

2001 CarswellAlta 1882, 2001 ABCA 69, 15 R.F.L. (5th) 30, 277 A.R. 309, 242 W.A.C. 309

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Bulloch v. Bulloch

Andrew Bulloch (Appellant / Defendant) and Anastasia Bulloch (Respondent / Plaintiff)

Alberta Court of Appeal

McFadyen J.A., Ritter J. (ad hoc) and Wilkins J. (ad hoc)

Heard: February 21, 2001

Judgment: March 14, 2001

Docket: Calgary Appeal 00-19055

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Counsel: *D.P. Castle*, for Appellant / Defendant

C.P. Lee, for Respondent / Plaintiff

Subject: Family

Family law.

The Court:

INTRODUCTION

1 The issue before the Court is the question of whether an adjustment should be made in the spousal maintenance to be paid by the Appellant husband to the Respondent wife by virtue of the fact that the Respondent has obtained a one year contract of employment at a pay substantially larger than that anticipated at trial. There is also an issue as to whether what the Respondent is to receive is to be considered on the basis of one year from the date of commencement of payment, or over the two calendar years during which payment will be received. This is due to the fact that the contract of employment commenced on the 1st of August, 2000 and will conclude on the 31st of July, 2001. Therefore, the first five months of the contract are in the 2000 calendar year, and the second seven months of the contract are in the 2001 calendar year.

2 It is the decision of the Court that no adjustment is to be made to the Appellant's payments for August through December of 2000. However, the appeal is allowed to the extent that the requirement of payment of maintenance by the Appellant to the Respondent for the period commencing January 1 through July 31, 2001 is terminated. Further, the parties are directed to reassess the needs of the Respondent at the end of the contract of employment on July 31, 2001 in accordance with the directions which follow.

BACKGROUND

3 This matter came to trial before Rooke, J. of the Alberta Court of Queen's Bench in February of 2000. After a two-day trial, Judgment was issued by the trial Judge requiring the Appellant to pay to the Respondent spousal maintenance in the sum of \$2,250.00 per month. The trial Judge conducted a means-needs analysis and determined that the Respondent's needs totalled a net of \$3,400.00 per month. This included \$500.00 each month towards the acquisition of an R.R.S.P., which the trial Judge allotted to attempt to equalize the fact that the Appellant would receive a pension through his employment and the Respondent would not.

4 During the course of his Reasons, the trial Judge attempted to project the income for the Respondent for the years 2000 and 2001. He allotted the sum of \$5,000.00 income to the Respondent in the year 2000. He estimated her earnings in 2001 to be \$12,000.00.

5 At the time of the trial, the Respondent was attempting to carry on a janitorial business and the amounts allotted by the trial Judge indicate that he anticipated that this business would not be overly successful.

6 Commencing the 1st of August, 2000 the Respondent received a contract of employment with Statistics Canada, with an annual pay of \$45,000.00. Evidently the annual pay is substantially greater than the amounts allocated by the trial Judge.

7 On August 8, 2000 the Appellant brought Application before the trial Judge for a reduction in spousal maintenance. He did so, because it was his view that the Respondent's needs were then being met by her employment. Further, once his child maintenance payments were deducted, and if he continued paying maintenance to the Respondent, her total income during the one year of the contract would be substantially greater than the Appellant's total income.

8 In October, 2000 the trial Judge (and chambers Judge) issued Reasons dismissing the Application brought by the Appellant. It was his conclusion that when one considered the total income for the Respondent in the year 2000, being approximately \$3,000.00 from her janitorial business, pre-trial maintenance paid by the Appellant, and post-trial maintenance paid by the Appellant to the end of the year and 5 months of contract employment, the total sum received by the Respondent was generally equivalent to her needs.

9 The chambers Judge conducted a similar analysis with respect to the year 2001. He determined that it was unlikely that the Respondent would earn anything from her janitorial business, as she was now engaged with Statistics Canada, and further determined that her total income would consist of the earnings for the remaining seven months of the employment contract, plus whatever spousal maintenance she received from the Appellant. He again concluded that the Respondent's needs could only be met if the Appellant continued to make payment to the Respondent at the rate of \$2,250.00 per month.

10 It is from this decision that the Appellant appeals.

ANALYSIS

11 The test for the standard of review of spousal support orders was addressed by the Supreme Court of Canada in *Hickey v. Hickey*, [1999] 2 S.C.R. 518. This case stands for the following principles:

- (a) Significant deference must be given to trial Judges in relation to Support Orders;
- (b) The discretion involved in making a Support Order is best exercised by the Judge who heard the parties directly; and

(c) Appeal Courts should not overturn Support Orders unless the reasons disclose an error in principle, significant misapprehension of the evidence, or unless an award is clearly wrong.

12 In this matter the Appellant does not place into issue any of the findings of the trial Judge at the trial. The analysis of the trial Judge in determining the maintenance payable on a needs-means basis is not put into question. The amounts determined by the trial Judge with respect to each of the needs of the Respondent are not called into question.

13 The Respondent does say that the trial Judge erred when as a chambers Judge he applied the wrong principle to the consideration of a substantial increase in the income of the Respondent. The Appellant says that the trial Judge erred in two ways:

(1) He divided the income to be received between August 1, 2000 and July 31, 2001 into two calendar years; and

(2) He erred in his assessment, which resulted in the conclusion that the Respondent would receive no income in 2001 other than the balance of the \$45,000.00 contract payable to July 31, 2001 and the maintenance payable by the Appellant.

14 We are satisfied that the first argument of the Appellant is without merit. In our view it is not an error in principle for a chambers Judge to look at the totality of the income of a recipient spouse in a particular calendar year to determine what maintenance is properly payable in that calendar year. This is the case whether or not something different might be done with respect to payment of child maintenance under the *Federal Child Support Guidelines*. The *Guidelines* do not apply to spousal maintenance, nor should they. At best they provide the Appellant with argument by way of analogy. However, the analogy falls short of the mark as there are differences, notably taxation differences, between spousal support and child support. Secondly, the *Guidelines* were established by Parliament to provide certainty with respect to child support. Parliament has chosen not to do so with respect to spousal support. The trial Judge had to make a choice between two reasonable positions. Having regard to the facts of this case, he was entitled to look at the totality of the income for the 2000 taxation year. We note that for a period of time in 2000, the Respondent's income was insufficient to meet her needs, and the trial Judge properly had regard to this shortfall in considering maintenance payable in the balance of the year.

15 However, we do not come to the same conclusion with respect to his analysis of income for the calendar year 2001. The trial Judge based his analysis upon charts obtained from the Child Support Centre, an agency attached to the Court of Queen's Bench. These charts indicate that the needs of the Respondent in the calendar year 2001 will only be met by continued payment of support in the sum of \$2,250.00 throughout that year by the Appellant.

16 The trial Judge also concluded that the Appellant would not receive any additional income from her janitorial business and we cannot discern any error in that conclusion. The trial Judge, however, also concluded that the Respondent would not earn any additional income from August 1, 2001 through to the end of 2001. At the same time, one of the deductions the Respondent is subjected to is for Employment Insurance. We are satisfied that the Respondent will at least be receiving Employment Insurance for part of the period between August 1, 2001 and December 31, 2001. That income was not considered by the trial Judge.

17 Secondly, there is nothing to prevent the Respondent from renewing her contract with Statistics Canada. We are cognizant of the fact that the Respondent had a previous contract with Statistics Canada which was not

immediately renewed. That, however, does not mean that this contract will not be renewed. It is impossible to project what income the Respondent might enjoy from August 1 to December 31, 2001. We are, however, satisfied that it will be more than nil.

18 It is our conclusion that the better approach would have been to look at the time frame between January 1, 2001 and July 31, 2001 as being a discrete period during which the entirety of the Respondent's needs were well met by her employment. On August 1, 2001 the matter should be reassessed. The parties are urged to do that reassessment on their own. They now have the trial Judge's analysis as to the Respondent's needs and the Appellant's means. The level of maintenance payable by the Appellant to the Respondent after August 1, 2001 should accordingly be based on that analysis. We urge the parties to resolve the exact amount payable by consideration of the analysis themselves. However, if they are unable to do so, they should return to Queen's Bench Chambers for fixation of the amount payable after August 1, 2001.

CONCLUSION

19 The Appellant's appeal is allowed with respect to maintenance payable from January 1, 2001 through and including July 31, 2001. Maintenance shall not be payable for those months.

As the Appellant has been successful, the Appellant will be entitled to his costs both here and at the Court of Queen's Bench.

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