

SUPREME COURT OF NOVA SCOTIA

Citation: *Moore v. Moore*, 2017 NSSC 258

Date: 20171002

Docket: AMH No. 1202-002246

Registry: Amherst

Between:

James Moore

Petitioner

v.

Darlene Moore

Respondent

Judge: The Honourable Justice James L. Chipman

Heard: September 19, 2017, in Amherst, Nova Scotia

Written Decision: October 6, 2017 (Oral Decision October 2, 2017)

Counsel: Lloyd I. Berliner, for the Petitioner
Tammy C. MacKenzie and Daniel F. Roper, for the
Respondent

Orally by the Court:

Introduction

[1] The parties were married on August 11, 1990, and separated after nearly 27 years of marriage in April, 2017. Mr. Moore is 50 and Ms. Moore is 60. There are no children of the marriage. Ms. Moore has two adult children from a previous marriage.

[2] On May 10, 2017, Mr. Moore filed a Petition for Divorce and the next day he moved out of the matrimonial home. In late May, Mr. Moore moved into a mobile home with his new partner, Shelly Scott and her 9 and 14 year old children who live there half of the time.

[3] Ms. Moore filed her Answer on June 20, 2017. She continues to reside at the matrimonial home. Ms. Moore works as a manager and server at Duncan's Pub in Amherst.

[4] Mr. Moore is the general manager at Moore's Automotive & Recreation Limited. The business was started in 1991 and Mr. Moore is a one-third owner with his brother and father. He has a similar ownership interest in two other family businesses, W.K. Donkin and Aim Properties.

[5] On June 20, 2017, Ms. Moore filed a Notice of Motion for Interim Relief seeking interim spousal support, interim exclusive possession of the matrimonial home and (if contested) costs. Mr. Moore resists the Application, asking that it be dismissed, with costs.

Interim Possession of the Matrimonial Home - Law

[6] My authority to grant interim possession of the matrimonial home is derived from s. 11 of the *Matrimonial Property Act*, RSNS 1989, c. 275 ("M.P.A.") which provides:

11 (1) Notwithstanding the ownership of a matrimonial home and its contents, the court may by order, on the application of a spouse,

(a) direct that one spouse be given exclusive possession of a matrimonial home, or part thereof, for life or for such lesser period as the court directs and release any other property that is a matrimonial home from the application of this Act;

...

(4) The court may only make an order for possession of the matrimonial home under subsection (1) or (3) where, in the opinion of the court,

(a) other provision for shelter is not adequate in the circumstances; or

(b) it is in the best interests of a child to make such an order.

...

Section 19 of the *M.P.A.* provides:

19 The court may make such interim order as it considers necessary for the proper application of this Act, pending the bringing or disposition of an application under this Act.

In *Legg v. Legg*, 2010 NSSC 326, Justice Jollimore, at para. 2, outlined the test to be followed when determining whether to grant interim exclusive possession of a matrimonial home to a spouse:

These Applications for interim exclusive possession of the matrimonial home are governed by section 11(4) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 which says that I may only make an order for possession where, in my opinion, other provision for shelter is not adequate in the circumstances or it is in the best interest of a child to make the order. The Act limits when I can make an order for exclusive possession to those two situations.

[emphasis added]

Interim Spousal Support - Law

[7] With respect to interim spousal support, resort must be made to the *Divorce Act*, RSC 1985, c. 3 (2nd sup) and in particular s. 15.2 and the below subsections:

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.

[8] When making an interim spousal support order the following factors must be considered in accordance with s. 15.2(4) of the *Divorce Act*:

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.

[9] The objectives of a support order are set out in s. 15.2(6) of the *Divorce Act*:

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.

[10] In *Eyking v. Eyking*, 2012 NSSC 409, Justice Wilson reviewed the case law in relation to spousal support and noted with approval at para. 68, *Baker v. Baker*, 2003 NSSC 203 at para. 17:

In attempting to determine the issue of spousal support the Supreme Court of Canada's analysis in *Moge v. Moge* [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow* [1999] S.C.J. No. 14 are at the forefront. A number of principles or basics exist such as:

1. There are now three basis for spousal support; compensatory; non-compensatory, i.e. need alone; and contractual.
2. There is no one philosophy of support; i.e. mutual obligation vs. clean break. They co-exist.
3. Issues of entitlement and quantum/duration are weighed by consideration of all of the factors and objectives in s. 15.2(4) and (6) and specifically s. 17(4.1) which is the application to vary section of the *Divorce Act*.
"The method to follow in determining a support dispute starts with the objectives and all must be considered. No one objective is paramount (see *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at page 440). The factors are looked at against the background of the objectives. (*Bracklow*, p. 440, par. 36)." *Higgins v. Higgins*, [2000] N.S.J. No. 48 N.S.C.A.
4. It is a matter of applying the relative factors in striking the balance that best achieves justice in the particular case before the Court. (*Bracklow*, supra par. 32).
5. The duty of a Court called upon to exercise discretion under s. 15.2(1) and s. 17(1) of the *Divorce Act* is to have regard to all of the factors in s. 15.2(4) and s. 17(4.1) in order to achieve the objective set out in s. 15.2(6).
6. Quantum of support does not always equal the amount of the need.

[11] The parties agree and I am of the view that on an interim application for spousal support the considerations are typically less in-depth than those at a final hearing. The focus should be on the parties' respective needs and ability to pay. As Justice Jollimore noted in *Legg* at para. 11:

My jurisdiction to award interim spousal support is found in section 15.2(2) of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3. In interim applications where spousal support is in issue, the focus is to ensure that the support order maintains a reasonable standard of living for both spouses and the means and needs of both spouses are relevant. Ms. Legg must establish an immediate need for support arising from the marriage breakdown. In an interim application there is less emphasis on the objectives of a support order: the interim nature of the proceeding may mean a court has little opportunity to examine these objectives fully. In *Mitchell*, 1993 CanLII 3442 (NS SC), 1993 CanLII 3442 (NS S.C.),

Justice Haliburton noted that his order was an interim one, and that the evidence before him, such as the circumstances of the parties, may be very different at the time of a final disposition of the issue.

Evidence Received

[12] Ms. Moore relied on her affidavit filed June 20, 2017, together with her supplemental affidavit filed August 14, 2017. She provided limited direct and re-direct evidence, with the majority of her time on the stand spent in cross-examination. Exhibit 1, a recent Duncan's Pub work schedule, was introduced during Ms. Moore's cross-examination. As well, the Court received Ms. Moore's Statement of Expenses, Property and Income, all filed on June 20, 2017.

[13] Ms. Moore called one of the owners of Duncan's Pub, Jeff Bembridge. During his cross-examination Exhibits 2, 3 and 4 were entered, consisting of further records from Duncan's Pub.

[14] Mr. Moore relied on his affidavit filed July 5, 2017. He gave limited direct evidence and was cross-examined.

[15] During Mr. Moore's cross-examination, Exhibit 5, Mr. Moore's 2016 Income Tax Return, was introduced. Mr. Moore's Statements of Property and Income filed May 30, 2017 were received by the Court, along with his Statement of Expenses, filed July 5, 2017.

[16] Mr. Moore called Tom Stronge, a former server at Duncan's Pub.

Positions of the Parties

Applicant

[17] Ms. Moore says that since separation she has been suffering from stress and anxiety. She adds that the parties interactions have been acrimonious. With reference to the *M.P.A.*, Ms. Moore says she has no other adequate provision for shelter. She says that she is not in a financial position to seek alternative housing. She asks for interim exclusive possession of the matrimonial home "...until the matter can be determined on the merits or the parties, through counsel, agree otherwise".

[18] With respect to spousal support, Ms. Moore submits that the Court should focus on the parties' respective needs and ability to pay. She says her income is

approximately \$40,000 per year but that it may be in jeopardy given her poor work performance of late, brought on by the stress of the separation.

[19] As for Mr. Moore's income, the Applicant says that his claimed amount of \$57,156 is understated. Ms. Moore points to his work truck and cell phone and says that these benefits should be included and grossed up, such that Mr. Moore's income is \$80,975.

[20] In addition, Ms. Moore says that Moore Automotive & Recreation Limited's financial statements show significant retained earnings and that his income should reflect one-third of the company's pre-tax income. In the result, she says that Mr. Moore's income should be imputed to be \$125,950.

[21] Ms. Moore asks for interim exclusive possession of the matrimonial home together with interim spousal support of \$3,500 per month.

Respondent

[22] Mr. Moore asserts that the Applicant's alleged stress and anxiety are overstated. He notes there is no doctor's report in evidence saying she must take time off work. The Respondent says that Ms. Moore earns significant tips in the order of \$500 per week at Duncan's Pub, such that her income is vastly understated.

[23] Mr. Moore notes that his \$57,200 income is based on a salary of \$1,100 per week. He argues the taxable benefit of his workplace cell phone and truck are not significant.

[24] Since separation Mr. Moore notes that he has requested that Ms. Moore advise whether she wishes to retain the matrimonial home and purchase his interest, or list the home for sale. In any event, he states that Ms. Moore has not made attempts to locate alternative accommodation. Mr. Moore submits that the Applicant's income is such that she has the financial means to obtain other adequate shelter.

[25] With respect to interim spousal support, Mr. Moore says there is no compensatory or non-compensatory basis for such an award. He argues that the parties' income over the past three years has been relatively equal. Mr. Moore says there is no basis for the argument that his company is "stockpiling money". He argues the cash shown on the Moore's Automotive & Recreation Limited

financial statements is for the most part due to an extended warranty maintenance program that involves clients pre-paying for maintenance.

[26] In all of the circumstances Mr. Moore asks that the Motion for interim exclusive possession of the matrimonial home and spousal support be dismissed with costs.

Review of the Evidence and Findings

[27] Ms. Moore's evidence is that her work performance has been deteriorating on account of stress and anxiety. This was backed up by Mr. Bembridge who gave recent examples of how she has forgot about important scheduled events at work. While there is no medical evidence of Ms. Moore needing to go off work, given the evidence of the Applicant and Mr. Bembridge, I have determined that it is most likely Ms. Moore's income in the weeks ahead will be compromised. In this regard, she clearly has not been working at her pre-separation level on account of stress and anxiety brought on by the separation.

[28] Although her employer has been most accommodating, given Mr. Bembridge's evidence, I cannot think that this accommodation will continue indefinitely in the face of potential ongoing sub-par work performance.

[29] Much of the time of the hearing was taken up with the topic of Ms. Moore's tips. I have no doubt that over the years she has somewhat under reported tips. I venture to say this is common in the industry. For example, Mr. Stronge allowed that he claimed about sixty percent of his tips. He also estimated he earned on average \$400 per week in tips. I hasten to point out that this apparent average dates back to his time at the Pub between 2012 and 2014. The current evidence of tips comes from Exhibit 4, the tip totals report for five days in early September, 2017. This shows daily overall tips from debit and Visa card transactions from a low of \$198.64 (Wednesday) to a high of \$298.42 (Friday). Mr. Bembridge estimated that these reports show approximately 85% of all tips, with the remainder coming from customers who pay by cash, which is not accounted for. This amount is nearly offset by the ten percent of tips given over to the kitchen staff. Further, the Duncan's Pub work schedule (Exhibit 1) demonstrates that three servers were working on these days. Accordingly, even if I accept the premise that the tips were equally split with Ms. Moore, she would only have received about one quarter of the amount on the days that she was in. Exhibit 1 shows that Ms. Moore was not in for any of these days. In fact, the last shift recorded for Ms.

Moore dates back to August 17, 2017. To my mind, this gives documentary credence to the *viva voce* evidence of both Ms. Moore and Mr. Bembridge to the effect that she has worked far less of late.

[30] In all of the circumstances, I am not so much fixated on deciphering the precise tip formula but rather, Ms. Moore's ongoing ability to remain working and her projected ongoing income. With this in mind and with scrutiny of her complete financial disclosure, I have no hesitation in fixing her overall income at what her counsel suggests; i.e., \$40,000 per annum.

[31] With respect to Mr. Moore, I have similarly scrutinized his financial disclosure and find it somewhat lacking. In fairness, we are still somewhat early in the process and I suspect expert assistance will ultimately be required to fathom the true picture. For present purposes, I have focused on his annual income from his tax returns which demonstrate a very favorable trend; i.e., \$36,788 in 2015, \$47,206 in 2016 and a projection of \$57,200 this year. On top of this we have the company truck and cell phone to factor in, along with the question surrounding what Applicant's counsel has characterized as the "stockpiling" of money at Moore Automotive & Recreation Limited. With respect to the latter, the company's financial statements show retained end of year earnings of \$196,419 in 2014, \$273,617 in 2015 and \$390,008 in 2016.

[32] Mr. Moore provided no affidavit evidence to counter the argument that he may indeed have some of the retained end of year earnings available to him. When cross-examined about these possible funds, Mr. Moore was asked about his counsel's explanation for this (at p. 8 of his brief):

With respect the company has not been stockpiling money over the years. The cash it shows on the financial statements is for the most part an extended warranty maintenance program that has been offered to clients at the time of sale and has been in existence since 2013. These extended warranty programs range in price from \$1,799 for extended warranty for 5 years to \$3,598 for warranty program and maintenance programs combined and has continually increased based on sales year over year since 2013. The extended warranty has allowed clients to prepay for recommended maintenance and enhances the manufactures warranty. The vast majority of the current cash is allocated to these programs and not available in the day to day operations of the business. These programs have been implemented to enhance and give value to a greater amount of clients to stimulate and increase our sales numbers which is evident.

[33] Mr. Moore was vague with his initial answer stating, “I go by the information my accountant has given me”. He seemed most unsure about the amounts and how they were generated and then said, “I believe it is retained earnings”.

[34] I would add that other areas of Mr. Moore’s cross-examination led me to conclude that he has fairly significant financial resources. For example, in late May he purchased an \$85,000 mobile home with financial assistance from his brother. He has been making monthly payments of \$900. Further, he is a one half contributor to the ongoing household expenses involving not just Ms. Scott but (every other week) her two children.

[35] Based on all of the oral evidence and written documentation, I am of the view that Mr. Moore’s alleged income of \$57,200 is vastly understated. Indeed, I see parallels between this situation and *Jenkins v. Jenkins*, 2012 NSSC 117 wherein Justice Forgeron noted at paras. 18-22:

[18] Section 15 of the *Divorce Act* provides the court with the authority to grant an interim order for spousal support. In so doing, I am directed to examine the means of the parties. Means includes, not only income earned, but also capital and income earning capacity. The Supreme Court of Canada confirmed this expansive definition in *Leskun v. Leskun* 2006 SCC 25 (CanLII) at para 29:

There is no support in the case law or in logic for the proposition that the Chambers judge was wrong to take into account the appellant's capital assets acquired after the marital break-up. In *Strang v. Strang*, 1992 CanLII 55 (SCC), [1992] 2 S.C.R. 112 (S.C.C.), the Court stated that the traditional understanding of the word "means" includes, "all pecuniary resources, capital assets, income from employment or earning capacity, and other sources from which the person receives gains or benefits" (p. 119). J. Payne and M. Payne elaborate as follows:

The word means includes all pecuniary resources, capital assets, income from employment or earning capacity, and any other source from which gains or benefits are received, together with, in certain circumstances, money that a person does not have in possession but that is available to such person. (Canadian Family Law (2001), at p. 195).

[19] Further, imputation of income is not restricted to child support cases, and indeed the same principles are at play when determining income for spousal support purposes: *Shaw v. Shaw* 2009 NSSC 353 (CanLII) at para 30, and *Poirier v. Poirier* 2010 ONSC 920 (CanLII) at para 85.

[20] Courts have grappled with the issue of income imputation as it relates to corporate holdings and self employed business people for many years. In making decisions, courts have underscored the marked distinction between the calculation of income for Revenue Canada purposes, and the calculation of income for support purposes re: *Wilcox v. Snow* 1999 NSCA 163 (CanLII) paras 22 - 24. For support purposes, courts have, and will, pierce the corporate veil in appropriate circumstances.

[21] Several themes have emerged from the case law as it relates to corporate holdings. First, courts will access the pre-tax corporate income for support purposes. In *Gosse v. Sorensen-Gosse* 2011 NLCA 58 (CanLII), the Newfoundland Court of Appeal reviewed appellate decisions before concluding that the trial judge erred in failing to consider the pre-tax corporate income of a company owned by one of the parents. As a result, the Court of Appeal imputed 85% of the pre-tax corporate income as income for child support purposes.

[22] Second, the onus of proof falls upon the director, officer, or shareholder to show that the pre-tax corporate income is not available for support purposes: *Gosse v. Sorensen-Goss, supra*, at para 102; *Hausmann v. Klukas* 2009 BCCA 32 (CanLII) at paras 51 - 61, with leave to appeal to the Supreme Court of Canada refused at 2009 SCCA 135. Evidence of legitimate business needs must be lead before a court can conclude that the corporation requires its pre-tax income as noted in *Kowalewich v. Kowalewich* 2001 BCCA 450 (CanLII), paras 58-60.

[36] I also refer to *Robaczewski v. Larson*, 2016 NSSC 318 and Justice Chiasson's comments at paras. 16-20:

[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, [1999] 1 S.C.R. 420 supra, at s. 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.

[37] I am of the view that Mr. Moore is able to pay spousal support. Having said this, I am not persuaded Mr. Moore's income should be set at nearly \$126,000, as suggested by the Applicant. For present purposes, given the evidence before me, I have decided it is appropriate to impute Mr. Moore's income at \$100,000 per annum.

[38] Having regard to the authorities and in consideration of all of the evidence I find that Ms. Moore has demonstrated a need for interim non-compensatory dependency-based support. This will address the disparity between the parties' needs and means. I have consulted the Spousal Support Advisory Guidelines which suggest a support range of \$1,500 per month to \$2,000 per month. I have accordingly set the amount at the mid-range of \$1,750 and Mr. Moore is to begin these payments on October 15, 2017, and mid-monthly thereafter.

[39] With respect to the request for interim possession of the matrimonial home, I am not persuaded that such an order is warranted. After all, the cross-examination of Ms. Moore demonstrated that she has taken no steps to explore alternative accommodation. While I accept her evidence that moving in with family members is not practical, Ms. Moore has not met her burden to show that other provision for shelter is not adequate. This is because she has done nothing to explore other arrangements, such as nearby potentially reasonably priced apartments. As Justice LeBlanc noted in *Smith v. Smith*, 2012 NSSC 432 at para. 18:

In this application, I am unable to find that there is an evidentiary basis to make an order of exclusive possession. I am not satisfied that alternative accommodations are not available. Mr. Smith maintained that he was prepared to pay the costs of Mrs. Smith's alternative accommodation, from which I conclude that he believes that some are available. Furthermore, I do not believe Mr. Smith made adequate attempts to locate such accommodations for himself, which in my mind, would be a prerequisite to any successful application for exclusive possession.

[emphasis added]

[40] In my view, the parties need to soon come together on the appropriate value of their home at 2240 Highway 204, Salem, Nova Scotia. Absent one buying the other out, the home (in which there appears to be considerable equity) should be placed on the market on a timely basis.

[41] In the result, I hereby dismiss the Motion for interim exclusive possession of the matrimonial home and allow the Motion for interim spousal support. I have set the amount at \$1,750 per month to begin in less than two weeks and to be paid by Mr. Moore to Ms. Moore mid-month on an ongoing basis. Given the mixed success on the application, I decline to award costs.

Chipman, J.