2005 onward, she worked a physically demanding job as a mail carrier, but only part-time until 2013 because of her family responsibilities. While with Canada Post, Ms. MacDonald twice took maternity leave to care for the newborns. There was a basis for the judge's consideration of the compensatory model.

[22] Next is the non-compensatory model. In *Moge*, p. 870, Justice L'Heureux-Dubé said:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant (see *Mullin v. Mullin* (1991), *supra*, and *Linton v. Linton*, *supra*). … As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution [citation omitted].

[23] In *Bracklow*, paras. 25-49, Justice McLachlin, as she then was, expanded on these principles. See also *Fisher v. Fisher*, 2001 NSCA 18, paras. 82-87, per Cromwell, J.A. (as he then was) for the Court.

[24] During their marriage, Mr. MacDonald's income always significantly exceeded that of Ms. MacDonald, providing a comfortable but un-luxurious lifestyle. The judge (para. 83) cited the parties' economic interdependence during their 21 year relationship and their different levels of current income. He noted Ms. MacDonald's evidence that she can no longer afford the lifestyle they enjoyed during their relationship, and must liquidate assets or incur credit card debt to cover living expenses (para. 81).

[25] In *Bracklow*, Justice McLachlin commented on the correlation of the two models for spousal support:

> 27 The mutual obligation model of marriage stresses the interdependence that marriage creates. The clean-break model stresses the independence of each party to the union. The problem with applying either model exclusively and stringently is that marriages may fit neither model (or both models). Many modern marriages are a complex mix of interdependence and independence, and the myriad of legislative provisions and objectives discussed below speak varyingly to both models. …

[26] The MacDonalds' marriage and its breakdown display features pertaining to both models. Justice MacDougall was entitled to consider them in tandem. His findings of income levels, contributions during marriage, economic integration during a long-term relationship, and impact of the marriage breakdown were supported by evidence and display no palpable and overriding error.

[27] I would dismiss the ground of appeal that the judge erred in determining entitlement to spousal support.

Second Issue: Quantum of Spousal Support

[28] Justice McDougall said:

> [84] Both parties agree that in the event Ms. MacDonald is entitled to spousal support, $500 per month is an appropriate amount. I agree. $500 is in the middle of the range suggested by Spousal Support Advisory Guidelines, is consistent with my findings with respect to entitlement, and achieves the objectives set out in ss. 15.2(4) and (6) of the *Divorce Act*.

[29] At the appeal hearing, both counsel agreed that there was no agreement to quantify spousal support at $500 or any other amount. Nor does the record suggest one. The judge's finding of an agreement is an error of fact.

[30] In my view, the error is not overriding. Even without an agreement, $500 monthly is an appropriate quantum.

[31] The Spousal Support Advisory Guidelines are not legally binding, and should not be taken as statutory. But they may buttress a conclusion derived from the evidence. A judge may find that, given the circumstances of the case, the Guidelines help to illuminate a rational path through the landscape of myriad legislative directives mentioned in *Bracklow*. Further, the Guidelines' use

promotes consistency among awards. In those respects, the Guidelines accommodate the scheme for spousal support in s. 15.2 of the *Divorce Act*. See *Strecko v. Strecko*, 2014 NSCA 66, para. 49 and *MacDonald*, para. 29, and authorities there cited.

[32] Justice McDougall (paras. 31 and 37) found that, before taxes and child support, Ms. MacDonald's income was $56,997.70 and Mr. MacDonald's was $107,316. The judge was presented with calculations under the Guidelines, stating a range of spousal support based on the disposable incomes of the parties, after child support and taxes. The middle of the range, based on these parties' circumstances, was spousal support of $499 monthly.

[33] The judge did not just default to a sterile formula in the Guidelines. His reasons discussed the parties' income sources, their means, needs and other circumstances, and the increased costs of shared custody. The findings were supported by evidence. The judge's conclusion on spousal support derived from the parties' situation, and his conclusion was consistent with the application of the Guidelines. That was an appropriate use of the Guidelines.

[34] The judge's reasoning for spousal support of $500 monthly contains no appealable error. I would dismiss the ground of appeal respecting quantum.

Third Issue: Duration of Spousal Support

[35] Justice McDougall's reasons said:

> [85] Like quantum, the duration of spousal support is to be determined by considering the length of the relationship, the basis for entitlement, the goal of self-sufficiency, and the parties' conditions, means, needs and other circumstances.
>
> [86] A pattern of dependency giving rise to a compensatory claim justifies support, but only for a reasonable transition period: *Kelloway* [*Kelloway v. Kelloway*, 2008 NSSC 261], at para. 26.
>
> [87] Similarly, a non-compensatory claim is typically satisfied when a spouse becomes self-supporting. In such a case, neither the payor's greater income, nor the recipient's inability to replicate a previous lifestyle, is a factor entitling the recipient to continuing support. The period of support will be for the period required to ease the recipient's transition to economic independence: *Kelloway, supra*, at para. 17.

> [88] Self-sufficiency is a relative concept. It means something more than an ability to meet basic living expenses, and it incorporates an ability to provide a reasonable standard of living ….
>
> [89] Although Mrs. MacDonald is working full-time, she is not presently self-supporting. Nor could this be expected. After a period of cohabitation of nearly twenty-one years, she is entitled to some time to move towards economic independence.
>
> [90] The SSAG provide that in most cases involving child support payments, courts will initially order that spousal support be paid indefinitely. I find that such an order is appropriate in this case. Of course, by "indefinite" I do not mean that spousal support will be payable forever; rather, I simply refrain from setting an end date.

[36] On the appeal, Mr. MacDonald makes two submissions.

[37] First, he says the judge erred by finding Ms. MacDonald is not self-supporting.

[38] I respectfully disagree. Self-supporting assumes an ability to provide a reasonable standard of living. Ms. MacDonald's evidence was that her reasonable expenses exceeded her income, requiring her to incur credit card debt and liquidate assets. The judge made no error of principle or palpable and overriding error of fact.

[39] Second, Mr. MacDonald's factum again faults the judge's reference to the Guidelines:

> 110. The Court further erred in adopting the advice from the SSAG guidelines, which provide that in most cases involving child support payments, the Courts will initially order that spousal support be paid indefinitely.
>
> 111. The SSAG guidelines are not law, they are not binding, and the advice of the guidelines do[es] not replace the statutory requirements of section 15.2 of the *Divorce Act*.
>
> 112. It is an error of law to conclude that because a payor is paying child support, then the payor should also pay spousal support indefinitely. …
>
> …
>
> 118. This appears to be spousal support "a pension for life". …

[40] With respect, the submission mischaracterizes the judge's reasoning.

[41] The judge did not take the Guidelines as a binding standard. Justice McDougall based his determination on the evidence of the parties' relationship, means, needs and circumstances. Their long-term life partnership has generated an interplay of remnant interdependence and developing self-reliance. The transition is a process, not an event. The evidence entitled the judge to find that a reasonable culmination date for the transition was not predictable at the date of trial. The judge also noted that, in these circumstances, the Guidelines suggest an indefinite term for spousal support. In that respect, the Guidelines discuss how and why long-term marriages, exceeding 20 years, with children may justify indefinite spousal support.

[42] Apart from the Guidelines, there is authority to support indefinite awards in long term relationships, particularly with children: *e.g. Gates v. Gates*, 2016 NSSC 49, para. 63(c), per Jesudason, J. and *Michaud v. Kuszelewski*, 2008 NSSC 276, para. 63, per O'Neil, J. (as he then was), appeal dismissed 2009 NSCA 118.

[43] Section 15.2(6)(d) of the *Divorce Act* says one "objective" of spousal support is "so far as practicable" to "promote economic self-sufficiency of each spouse within a reasonable period of time". These are flexible standards. Self-sufficiency isn't a binding obligation with a due date. Rather, it is one objective among others to be weighed in the judge's exercise of discretion based on all the circumstances: *Leskun v. Leskun*, [2006] 1 S.C.R. 920, para. 26, per Binnie, J. for the Court; *Moge*, pages 853 and 866; *Bracklow*, paras. 31-32, 35-36, 43, 53.

[44] Neither did the judge's ruling create a "pension for life", as suggested in Mr. MacDonald's factum. The judge said "I do not mean that spousal support will be payable forever". Rather, the ruling means that an end date of the reasonable period for Ms. MacDonald's transition toward economic independence is not determinable today.

[45] I would dismiss the ground of appeal that challenges the indefinite duration of spousal support.

Conclusion

[46] I would dismiss the appeal, with $2,500 costs for the appeal payable by Mr. MacDonald to Ms. MacDonald.

Fichaud, J.A.

Concurred: Saunders, J.A.

Oland, J.A.