

Michel Messier *Appellant*;

and

Dame Jocelyne Delage *Respondent*.

File No.: 16806.

1983: March 16; 1983: November 3.

Present: Ritchie, Beetz, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Divorce — Maintenance — Varied — Application to set aside alimentary pension paid to ex-wife — Ex-wife holder of Master's degree — Ability to work — Divorce Act, R.S.C. 1970, c. D-8, s. 11.

The parties were divorced in 1975 after living together for more than twelve years. A decree absolute gave respondent custody of the two children and an alimentary pension for herself and the children. Three years later, the older child went to live with his father. In April 1979, appellant applied to vary the corollary relief orders, and in particular to set aside the alimentary pension payable to respondent. Appellant's means enabled him to pay this pension, but he argued that respondent was now fully able to support herself. At this time, respondent was 38 years old and in good health. Although after the divorce she had completed her studies and obtained a Master's degree in translation, she was encountering serious difficulties in rejoining the work force. In fact, she only worked part-time for an approximate annual income of \$5,000. As respondent now had only one dependent child, the Superior Court reduced the alimentary pension which appellant had to pay for this purpose. In addition, the Court set aside the pension payable to respondent as of January 1, 1980, that is eight months later. The Court of Appeal reversed this judgment in part, striking the conclusion which set aside respondent's alimentary pension.

Held (McIntyre, Lamer and Wilson JJ. dissenting): The appeal should be dismissed.

Per Ritchie, Beetz, Estey, Chouinard JJ.: The mechanism provided by the *Divorce Act* to take into account the conduct of the parties and changes in the condition, means or other circumstances of either of them is their right to apply to the court each time a change which is regarded as fundamental occurs. The judge must arrive at his decision on each occasion

Michel Messier *Appellant*;

et

Dame Jocelyne Delage *Intimée*.

N° du greffe: 16806.

1983: 16 mars; 1983: 3 novembre.

Présents: Les juges Ritchie, Beetz, Estey, McIntyre, Chouinard, Lamer et Wilson.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

having regard to the actual circumstances, not in accordance with events which may or may not occur. Accordingly, the Court of Appeal properly intervened in the case at bar. The Superior Court erred in disregarding the actual factors submitted for its consideration, and hypothesizing as to the unknown future, which cannot be foreseen at this time. There was no reason to cancel respondent's pension eight months in advance on the assumption that she would no longer need or be entitled to it. If the situation arises, it can be dealt with.

[*Marcus v. Marcus*, [1977] 4 W.W.R. 458; *Lanthier v. Raymond*, C.A. Que., No. 500-09-001056-761, February 28, 1979, considered; *McKay v. McKay*, [1971] 1 W.W.R. 487; *Lee v. Lee*, [1972] 3 W.W.R. 214; *Morrow v. Morrow* (1974), 44 D.L.R. (3d) 711; *Shaffran v. Shaffran*, [1970] C.A. 1174, referred to.]

APPEAL from a judgment of the Quebec Court of Appeal¹ reversing in part a judgment of the Superior Court. Appeal dismissed, McIntyre, Lamer and Wilson JJ. dissenting.

Pierrette Rayle and George Artinian, for the appellant.

Sidney Cutler, for the respondent.

English version of the judgment of Ritchie, Beetz, Estey and Chouinard JJ. delivered by

CHOUINARD J.—The unanimous decision of the Quebec Court of Appeal that is the subject of this appeal set aside the judgment of the Superior Court in part: it deleted the term set by the latter on the obligation imposed on appellant to pay respondent an alimentary pension, pursuant to s. 11(2) of the *Divorce Act*, R.S.C. 1970, c. D-8.

The undisputed facts that are relevant to the determination of the appeal may be summarized as follows:

The parties were married in June 1962 and ceased to live together in February 1974. Upon the petition of respondent a decree *nisi* of divorce was granted on September 10, 1975 and was made absolute on December 30 of that same year.

sion, c'est en regard des circonstances actuelles que le juge doit statuer et non en regard de circonstances qui pourront être mais ne seront peut-être pas. En l'espèce c'est donc à bon droit que la Cour d'appel est intervenue. La Cour supérieure a erré en s'écartant des facteurs actuels soumis à sa considération pour projeter dans l'avenir inconnu et imprévisible à ce moment. Il n'y avait pas lieu en effet d'annuler huit mois à l'avance la

The parties have two children, Pascal, born on January 2, 1963, and Joëlle, born on April 6, 1964.

Custody of the children was given to respondent, and she was granted an alimentary pension of \$1,600 a month. Respondent took care of the children. She did not work outside the home, but was enrolled in a program of studies.

Appellant agreed to rent the former matrimonial home to respondent, for her own use and that of the children, for a period of four years ending on June 30, 1979.

In December 1978 the elder of the children, Pascal, left his mother and went to live with his father. The latter assumed the expenses involved while continuing to pay respondent the alimentary pension granted by judgment for herself and the two children.

On April 5, 1979 appellant applied to vary the corollary relief orders that had been in effect. He asked for custody of Pascal, which he was given, his application being uncontested. Appellant offered to continue to pay respondent an alimentary pension of \$500 a month for their daughter Joëlle, of whom she had custody, but he asked that his other alimentary obligations be terminated for the following reasons:

[TRANSLATION]

- (a) Pascal was now fully dependent on applicant;
- (b) in the five years following the separation between the parties, respondent had had plenty of time to reorganize her life, she had successfully completed her program of study and obtained a Master's degree in translation and, at the age of 38 and in good health, was fully able to support herself; at the time of the hearing, moreover, she was working part-time as a freelance translator;
- (c) respondent was no longer tied down by the children of the marriage since one of them was now in applicant's custody and the other was fifteen years old.

Appellant added the following in his written submission:

[TRANSLATION] Applicant is not arguing that he was unable to pay an alimentary pension for respondent (his gross professional income being \$72,000 and, after

Les parties ont deux enfants, Pascal né le 2 janvier 1963 et Joëlle née le 6 avril 1964.

La garde des enfants a été confiée à l'intimée qui s'est vu accorder une pension alimentaire de 1 600 \$ par mois. L'intimée s'occupait des enfants. Elle ne travaillait pas à l'extérieur, mais poursuivait des études.

L'appelant accepta de louer à l'intimée, pour son usage et celui des enfants, l'ancien domicile conjugal pour une période de quatre ans qui s'est terminée le 30 juin 1979.

professional expenses were deducted, approximately \$56,000), but maintained that respondent would henceforth enjoy professional status and should no longer be financially dependent on applicant. The evidence showed that after obtaining her Master's degree in 1978 and in the last part of that year, respondent had done translation work for various associations and businesses and had earned income of some \$5,000 through her part-time work.

In its judgment of May 25, 1979 the Superior Court awarded custody of Pascal to appellant and custody of Joëlle to respondent. It ordered appellant to pay respondent her moving expenses up to \$700 when she had to leave the former matrimonial home the following June 30. The relevant part of the judgment respecting the alimentary pension read as follows:

[TRANSLATION] REDUCES to \$1,200.00 a month the alimentary pension respondent is required to pay applicant for herself and her minor daughter, as of May 1, 1979;

SETS ASIDE the alimentary pension payable to applicant as of January 1, 1980 and SETS the alimentary pension respondent must pay applicant for her minor daughter Joëlle as of that date at \$500.00;

In its decision of October 19, 1981, the Court of Appeal reversed the judgment of the Superior Court in part. It struck the conclusion setting aside the alimentary pension payable to respondent as of January 1, 1980 and set the alimentary pension which appellant must pay respondent for her and her daughter Joëlle at \$1,200 a month.

Appellant relied on two grounds, the second of which is based on six propositions:

[TRANSLATION]

1. The Court of Appeal substituted its judicial discretion for that of the Superior

- A. Alimentary obligations are entirely different depending on whether the parties are separated as to bed and board or divorced.
- B. The Court of Appeal ignored the evolution in the status of married women, whereas formerly it has invited the courts increasingly to take it into account in their judgments.
- C. The Court of Appeal failed to respect the equality of treatment between the sexes established by the Divorce Act.
- D. The Court of Appeal erred in considering the criterion of appellant's conduct at the time of the divorce.
- E. The Court of Appeal did not take into account the other criteria set out in s. 11(2) of the Divorce Act that should guide it in the exercise of its judicial discretion.
- F. The Court of Appeal's judgment contravenes the spirit of the new art. 635 of the Civil Code.

With respect, there is in my view no basis for the first ground.

At the time art. 503.1 *C.C.P.*, since repealed, provided as follows:

503.1. The parties may attach to the statement a detailed agreement respecting the filing and content of a joint record. Failing an agreement, one of the parties may attach to the statement, or the respondent to his comments, a motion that a judge of the Court of Appeal order the filing of a joint record, containing whatever he determines.

If an agreement or motion respecting the filing of a joint record is not attached to the statement or the comments, the appeal is submitted on the basis of that statement or the comments alone.

It can be seen that either of the parties was free to propose an agreement respecting the filing and content of a joint record, or to ask a judge of the Court of Appeal to order the filing of a joint record. It is difficult to see how the lack of a joint record can now be relied on.

It also appears that the Court of Appeal relied

[TRANSLATION] It is clear from a reading of these two statements that the parties are not in total agreement on the principal facts of the case. In the circumstances it is necessary to refer to the trial judge's judgment on the points at issue.

Joint record or no joint record, this is what the Court of Appeal should have done in any event, unless it was shown an obvious error.

Moreover, there do not seem to be any major differences on the facts. Respondent accepted the facts I set out at the beginning of these reasons, taken from appellant's submission.

I omitted the following passage from appellant's submission:

[TRANSLATION] In addition to the pension, applicant paid a gift of \$10,000 contained in the marriage contract and let respondent have all the furniture in the matrimonial home and a new car.

Respondent maintained in her submission that the latter facts had not been adduced in evidence. Neither the Superior Court nor the Court of Appeal mentioned them, and I do not think that taking them into account can have any effect on the conclusions I shall be proposing.

In addition, respondent alleged that appellant did not mention in his summary of the facts that at the time of the Superior Court's judgment she was 38 years old, and although she had completed her studies she was encountering serious difficulties in rejoining the work force. This was brought out in the Superior Court's judgment and was repeated word for word by the Court of Appeal.

Except with respect to the facts concerning the gift by contract of marriage, the disposition of the furniture from the matrimonial home and a car, which respondent said had not been adduced in evidence, therefore, the parties agreed in this Court on the facts as reported by appellant or determined by the Superior Court. These are the facts that were before the Superior Court and on which the Court of Appeal relied. In my view, the fact that there was no joint record in the Court of Appeal is of no consequence in the case at

respondent's needs for herself and her daughter Joëlle as \$1,200 a month, being \$500 for her daughter and \$700 for herself, and awarding respondent a total pension of \$1,200 a month, the Superior Court judge placed a term on appellant's alimentary obligation toward respondent. He ordered that respondent's pension be set aside as of the following January 1, eight months later. It was this part of the judgment that was reversed by the Court of Appeal.

The second ground and the propositions put forward in support of it can, in my view, be considered together in the following discussion, subject to a few preliminary remarks on the first and fourth of these propositions.

The first proposition, that [TRANSLATION] "Alimentary obligations are entirely different depending on whether the parties are separated as to bed and board or divorced" and the fourth, that [TRANSLATION] "The Court of Appeal erred in considering the criterion of appellant's conduct at the time of the divorce", seem to me to refer to the following passage from the reasons of Turgeon J.A.:

[TRANSLATION] I also cannot subscribe to the proposition of the trial judge that when appellant opted for a divorce petition rather than one for mere separation from bed and board, she herself made the decision to terminate the marriage between her and the respondent, and that she must accept the consequences.

The record shows that appellant began divorce proceedings because her husband was deceiving her. It is unfair to blame her for having undertaken these proceedings rather than proceedings for a separation. This fact can have no effect on her entitlement to an alimentary pension.

What Turgeon J.A. is trying to say here, in my view, is that a person cannot be blamed for exercising a right he has under the *Divorce Act* where one of the grounds defined by the Act exists. The Court of Appeal did not base itself on appellant's conduct before the divorce in establishing the amount of the alimentary pension to be paid, which it

entirely different depending on whether the parties are separated as to bed and board or divorced, since this is a proceeding under the *Divorce Act*. I would simply say that although the source of the obligation is different, being the matrimonial obligations in the former case since the marriage has not been dissolved, and a statutory provision in the latter case, the marriage having been dissolved, the determining factors set out in arts. 212 and 213 C.C., which were adopted after the *Divorce Act* came into force, are the same as those contained in s. 11 of the *Divorce Act*.

The issue in this case relates exclusively to this latter section. The fundamental difficulty, in the view of some, arises from the lack of precision in and the insufficiency of its provisions. Perhaps, rather, this should be seen as an intentional flexibility.

As Choquette J.A. wrote on behalf of the Court of Appeal in *Shaffran v. Shaffran*, [1970] C.A. 1174, at p. 1174:

[TRANSLATION] Were it not for s. 11 of this Act, the parties would be free of all alimentary obligations, the marriage having been dissolved by the divorce.

Section 11 reads as follows:

11. (1) Upon granting a decree nisi of divorce, the court may, if it thinks it fit and just to do so having regard to the conduct of the parties and the condition, means and other circumstances of each of them, make one or more of the following orders, namely:

(a) an order requiring the husband to secure or to pay such lump sum or periodic sums as the court thinks reasonable for the maintenance of

- (i) the wife,

(c) an order providing for the custody, care and upbringing of the children of the marriage.

(2) An order made pursuant to this section may be varied from time to time or rescinded by the court that made the order if it thinks it fit and just to do so having regard to the conduct of the parties since the making of the order or any change in the condition, means or other circumstances of either of them.

Since we are dealing with an application to vary the pension in the case at bar, it is subs. (2) that is particularly relevant.

Like subsection (1), subs. (2) does not indicate the aims sought in awarding an alimentary pension or the specific criteria applicable. It is thus to be noted that they have given rise to widely divergent interpretations.

I cannot state the matter any better than Judge Rosalie S. Abella of the Provincial Court, Family Division, for the judicial district of York in Toronto, did in an article entitled "Economic Adjustment On Marriage Breakdown: Support", (1981) 4 *Family Law Review* 1. She wrote the following at p. 1:

To try to find a comprehensive philosophy in the avalanche of jurisprudence which is triggered by the Divorce Act (RSC 1970 cD-8) and the various provincial statutes is to recognize that the law in its present state is a Rubik's cube for which no one yet has written the Solution Book. The result is a patchwork of often conflicting theories and approaches.

These matters have been the subject of numerous articles and in-depth studies in many jurisdictions. I shall merely mention the work and the reports and recommendations of the following organizations:

- Law Commission

Section 15 of the Ontario *Family Law Reform Act*, R.S.O. 1980, c. 152, provides as follows:

15. Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.

Section 18(5) of the same Act sets out specific criteria to be considered in determining the amount, if any, to be paid. Subsection (6) of the same section deals with conduct.

The other provincial statutes that contain provisions on this subject are as follows:

- Family Law Reform Act*, 1978 (P.E.I.), c. 6, ss. 16 to 19;
- Child and Family Services and Family Relations Act*, 1980 (N.B.), c. C-2.1, ss. 114 and 115;
- The Family Maintenance Act*, 1978 (Man.), c. 25/F20, ss. 1 to 7;
- Family Relations Act*, R.S.B.C. 1979, c. 121, ss. 60 to 64;
- Family Maintenance Act*, 1980 (N.S.), c. 6, ss. 5 to 9.

In this appeal the question of whether provincial legislation on support obligations applies to divorce, where the field is occupied by federal legislation was not raised. It is accordingly not necessary to decide the point, but it may be doubted whether the provinces can alter a support obligation imposed by the *Divorce Act*.

In the case at bar the issue turned exclusively

