Case Name:
Jessop v. Wright

Between
Richard Jessop, Applicant (Appellant), and
Shelley Wright, Respondent (Respondent)

[2008] O.J. No. 3849

2008 ONCA 673

56 R.F.L. (6th) 29

2008 CarswellOnt 5785

169 A.C.W.S. (3d) 1102

Docket: C48551

Ontario Court of Appeal
Toronto, Ontario

S.E. Lang, P.S. Rouleau and D. Watt JJ.A.

Heard: September 29, 2008.
Judgment: October 6, 2008.

(18 paras.)

Family law -- Maintenance and support -- Child support -- Variation or termination of obligation -- Spousal support -- Considerations -- Effect of income or potential income of claimant -- Appeal by the husband from a final order awarding the respondent retrospective and prospective child and spousal support as well as costs -- Appeal allowed in part -- Motion judge erred in failing to provide any reason why spousal support should be $2,000 monthly for the respondent in both years when she earned no income and in years when she earned $28,000 to $37,000 -- Spousal support was varied during the period when the respondent was earning income to $1,700 monthly.

Appeal by the husband from a final order awarding the respondent retrospective and prospective child and spousal support as well as costs. The appellant argued that the motion

judge erred in determining the amount of support by failing to take into account the appellant's allegedly higher rates of income tax in the United States, where the appellant was currently employed. The appellant further argued that the motion judge erred in failing to impute income to the respondent. The appellant also challenged the amount of spousal support awarded from May 2005.

HELD: Appeal allowed in part. There was no evidence before the motion judge regarding what income tax the appellant paid in the United States and what he would have paid in Canada. Accordingly, there was no basis for that ground of appeal. There was no basis to interfere with the motion judge's decision to order support retrospective to May 2005. However, the motion judge awarded $2,000 monthly without explaining how he arrived at that amount or specifying the earnings on which it was based. Further, in arriving at the appropriate amount of support, the motion judge did not apply the Spousal Support Advisory Guidelines to the incomes that the respondent was occasionally earning. The motion judge erred in failing to provide any reason why spousal support should be $2,000 monthly for the respondent in both years when she earned no income and in years when she earned $28,000 to $37,000. Accordingly, spousal support was varied during the period when the respondent was earning income to $1,700 monthly.

Appeal From:

On appeal from the order of Justice James Robert MacKinnon of the Superior Court of Justice, dated February 21, 2008.

Counsel:

William Abbott and Michael Stangarone, for the appellant.

Paul J. Daffern, for the respondent.

ENDORSEMENT

The following judgment was delivered by

1 THE COURT:-- This is an appeal from the Final Order of MacKinnon J., which awarded the respondent retrospective and prospective child and spousal support as well as costs. The appellant challenges the order on several bases, which we will deal with in turn.

2 The appellant argues that the motion judge erred in determining the amount of support by failing to take into account the appellant's allegedly higher rates of income tax in the United States, where the appellant is currently employed. However, there was no evidence before the motion judge regarding what income tax the appellant paid in the United States and what he would have paid in Canada. Accordingly, there is no basis for this ground of appeal.

3 The appellant argues that the motion judge erred in failing to impute income to the respondent. The parties filed affidavits giving greatly differing perspectives on why the respondent's employment income was significantly less than that of the appellant, and whether that difference resulted from career sacrifices made by the respondent during the parties almost 15 years of marriage. However, rather than proceeding to trial to test each other's perspectives, the parties elected to have the motion judge determine the issue on the basis of their affidavit evidence. Neither party pressed for a trial.

4 On the basis of the written record, the motion judge concluded that the respondent had needed spousal support since the parties' separation, a need that became more acute after her employment terminated as a result of a corporate restructuring. It is implicit in the motion judge's reasoning that he rejected the argument that the respondent should currently be self-sufficient and that she should have made greater efforts to obtain alternate employment or pursue retraining. Instead, he accepted the respondent's evidence, including the efforts she made to seek alternate employment. Given the circumstances at the time the motion was heard, we see no basis to interfere with the motion judge's decision not to impute income to the respondent.

5 The appellant also argues that the motion judge erred in ordering support commencing in May, 2005. We disagree. The appellant lost his job with Nortel in November 2000, at which time he was earning approximately $108,000 annually. He continued to pay child and spousal support from his severance package until September, 2001. In December 2001, the parties agreed to a nominal order for both child and spousal support. The appellant did not obtain re-employment until April 5, 2005. At that time, he returned to employment with a Nortel-related company. That employment subsequently evolved into his current employment in the United States.

6 As soon as the respondent learned of the appellant's re-employment she sought financial disclosure and put the appellant on notice that she would be seeking both child and spousal support. The motion judge made a specific finding that the respondent did not delay in advancing her claim. In these circumstances, we see no basis to interfere with the motion judge's decision to order support retrospective to May 2005.

7 The appellant challenges the amount of spousal support awarded from May 2005. The motion judge awarded $2,000 monthly without explaining how he arrived at that amount or specifying the earnings on which it was based. We note that, in determining the amount of support, it is helpful for a court to give at least brief reasons for the amount awarded, including the incomes upon which the award is based. Such reasons inform not only appellate review, but are of important assistance to a court considering a future variation.

8 Nonetheless, there is sufficient information in the record to determine support without putting the parties to the expense of another hearing. It appears from the material before the motion judge that the respondent earned $28,938 in 2005 and $35,707 in 2006. In 2007, she earned approximately $37,870, which includes her income until her termination as well as her subsequent severance package. At the time the motion was argued, the respondent remained unemployed. In contrast, the appellant filed material indicating that he earned an annualized income of $135,500 in 2005, $145,500 in 2006 and $131,425 in 2007.

9 In arriving at the appropriate amount of support, the motion judge did not apply the *Spousal Support Advisory Guidelines* to these incomes. However, ranges under the *Guidelines* were not provided to the motions judge. In these circumstances, there can be no error in failing to apply the *Guidelines*: see *Fisher v. Fisher* (2008), 88 O.R. (3d) 241 (Ont. C.A.).

10 On appeal, while the appellant's factum referred to one range of *Guidelines* amounts, those amounts were based on an income imputed to the respondent of $35,000, which can only have application to the year 2007. For subsequent years, the motion judge rejected imputation of income to the respondent.

11 However, in our view, the motion judge erred in failing to provide any reason why spousal support should be $2,000 monthly for the respondent both in years when she earned no income and in years when she earned $28,000 to $37,000. It seems apparent that the amount of spousal support should vary depending upon the respondent's income. We would accordingly vary spousal support during the period when the respondent was earning income to $1,700 monthly from May 1 until the respondent's severance apparently expired in November 2007. This amount fits within the one *Guidelines* example given in the appellant's factum, although it does not address the important factor of the duration of support.

12 We would not interfere with the motion judge's award of $2,000 monthly from December 1, 2007. That was the amount sought by the respondent in her notice of motion and appears to fall at the low end or even below the suggested *Guidelines* range given her current unemployment.

13 We observe that the lack of comprehensive reasons given by the motion judge poses difficulties for any application to vary. The motion judge's silence on the issue of duration of spousal support suggests the issue was not decided. At that time, there was obviously a material uncertainty regarding the respondent's further efforts to obtain employment or retraining or self-sufficiency. On any subsequent variation hearing, the court should consider the appropriate duration of spousal support, including whether support should be limited or unlimited, which will in turn have an impact on the amount of support.

14 This is not a case where endless litigation may result from a review of these issues. Indeed, it is apparent from the parties' choice of a motion as opposed to a trial forum, and from the skeletal reasons provided by the motion judge, that the parties and the judge did not fully canvass the issues with the intention of delineating the long-term obligations of the parties.

15 The appellant also challenges the motion judge's award of $5,000 for arrears of child support. Based on the figures provided by the parties, we see no error in this estimation.

16 Finally, the appellant challenges the motion judge's costs award on the basis that it included a costs component for steps in the proceeding for which no costs were ordered. In the circumstances, we would vary the costs awarded by the motion's judge from $8,000 to $7,000.

17 In the result, the appeal is allowed only to the extent of varying paragraph 1 of the motion judge's order to provide for spousal support of $1,700 from May 1, 2005 to and including November 1, 2007 and $2,000 monthly spousal support from December 1, 2007 and to reduce the costs awarded from $8,000 to $7,000.

18 As the results of this appeal are mixed, we would make no order as to costs.

S.E. LANG J.A.
P.S. ROULEAU J.A.
D. WATT J.A.

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