

Barrett v. Barrett

Bernard Barrett, Petitioner and Vera Barrett, Respondent

Newfoundland Unified Family Court

Wells J.

Judgment: January 26, 1988

Docket: No. 83/1491

Counsel: *Mr. Randolph J. Piercy* , Counsel for the Petitioner.

David C. Day, Q.C. , Counsel for the Respondent.

Wells J.:

1 This is an application by Bernard Barrett for a variation to reduce the amount of monthly maintenance payable to his former wife.

2 The parties were divorced on October 14th, 1983, following which on December 2nd, 1983 the petitioner was ordered by Madam Justice Cameron to pay maintenance to the respondent in the amount of \$575.00 per month. That amount was later increased by the Court of Appeal to \$700.00.

3 Counsel has argued for a variation under Section 17 of The Divorce Act, on the ground that there has been a change in the condition, means, needs or other circumstances of Mr. Barrett since the making of the support order.

4 Section 17 (7) subsections (a) and (c) are in my view particularly relevant:

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage.

5 Mifflin, C.J.N. in his oral judgement said when increasing the maintenance to \$700.00 per month:

We make the order realizing fully that there would have to be an application for variation of maintenance by one party or the other following disposition of the appeal in relation to matrimonial property.

6 Mr. Barrett sought a variation in due course, however after the hearing and before judgment could be given, fire destroyed both the record of the evidence and the Court file, thereby

occasioning a considerable delay and ultimately a new application for variation. Leave has been given to withdraw the previous application and to proceed forthwith on the present one.

7 The major change in the applicant's circumstances has come about because of his serious illness, and as well the operation of The Matrimonial Property Act. Mr. Barrett is 59 years old and has suffered from diabetes for some years. In addition to that, he is somewhat deaf. At the beginning of 1987 his condition worsened rapidly and seriously, with the result that in 1987 he spent a considerable time in hospital and was able to work for a total of six weeks only, at the end of the year. His state of health permitted him to resume full time employment, but I find that his health is precarious, and that it is causing him serious concern about his ability to work and support himself in the future.

8 Mr. Barrett has been a machinist at the C.N. Dockyard for twenty-nine years, however since his return to work he has been moved to a less strenuous post because he no longer has the physical capacity to function as an all round dockyard machinist. He is now a tool room attendant, though fortunately his rate of pay has not been affected. His job, should his state of health permit him to keep it, is a permanent one and will allow him to retire on pension at age 65.

9 His rate of pay is \$14.49 per hour, so that if he works 40 hours per week for 48 weeks, that is if his health allows and work is available, it is possible for him to earn a gross yearly income of about \$27,000.00. I am satisfied that his health is such that it is likely that he will lose time by reason of illness, so that I expect his earnings will be in fact considerably less than the maximum possible.

10 When working a full two weeks in December, 1987, his gross pay as shown by his pay stub was \$836.64, and his deductions \$294.91 including a savings component of \$20.00. If he worked a full month on that basis, his net income, depending on the number of working days, would be of the order of \$1083.46 as indicated by the record for the two week pay period from December 13th to 26th.

11 I find that \$836.64 represents 58 hours only, which is lower than the 80 hours which I would have expected him to work. No explanation of this discrepancy was given, as the applicant does not appear to fully understand financial matters and pay calculations. It is on the probability of his working more than 58 hours, but less than 80 hours in the normal two week period, that I have concluded that his gross yearly income is likely to be of the order of \$27,000.00 per year or somewhat less. That, if correct, will mean after deductions, a net of about \$18,000.00 or \$19,000.00 per year or \$1500.00 to \$1600.00 per month. I think it very unlikely that he will earn more than that, because he receives no overtime, and from time to time there will be lost time as a result of factors which are beyond his control.

12 Since the order of Madam Justice Cameron in 1983 his circumstances have changed in the following ways:

- (a) he has been seriously ill during the past year,
- (b) his total income in 1987 was reduced to approximately 37 weeks of benefits,

(insurance and U.I.C.) at \$243.00 per week plus 6 weeks at normal wages,

(c) his prospects for good health have seriously diminished,

(d) his living expenses have increased.

13 On the matter of living expenses he was at the time of the original order living in an 18 foot travel trailer parked on the property of a service station, without having the benefit of such basic amenities as hot water. His rent at that time was \$180.00 per month. He has wisely rented a modest apartment for which he pays \$280.00 per month, an increase of \$1200.00 per year.

14 Since his illness his daily cost of necessary medication (insulin) is \$4.00, for a yearly total of \$1460.00, of which his health insurance pays 80% and he himself 20%, which is \$24.33 monthly, for a yearly total of \$292.00.

15 For 8 weeks of 1987 he had no income, and for 37 weeks his average weekly income from sickness insurance and U.I.C. was \$243.00, a portion of which was attached for arrears of maintenance. These events caused him severe financial setbacks from which it will take some time to recover. During 1987 he remained obligated to pay maintenance of \$700.00 per month so that the maintenance went into arrears. In my opinion his income in 1987 was such that he could not pay the maintenance and live himself. In fact he only paid the sums which were attached from his health insurance entitlement and his bank account, namely \$1900.00, so that he remains in arrears.

16 On the evidence of the petitioner, which is uncontradicted, I am satisfied that a material change has occurred in his circumstances, to a degree which entitles him to a variation of maintenance.

17 In an effort to balance the equities in this case, and to achieve a proper variation, I am considering also the respective positions of the parties vis a vis the division of assets arising out of the operation of The Matrimonial Property Act.

18 The major matrimonial assets were, a unencumbered home with an appraised value of \$80,000.00, Mr. Barrett's C.N. pension which was worth approximately \$40,000.00, and the contents of the home.

19 Mr. Barrett gave his former wife the entire contents of the home. The other assets were divided as follows.

20 Mrs. Barrett purchased his one half interest in the house for \$40,000.00, and he purchased from her her one half interest in his pension entitlement at C.N. for \$20,000.00. To achieve that net result he conveyed his interest in the house to Mrs. Barrett for \$20,000.00. The effect of these transactions was that Mrs. Barrett received capital in the form of equity in the house to the total value of \$60,000.00. Mr. Barrett received a total of \$20,000.00 in cash from her, and retained the right to his full pension at age 65. Mrs. Barrett received the proceeds of her entitlement forthwith, while Mr. Barrett will not receive his pension for a further six years.

21 Using 8% as a reasonable rate of return on the value of the assets each received in 1984, Mrs. Barrett could if she chose, receive a yearly income of \$4800.00 from her asset, though in fact she has chosen to receive the benefit by way of living accommodation which she shares with a son.

22 Mr. Barrett could earn an interest income of \$1600.00 per year should he chose to do so. In fact Mr. Barrett removed his \$20,000.00 from the bank in 1987 because some \$1400.00 of it was attached while he was ill and unable to pay maintenance. His expressed intention is to preserve as much as he can of his remaining capital as a nest egg against an uncertain future.

23 The uncontradicted evidence is that Mrs. Barrett will be 64 years old on February 29th, 1988, and lives in the former matrimonial home with her son who is an adult. She is apparently in good health. For a number of years prior to the divorce in 1983, she had worked part time for the Alcohol and Drug Foundation, however since the divorce she has not worked, although in Mr. Barrett's opinion she could have done so.

24 Taking into account the circumstances of both parties as indicated by the evidence, I find their respective financial positions to be as follows:

(a) Mr. Barrett has a net monthly income of \$1500.00 to 1600.00, with expenses of approximately \$1200.00 to \$1300.00. He could have an investment income of \$124.00 per month. His assets are a 1984 Chevrolet and approximately \$2,000.00 worth of furniture. He has the prospect of a CN pension, a small RRSP and will have his old age pension in six years.

(b) Mrs. Barrett has the equivalent of \$400.00 per month (taken in the form of living accommodations), with a home and contents in which she has an equity of at least \$60,000.00 and perhaps more. She has had monthly maintenance of \$700.00 since 1984, and has the prospect of an old age pension in about 13 months.

25 Whether Mrs. Barrett has earned any money from work, or providing rental accommodations during the past four years I do not know. I do however believe that it has been open to her, and remains open to her, to contribute to her own support to some degree.

26 As of March 1st, 1989 Mrs. Barrett will receive the old age pension. I take judicial notice of the fact that the old age pension in Canada without the supplement is \$310.66 per month, and with the maximum supplement can be as much as \$679.91.

27 Taking into consideration all of the above facts, I believe it equitable to vary the monthly maintenance downward from \$700.00 per month to \$475.00 per month, from January 1st, 1988 until February 28th, 1989 after which the monthly maintenance will be reduced to \$250.00.

28 There will be no order as to costs.

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