1997 CarswellAlta 448, 200 A.R. 198, 146 W.A.C. 198, 29 R.F.L. (4th) 34

Lauderdale v. Lauderdale

Julie Dianne Lauderdale, Petitioner/Plaintiff Respondent (Respondent) and William Mark Lauderdale, Respondent/Defendant Applicant (Appellant)

Alberta Court of Appeal

Côté, Russell and Berger JJ.A.

Judgment: May 13, 1997
Docket: Calgary Appeal 16366

Proceedings: reversing in part (1996), 21 R.F.L. (4th) 17 (Alta. Q.B.)

Counsel: *D. Vallance*, for petitioner/plaintiff respondent (respondent).

*D.P. **Castle*** and *J.M. Anquist*, for respondent/defendant applicant (appellant).

Subject: Family

Family Law --- Support — Spousal support under Divorce Act — Lump sum award — Factors to be considered — Economic disadvantage of marriage

Trial judge ordered lump sum spousal support and husband appealed — Difficulty of disentangling economic lives of spouses mitigating in favour of periodic support — Trial judge erred in principle by placing undue reliance on mechanism of discharging wife from equalization obligation — Lump sum award to be exception and not rule — Lump sum award set aside and question of quantum of periodic support remitted to trial judge.

The parties separated after 17 years of marriage. There were four children of the marriage who remained in the matrimonial home with the wife and her common law partner. The trial judge determined that the wife was economically disadvantaged in her future earning capacity by having stayed at home to raise the children and he awarded her lump sum spousal support. He referred to her probable remarriage as an important factor in making such an award and he also referred to the costs of her completing her post-secondary education.

The husband appealed.

Held: The appeal was allowed, the lump sum award set aside and the matter of the quantum of periodic support remitted to the trial judge for redetermination.

The trial judge's determination on the issue of spousal support evidenced an almost exclusive compensatory model approach. Although the courts recognized the disadvantaged position on divorce of the spouse who had

stayed at home to raise the children, nevertheless, lump sum awards of spousal support remained the exception rather than the rule. This was due to the difficulty of disentangling the economic lives of the divorcing spouses, which difficulty mitigated in favour of periodic sharing of the income stream of the employed spouse.

The trial judge had also erred in relying on the wife's probable remarriage as an important factor in awarding a lump sum, when this was only one of many factors to be considered. He also erred in principle in placing undue stress on discharging the wife from her equalization obligations and failing to balance the advantages and disadvantages to both spouses of decisions made during the marriage. Absent circumstances mitigating in favour of a "clean break," the possibility that periodic payments would not be made, or where specific need was established and could not otherwise be addressed, a lump sum award should not be made.

Accordingly, the appeal was to allowed, the lump sum award set aside and the question of the quantum of periodic spousal support remitted to the trial judge for determination.

Cases considered:

Elliot v. Elliot (1993), 48 R.F.L. (3d) 237, 15 O.R. (3d) 265, 106 D.L.R. (4th) 609, 65 O.A.C. 241 (Ont. C.A.) — referred to

Levesque v. Levesque, 20 Alta. L.R. (3d) 429, 4 R.F.L. (4th) 375, [1994] 8 W.W.R. 589, 155 A.R. 26, 73 W.A.C. 26, 116 D.L.R. (4th) 314 (Alta. C.A.) — referred to

Moge v. Moge, [1993] 1 W.W.R. 481, 99 D.L.R. (4th) 456, [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, 30 W.A.C. 161, 43 R.F.L. (3d) 345, 145 N.R. 1, [1993] R.D.F. 168 (headnote only) (S.C.C.) — considered

Robson v. Robson (1996), 20 R.F.L. (4th) 123, 178 A.R. 278, 110 W.A.C. 278 (Alta. C.A.) — referred to

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — considered

APPEAL from judgment awarding lump sum spousal support.

***Per curiam*:**

1 The Court is mindful of the standard of appellate review in matters of this kind: *Robson v. Robson* (1996), 20 R.F.L. (4th) 123 (Alta. C.A.), at p.126.

2 The reasons for judgment evidence an almost exclusive compensatory model approach to spousal support. The learned trial judge, in awarding a lump sum payment, put the following question (A.B. 569):

> What then would be an appropriate lump sum payment to achieve the objective of compensation stipulated by *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.) ..?

The learned trial judge first concluded that the Respondent had "an economic disadvantage in her future earning capacity which flowed directly from her decision, made with the concurrence of Dr. Lauderdale, to interrupt her

career and become a stay at home mother" (A.B. 566). He considered that the Respondent's decision to marry Dr. Trew "was an important factor in determining that the lump sum approach was appropriate in this case" (A.B. 567). The trial judge articulated that his purpose was to achieve a number of different objectives. He reasoned as follows:-

> I am able to compensate her for the child support inequity which I believe existed due to the tax burden she bore and I am able to compensate her for the very clear economic disadvantage which she would face in trying to provide for herself and to discharge her support obligation to her children on the breakup of her marriage. In essence, I am compensating Mrs. Lauderdale for the situation in which she found herself when the marriage terminated.

3 In *Moge v. Moge* (supra) McLachlin, J. at pp. 396-397 confirmed that the assessment of spousal support requires a consideration of all of the factors set out in the *Divorce Act*:

> The first thing the judge must consider is 'economic advantages or disadvantages arising from the marriage or its breakdown.' This heading brings in many of the considerations which my colleague discusses. It clearly permits the judge to compensate one spouse for sacrifices and contributions made during the marriage and benefits which the other spouse has received.
>
> The second factor which the judge must consider is the 'apportionment' of the 'financial consequence' of the care of children. This heading also raises compensatory considerations. If a spouse, either before or after separation, has or continues to incur financial disadvantage as a result of caring for a child of the marriage, he or she should be compensated.
>
> The third thing which the judge's order should do is grant relief from any economic hardship arising from the breakdown of the marriage. The focus here, it seems to me, is not on compensation for what the spouses have contributed to or gained from the marriage. The focus is rather post-marital need; ...
>
> Finally, the judge's order must 'in so far as practicable' promote the economic self-sufficiency of each former spouse within a reasonable period of time.

4 *Moge v. Moge (supra)* rejected the self-sufficiency model, otherwise referred to as a needs based model. Compensatory considerations received the support of the Court, but not to the exclusion of other legislative mandated considerations. The Supreme Court recognized that couples who choose to have one spouse remain at home and care for the children thereby place that spouse in a significantly disadvantaged position if the relationship ends in divorce. The Supreme Court also recognized the effect of becoming the custodial parent after divorce.

5 That having been said, lump sum awards, in our view, remain the exception rather than the rule. The difficulty of disentangling the economic lives of the divorcing spouses in this case militates in favour of periodic sharing of the income stream of the employed spouse. *Elliot v. Elliot* (1993), 48 R.F.L. (3d) 237 (Ont. C.A.). Re-marriage, relied upon by the trial judge as an "important factor" in adopting the lump sum approach is, in our respectful opinion, an erroneous consideration for rejection of a periodic support model. Re-marriage is not dispositive. It is but one of many factors to be considered.

6 The reasons for judgment also demonstrate that the trial judge was, in large part, motivated by a desire to

discharge the Respondent from her equalization obligation of $74,162.86 pursuant to the division of matrimonial property. We think that undue reliance upon this "mechanism" (to use the language of the trial judge) and the failure to balance the advantages and disadvantages to both spouses of decisions made during the marriage was, with respect, an error in principle. Moreover, in calculating the lump sum, the learned trial judge engaged in some considerable speculation about the future. He observed:

> Mrs. Lauderdale has only attended one year of University. That was several years ago and would only be of limited value to her today. She does have some music training but without further education it is of limited value. She really needs an opportunity to retrain herself which inevitably would involve full time attendance at an educational institution. This would involve day care costs, tuition and living expenses and could take at least three years if she chose to complete her post secondary education previously abandoned.

7 Of course, she may not make that choice. And there was cogent evidence that she had determined to postpone making that decision for some time. Therein, in our opinion, lies much of the difficulty in awarding a lump sum when complex economic issues present. Absent circumstances that would militate in favour of a "clean break", the possibility that periodic payments will not be made, or where there is a specific need established by the evidence that cannot otherwise be addressed, a lump sum should not be awarded. *Elliot v. Elliot (supra)* para. 105, 106.

8 For these reasons we would allow the appeal, set aside the lump sum award, and remit the question of quantum of periodic spousal support to the trial judge to be determined on the Record as it now stands supplemented only by further oral argument. The trial judge will consider whether such periodic spousal support will be temporally limited.

9 The Appellant also quarrelled with the trial judge's assessment of maintenance for the four children of the marriage. We have carefully reviewed his reasons in that regard mindful of this Court's decision in *Levesque v. Levesque* (1994), 4 R.F.L. (4th) 375 (Alta. C.A.). More particularly, we reject the Appellant's submission that the calculation of child support was made otherwise than in accordance with the evidence at trial. And we are not persuaded that the trial judge calculated child maintenance on the basis of inflated expenses disregarding the incremental nature of child support.

Appeal allowed.

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