



Noseworthy v McDonald, 2017 ABQB 439 (CanLII)

Date: 2017-08-22

File 4801 154729

number:

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Court of Queen's Bench of Alberta

Citation: Noseworthy v McDonald, 2017 ABQB 439

Date: 20170822
Docket: 4801 154729
Registry: Calgary

Between:

Mary Noseworthy

Respondent/Plaintiff

- and -

John Patrick McDonald

Applicant/Defendant

**Reasons for Decision
of the
Honourable Madam Justice C.L. Kenny**

[1] This is an application by Mr. McDonald (the Husband) for ongoing spousal support and enforcement of an arbitration award that Ms. Noseworthy (the Wife) pay the Husband's retroactive section 7 expenses (*Federal Child Support Guidelines*, SOR/97-175). The Wife has filed a cross application seeking that the Husband pay his proportionate share of section 7 expenses with respect to the children.

Background

[2] The parties married in July of 1994 in St. John's, Newfoundland and separated in Calgary, Alberta in October of 2012. They have four children: two boys currently ages 22 and 19, and twin girls, age 17. The parties lived the majority of their relationship in Newfoundland. They moved to Calgary in 2009. The Wife is 51 years of age and currently a pediatric respirologist at the Alberta Children's Hospital. The Husband is 51 years of age and a lawyer by profession. He was a lawyer with the Department of Justice for the Government of Newfoundland from 1994 to 2006. In 2006, he was appointed the High Sheriff of Newfoundland.

[3] The parties both worked full time through the majority of the marriage. They both cared for the children and supported their activities and academics. The parties hired a full-time nanny for eight years until all of the children were in full-time attendance at school.

[4] When the parties moved to Calgary in 2009, it was agreed that the Husband would stay home for a brief period of time in order to get the children settled. He was called to the Alberta Bar in 2010. The lawyer who presented the Husband to the Bar offered him employment at that time. The Wife only found out several months later that the Husband turned down the job.

[5] The Husband did not look for any employment from 2009 to 2012 when the parties separated. The Wife was the sole financial supporter of the family during this period of time. There is no evidence that the Husband sought any employment from 2012 to 2014. In 2014, the Husband took his certification as a realtor and started working as such in June of 2014. He says that the real estate market plummeted at that time and after expenses and sharing of his commissions, he did not earn any income at all. He left this employment and decided to seek something else.

[6] The Husband indicates that he has been diagnosed with depression and anxiety and also has suffered from an addiction to crack cocaine. He says, however, that he has not done any crack cocaine since 2012 except for a one night relapse in March of 2016. He also says that he has been diagnosed with Cluster C Dependent Personality Disorder which is a lifelong disorder. He says that as a result of these various diagnoses, his ability to find employment and become self-sufficient has been impacted. He has provided no evidence that this is the case.

[7] The Wife had the full-time care of all four children from the date of separation until September of 2014. At that time, the two youngest daughters started to divide their time equally between their parents, one week on and one week off. The two older boys continued to, and still do to this day, reside full time with the Wife. The older boy resides with the Wife and is in full-time studies at the University of Calgary. The younger boy is now in full-time attendance at the University of Victoria and resides with his mother in Calgary when he is not in school. The Wife has paid almost all section 7 expenses for the children since 2012 which were estimated to

be about \$52,000 per year in 2014 and which the wife estimates having been over \$80,000 per year since 2015. The Wife expects the expenses to increase as the younger daughters play competitive hockey at a high level and are entering their last year of high school before university. They hope to get scholarships to university through their accomplishments in hockey.

[8] The parties attended arbitration with Ms. Kachur Q.C. (the Arbitrator) in 2014 and 2016. In 2014, the matrimonial property was divided in accordance with the arbitration award. The Arbitrator also found, as it relates to spousal support:

- a) The Wife's income to be \$310,000 per annum,
- b) The Husband's income to be \$0 but expected to rise in the near future to \$110,000 as a realtor,
- c) That the Wife was paying all of the parties' expenses including all of the section 7 expenses for the children in the amount of \$52,000 per year,
- d) That the Husband was working on obtaining a residence suitable to care part-time for two of the children,
- e) The Spousal Support Advisory Guidelines,
- f) That the Husband was receiving a substantial settlement payment with respect to the matrimonial property, and
- g) That the parties wanted some certainty in their financial planning given the Husband's fluctuating income upon re-entering the work force.

[9] The Arbitrator awarded spousal support in the sum of \$2,200 per month, from July 1, 2014 to July 1, 2016. At that time there would be a review of spousal support including whether there was any entitlement to continued spousal support. The review was necessary, according to the Arbitrator, as the parties' situation was uncertain going forward including the substantive change in the Husband's income in the next two years, the changing section 7 expenses including that the oldest child might no longer be a child of the marriage, whether there would be a fully operating week on, week off care arrangement with respect to the two youngest children, and finally, the Husband's housing arrangements.

[10] The 2014 arbitration award also provided that child support would be reviewed in approximately June of 2015, retroactive to July 1, 2014 once the parties were able to determine 2014 incomes and anticipated 2015 incomes. The Husband had been paying no child support since separation. The parties attended arbitration again in January of 2016 with a consent agreement. It included a retroactive child support award on a set-off basis since the Husband had had the two youngest children with him half time since September of 2014. The agreement deemed his income to be \$50,000 per year and the Wife's income to be \$310,000 per year. It provided that the Wife would pay all of the children's section 7 expenses and that the Wife would pay to the Husband on a go forward basis, once the arrears had been paid, the sum of \$2000 per month for the support of the two youngest children who resided with him half time.

[11] This matter now comes before this court as the Husband is seeking indefinite continued spousal support in accordance with the Spousal Support Advisory Guidelines. He also seeks contribution to certain section 7 expenses he says he incurred.

Discussion

Section 7 expenses incurred by the husband.

[12] The Husband claims a contribution to section 7 expenses incurred by him in 2014. These are denied as the arbitration award signed January 19, 2016 indicates that upon the arrears being paid there is no outstanding section 7 support owed by one party to the other up to and including December 31, 2015.

[13] The Husband then claims three section 7 expenses for 2016. These include \$790 for Pursuit of Excellence registration for the two youngest girls, as well as reimbursement for two hotel charges for himself. There is no indication the hotel charges have anything to do with expenses for the children.

[14] In accordance with the arbitration award of 2016, the Wife is to pay all section 7 expenses. She shall therefore reimburse the Husband the sum of \$790 for the expense claimed above.

Spousal Support

The Law

[15] The *Divorce Act*, RSC 1985, c 1 (2nd Supp) section 15.2 deals with spousal support orders. Subsections (4) and (6) deal with the factors and objectives of a spousal support order. The court must consider the means, needs, conditions and other circumstances of both parties. In particular, the court must consider the length of the marriage, the functions performed by each party, orders regarding support, the economic advantages or disadvantages of the marriage or its breakdown, the apportionment of costs related to the children, relief of economic hardship and the promotion of self-sufficiency.

[16] The Husband argues that the length of the marriage results in a presumption that his standard of living be equalized with that of his Wife (*Moge v Moge*, 1992 CanLII 25 (SCC), [1992] 3 SCR 813). That is not what the case stands for. It is rather a consideration of the economic disadvantages or advantages flowing from the role adopted by the spouse in the marriage and its impact on marriage dissolution. That is why the various factors set out in the legislation need to be considered.

[17] In this case, both parties were professionals and worked full time throughout the marriage. They employed professional child care help. It is acknowledged that when the parties moved to Alberta, the Husband had to leave his position in Newfoundland first as a lawyer and latterly as a High Sheriff. It was agreed that the Husband would stay at home for a short period of time to help the children get settled. No time limit was mentioned but surely a year would be more than sufficient given that the children were all in full-time attendance at school. The Husband was admitted to the Bar in Alberta in 2010 and offered a job at that time which he turned down. He would have been 44 years of age at that time.

[18] The parties separated in 2012. The Wife indicates the separation was because of the Husband's illicit drug use, which he admits, as well as the tremendous debt which he placed the family in, allegedly for the same reason. After the separation, the Husband says that he was depressed and anxious and therefore not able to become self-sufficient. There is no evidence of this. Although the wife suspects that the drug use continued, the Husband denies that and says other than one night, he has not touched cocaine since 2012.

[19] There is no evidence that the Husband was medically unable to obtain and hold employment; it appears he simply was not interested in working. He did not have any child care responsibilities. All four children lived full time with the Wife. She was working full time and paying all expenses for the children. She was paying all of the expenses associated with their property as well as all of their debts.

[20] Finally in 2014, the Husband decided he wanted to be a realtor. He became certified and worked for a short period of time as a realtor but said that he could not make any money at it as the economy had deteriorated right about the same time. He eventually quit. During this period of time, the Wife was paying the Husband spousal support, first by interim court order and then later by virtue of the arbitration award. She also paid child support once the two youngest children went to live with the Husband half time.

[21] There is then no evidence of any attempts to find employment again until a couple of months before the review period for the spousal support award. The Husband has submitted positions that he has applied for. None of them are law or real estate related which is his training, and it appears that he has applied for roughly one position a month from March of 2016 until recently.

[22] The day before this application was argued, the Husband obtained an offer of employment as an insolvency administration specialist paying \$58,000 per annum. It was not referred to in his affidavit material in which he indicated that he had now decided he wanted to be a social worker and had therefore applied, a few months ago, to be accepted into a program which would take two years of study.

[23] In 2014, the Arbitrator found that the Husband was entitled to spousal support firstly on a compensatory basis, particularly because of the move to Calgary in 2009 which required that he leave his position in Newfoundland, and secondly on a non-compensatory basis because he had no job and could not support himself. In my view, the Arbitrator in 2014 was extremely accommodating and generous to the Husband. There is no question that in 2009, the Husband was disadvantaged by having to give up his position to move to Calgary. It is expected that he would suffer a disadvantage for which he would be entitled to compensation until he could get back into the workforce in Calgary. That move happened in 2009. There is no evidence of any reason the Husband could not have been employed within about a year after that time, once the children were settled. In 2014, it had been five years since the move. Any economic disadvantage from the move should have been easily dealt with long before that time. In any event, the Arbitrator gave the Husband a further two years of spousal support expecting him to be fully employed as a realtor by the end of that period. Not only did that not happen, the Husband eventually quit that position and did nothing of note until just before the expiration of the spousal support at which point he started to apply for a few positions, none related to law or real estate, the two areas he was qualified in.

[24] The Husband was not economically disadvantaged by the marriage and its breakdown other than for a short period of time after the move. He worked throughout the marriage full time as did the Wife until the move. After the move, he settled the children into a new city. Thereafter, the Husband remained unemployed except for a brief stint as a realtor in 2014. The Wife bore all of the financial obligations of the family.

[25] After the separation, the Wife suffered the disadvantage. She was left with extensive debt from the Husband's activities before the marriage breakdown. She had the full child care

responsibilities for two years until September of 2014 when the two youngest children went to live with the Husband half time. She bore all of the financial expenses for herself, the four children and the Husband. The expenses for the children continue to increase given post-secondary education and the elite level hockey played by the 17 year old twins. The Husband contributes nothing to these expenses.

[26] Counsel for the Wife refers to several decisions which support the proposition that the situation the Husband finds himself in has nothing to do with the marriage or its breakdown, but rather is as a result of his own lack of initiative or choices that he makes (*Adams v Adams*, 2011 ABQB 306 (CanLII); *Tomlinson v Tomlinson*, 2012 ABQB 509 (CanLII); *Pannu v Bamber*, 2017 ABQB 407 (CanLII)). The facts in *Pannu* are very similar to the facts in this case. The lack of initiative by a very well educated individual, with no evidence of a disability which would impact his ability to become self-sufficient, does not entitle one to continued spousal support. The financial support by the Wife from 2009 to 2012 when the parties separated combined with a further three years of spousal support has more than made up for any economic disadvantage suffered by the Husband because of the move to Calgary. This is especially so when the Wife had the full-time care of all four children for two years after the separation and has continued to have the full-time care of two of the children in university and half-time care of the younger two in their last year of high school.

[27] I find the Husband is not entitled to any further spousal support effective July 1, 2016.

[28] Although it is not necessary given the decision above, counsel for the Wife points out that under the Spousal Support Advisory Guidelines, when the incomes of the parties are factored in, along with the care arrangements for the children and the section 7 expenses paid by the Wife, there would be no spousal support paid by the Wife to the Husband in any event under the Guidelines. Child support takes priority over spousal support even if entitlement to spousal support was found to continue.

Cross Application by the Wife for proportionate sharing of Section 7 Expenses

[29] The Wife claims that the Husband has been cashing in his RRSPs to live on in addition to the spousal support the Wife has been paying and says that should all be included as income for the purpose of calculating proportionate sharing of section 7 expenses. That would require a variation to an arbitration award which was in fact on consent. The 2016 arbitration award found that the Wife would pay all section 7 expenses for the children on a go forward basis. This award was based on the Husband having an income close to what he has just been offered. While there may be cases in which the cashing in of RRSPs could be considered as income for the purposes of section 7, I am not prepared to make that finding in this case on the current facts. There is no basis to interfere with the arbitration award. The cross application is denied.

[30]

Heard on the 06th day of July, 2017.

Dated at the City of Calgary, Alberta this 22nd day of August, 2017.

C.L. Kenny
J.C.Q.B.A.

Appearances:

Diann P. Castle
for the Applicant/Defendant

Louise P. Campbell Q.C.
for the Respondent/Plaintiff

By **lexum** for the law societies members of the  Federation of Law Societies of
Canada