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Clarke v. Clarke

Newfoundland Unified Family Court

Noonan U.F.C.J.

Judgment: July 20, 1988

Clarke v. Clarke

Judy Elizabeth Clarke, Petitioner v. Thomas Alexander Gerard Clarke, Defendant

Newfoundland Unified Family Court

Noonan U.F.C.J.

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Docket: Doc. 1986 Court No. 1002, Divorce Registry No. 86/2529

Counsel: Thomas Alexander Gerard Clarke, the Applicant represents himself.

David C. Day, Q.C. represents the Respondent.

Noonan, J.:

1 This is an application for variation of a support order which required Mr. Clarke to contribute the sum of \$1,200.00 per month for the support of Mrs. Clarke and the two children of the marriage.

Background

2 Mr. and Mrs. Clarke married on April 25, 1980. There are two children: Lee Thomas born July 12, 1981 and Ashley Virginia born November 1, 1982. They separated in December, 1984 and entered into a comprehensive separation agreement in 1985. A Decree Nisi issued on July 21, 1986 and by decision filed December 4, 1986, Mr. Justice Steele resolved the matters of corollary relief. He ordered that custody of the children remain with Mrs. Clarke with reasonable access to Mr. Clarke in accordance with their separation agreement. He also ordered that Mr. Clarke contribute the sum of \$1,200.00 per month for the support of Mrs. Clarke and the two children. The support order was different from the amount agreed on in the separation agreement. In the agreement the sum of \$1,300.00 was to be paid each month. The sum was not specifically allocated but Mrs. Clarke said she agreed on \$700.00 per month as appropriate for the children.

3 Mr. Clarke applies for a variation of Mr. Justice Steele's Order. He asks that I vary the order to \$400.00 per month for the children's support and he asserts that he no longer should be

obliged to contribute to Mrs. Clarke's support. His position is that he believes Mrs. Clarke is now self-sufficient and he says her income position has improved. Mr. Clarke says he is no longer able to continue to work 80 - 100 hours per week to gain sufficient income to enable him to meet his obligation under the support order.

4 Mr. Clarke's financial position is essentially the same as it was in December 1986. He continues to work as a firefighter and he runs messenger service during his time off.

5 Mrs. Clarke remained at home with the children during the marriage and following separation. She recently concluded an on-the-job training program with Atlantic Micrographic Services. She was paid \$510.00 every two weeks during the training period which began in July, 1987. At the time the hearing concluded she had been employed on a full-time temporary basis with Atlantic Micrographic Services. Her job security was uncertain. She was earning \$5.00 per hour for a 37 1/2 hour week. In December, 1987 her elderly parents came to live with her and the children in the matrimonial home which she now owns as a result of a compromise of the matrimonial property issues. They pay one-half the mortgage, heat, light and telephone a contribution valued at approximately \$486.00 per month. As well, Mrs. Clarke anticipated that her parents would assist with baby-sitting, thereby enabling her to reduce her child care cost of \$280.00 per month. There are, of course, costs to Mrs. Clarke associated with her parents' living with her. Mrs. Clarke's position is that she is prepared to contribute to the children's support once she has a permanent job. At that point she says she will be prepared to support herself without assistance from her former husband.

Legal Issues

6 This application is governed by *section 17* of the *Divorce Act, 1985*. The following subsections are relevant:

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses;

(3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

(4) Before the court makes a variation order in respect of a support order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of either former spouse or of any child of the marriage for whom support is or was sought occurring since the making of the support order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration that change.

(7) A variation order varying a support order that provides for the support of a former spouse should

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

(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the former spouses pursuant to subsection (8);

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

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

(8) A variation order varying a support order that provides for the support of a child of the marriage should

(a) recognize that the former spouses have a joint financial obligation to maintain the child; and

(b) apportion that obligation between the former spouses according to their relative abilities to contribute to the performance of the obligation.

7 I believe it is also appropriate to repeat the clause in the separation agreement which deals with the issue of support.

11. The Husband shall pay to the Wife, for the care, support, maintenance and education of the said wife and children of the marriage the sum of Thirteen Hundred Dollars (\$1,300.00) per month, and the parties agree to review the amount of maintenance on each anniversary of the agreement, and if the parties fail to come to an agreement for the following year, either party may take appropriate court action. The Husband also agrees to keep in good repair, at his expense, the matrimonial home and the Wife's vehicle, more fully described below.

8 The law relating to spousal support has recently been reviewed by the Supreme Court of Canada in *Re Pelech and Pelech* (1987) 7 R.F.L. (3d) 225, *Richardson v. Richardson* (1987), 7 R.F.L. (3d) 304 and *Caron v. Caron* (1987) 7 R.F.L. (3d) 274. In each of these cases the court was dealing with settlement agreements. The Court's position is stated in the *Richardson* case by Wilson J. with whom Dickson C.J.C., McIntyre, Lamer and LeDain concurred at p. 310

In approaching this case the courts should have regard to the principles enunciated in Pelech v. Pelech ... that a court should vary a settlement agreement only where there has

been a radical change in the circumstances of the former spouse and that change is the result of a pattern of economic dependency created by the marriage relationship.

9 I believe this case can be distinguished from the trilogy cases. It was clearly the intention of Mr. and Mrs. Clarke that the issue of maintenance was to be regularly reviewed. From that perspective the separation agreement was not to be a final settlement of all issues between them. For that reason it is not necessary for Mr. Clarke to establish a "radical" change in circumstances.

10 *Pelech, Caron and Richardson* dealt with support applications under the *Divorce Act, 1968* where there were existing settlement agreements. I believe the reasoning in those cases can be extended to applications under the *Divorce Act, 1985* and to the question of support generally where there is no prior final agreement on support. A court must determine what is fair and reasonable having regard to all the circumstances of the parties, including their means and needs. *Madam Justice Wilson says at p. 254 of Pelech:*

The courts are required to analyze the pattern of financial interdependence generated by each particular relationship and devise a support order that minimizes as far as possible the economic consequences of the relationship's breakdown. In this sense, each case is sui generis as declared by this court in Messier. However, the order made must meet a uniform standard of fairness and reasonableness. As Mannin J.A. (as he then was) stated in Katz v. Katz (1983), 33 R.F.L. (2d) 412 at 417 (Man. C.A.), "Fairness ... is the essential consideration".

11 Mr. Clarke based his application on the assertion that there has been a material change in Mrs. Clarke's circumstances since the original order was made in December 1986. I agree. Mrs. Clarke has been able to obtain a marketable skill through her initiative and hard work. In my opinion, she has transcended any economic dependency she may have had because of the marital relationship. She is employed, although not permanently. She has an improved financial situation as a result of the matrimonial property settlement and because she has the assistance of her parents. In my opinion she has recovered from any disadvantage which may have resulted to her because of the marriage breakdown. I see her as self-sufficient. I believe she no longer needs the support of Mr. Clarke to maintain herself and, in fairness, I believe he should be relieved of that obligation.

12 Mr. Clarke continues, with Mrs. Clarke, to have a joint responsibility to provide for the children's support. At the time the separation agreement was entered into Mrs. Clarke says that they intended to allocate \$700.00 of the \$1,300.00 for the support of the children. Mrs. Clarke is unable in her present circumstances to contribute significantly to the children's support.

13 In *Menage v. Hedges (1987) 8 R.F.L. (3d) 225 at p. 226 (Ont. U.F.C.) Fleury U.F.C.J.* offers a list of factors which he finds helpful in determining the appropriate amount a non-custodial parent should contribute to children's support. I have considered those principles in reaching my conclusion. The factors are:

(a) *The responsibility for providing child support is shared by both parents in*

accordance with their ability to pay;

(b) Any amount ordered to be paid by way of support will be tax deductible in the hands of the payer and taxable in the hands of the spouse having custody of the child;

(c) In assessing the capacity of both parents to provide financial assistance, all of their income producing assets should be considered including those assets acquired as a result of an equalization order;

(d) It is frequently difficult to assess each and every expense generated by a child and an assessment of the need must take into account certain generalities;

(e) The spouse who has custody of the children provides non-financial assistance to the children which can be considered when assessing the mutuality of the obligation of support;

(f) The amount of support should be fixed having regard to present circumstances and may be varied subsequently in the event of a change in the financial circumstances of either parent.

14 Having reviewed the financial circumstances of the parties in light of the children's needs I conclude that it is fair and reasonable in all the circumstances that Mr. Clarke contribute the sum of \$350.00 per month for the support of Lee Thomas and \$350.00 per month for the support of Ashley Virginia.

15 In summary it is ordered:

1. The application for variation of corollary relief is granted.

2. Paragraph (3) of the order of Mr. Justice Steele dated December 4, 1986, as amended, is deleted and the following is substituted:

Mr. Clarke shall contribute through the Unified Family Court the sum of \$350.00 per month for the support of each of the children of the marriage on or before the 1st. day of each month commencing August 1, 1988.

3. Mr. Clarke shall deposit with the Unified Family Court twelve post-dated cheques on or before the 1st. day of August of each year commencing August 1, 1988 to cover support payments for the ensuing twelve month period.

4. There is no order for costs.

Order accordingly.

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