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DETERMINATE MAINTENANCE ORDERS

MESSIER v. DELAGE

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Messier v. Delage

Determinate Maintenance Orders

We "family law lawyers" are borne of the same system as "real lawyers" - we spend three years in law school learning that our courts' method of decision making is entirely dependent upon previously decided cases - stare decisis. As students we enthusiastically consumed thousands of cases over a law school lifetime, in each instance looking for that one line which establishes judicial precedent. The fortunate majority graduate to embark upon a career as a solicitor, in which instance they can quickly remove themselves from the daily dependence upon case law. Others become barristers, and the addiction continues. The unfortunate minority become family law practitioners who, although functioning as barristers, soon discover that the courts, in dealing with family law matters, are loathe to blindly follow judicial precedent. Rather, the tools which serve us best, if we are to survive in the practise are common sense, practicality and a measure of fairness. The law school programming however, dies hard, even in family lawyers, thus, in our desperate search for judicial direction, we have heralded the arrival of Messier v. Delage (1983), 35 R.F.L. (2d) 337 (S.C.C.) with unrestrained zeal. Unfortunately, so enamoured are we of the "fact" that the Supreme Court of Canada has rendered a decision in family

law, we have trotted the case out at every possible opportunity. The result, in this writer's opinion, has been a serious over-interpretation of the contents. Busy lawyers write briefs for busy judges, and, with all respect, in many instances, neither have taken the time to really delve into the case, which, at first blush, would indeed appear to sound the death knell for terminal maintenance orders.

The Case

The parties were married in 1962 and separated in 1974, with the divorce following in 1975. The wife was awarded custody of the child and spousal support. In the latter part of 1978, the wife who had been enrolled in a program of studies at the time of divorce, completed her masters degree and had obtained part-time work in her field (translation). In 1979, the husband applied to terminate the support for the wife. The wife, at the time of the application to vary, was 38 years old and in good health. At trial the court imposed a limited term on the continuation of spousal maintenance. On appeal, the court partially reversed the judgment of the lower court by setting aside the provision limiting the term of the spousal maintenance. On further appeal to the Supreme Court of Canada, the decision of the Court of Appeal to remove the temporal limitation was upheld. At this stage, lawyers jumped to the conclusion that the Supreme Court of Canada's

decision had decreed the end of terminal maintenance orders, for all time.

On closer view, it is this writer's opinion that the Supreme Court decision does not necessarily go so far. One must consider that it is a four to three decision, Chouinard, J. writing for the majority. The Learned Justice, it is suggested, takes careful steps to restrict the case to its facts, pointing out the limitation in the cross-application of family law decisions. He states at page 352:

> "The decision must therefore be made on the facts of each case. The facts may change with time: that is the way of life. This is why Section 11(2) provides that an order may be varied from time to time; but in my opinion, the judge must arrive at his decision on each occasion [translation] 'having regard to the actual circumstances...'. The decision therefore must not be made in accordance with events which may or may not occur." (emphasis added)

He goes on to state at page 353:

> "That does not mean that the obligation of support between ex-spouses should continue indefinitely and the marriage bond is dissolved, or that one spouse can continue to be a drag on the other indefinitely, or acquire a lifetime pension as a result of the marriage, or to luxuriate in idleness of the expense of the other ..." (emphasis added)

Lawyers have taken the initial quotation, to the effect that the court must decide on the basis of "actual

circumstances", to imply that the court is not in any way entitled to speculate as to future status. That statement must, however, be viewed in the context of the findings of fact in this case. Mr. Justice Lamer, writing for the minority, clearly states in his decision that this wife "has not been able to find work, due to no fault on her part, but because of the economic situation" (at page 355). Although this fact comes to light in the decision of the minority, it is not inconsistent with the comments of Chouinard, J.

Clearly, it is submitted, the Supreme Court in Messier has found that the maintenance for this wife, who although retrained, has been unable to find full-time employment, should not be limited by time. In other words, the court could not reasonably project that the wife would have employment within a predictable time frame. To extend that finding, however, to the proposition that in every case terminal maintenance orders are inappropriate goes beyond the intent of the court. The "actual circumstances" as found in Messier resulted in the court concluding that a temporal limitation on the maintenance was too speculative.

It does not necessarily follow that in every situation the court is precluded from projecting into the future and making a determination as to the wife's reasonable prospects for employment.

The Philosophy of Spousal Support

In order to properly assess the propriety of terminal maintenance orders, it is necessary to consider, generally, the philosophy of spousal support. It is impossible, however, despite the wealth of material available, to arrive at a consensus as to the purpose of maintenance.

The most popular concept endorses "economic loss" as the basis for an award of spousal support. Where one spouse, usually the wife, remains at home in the traditional role, and as a result, does not establish herself in the workplace, she is often, upon divorce, without the tools to become self-supporting - hence, the court orders the husband to share his earnings through the payment of support, the alternative being that the wife is supported by the state. Implicit, however, in the theory of economic loss, is the assumption that in the absence of marriage (and the assumption of the domestic role) the wife would have been self-supporting.

Having determined that spousal maintenance is appropriate, the court must then determine the proper level

of support. In many instances, the matter of quantum is academic since the husband's income is barely adequate to service the family intact, let alone, underwrite two households. In such instances, the court simply fixes the level of support at the maximum the husband is able to pay, without completely destroying his incentive to continue working.

Where, however, the husband does have the ability to pay varying levels of support, the court must then fix the acceptable standard of living for the wife (and children). Should the wife be maintained at the family's original standard of living, even if that means the husband is relegated to a lower one? Should the parties' joint lifestyle be reduced equally? Should the wife who interrupted her professional training to assume the tradition role, be maintained at a higher level than the wife who was untrained and unemployed at the time of marriage? Is the recipient spouse who cannot find employment in her chosen field, obliged to accept work at a substantially lower level? Should the recipient spouse be obliged to relocated geographically to find work? Should the financially dependent wife who is leaving a blameless husband receive support at all?

Courts, in dealing with maintenance, must wrestle with such issues and, in the final analysis, decode each case according to its own facts and the particular judge's

sense of fairness in the circumstances. Determining the propriety of a terminal order, it is submitted, is simply another dilemma facing the court, and of no greater or lesser status than the foregoing problems.

Terminal Maintenance Orders

The decision in Messier it is submitted, is limited to the facts of that case. The court having made a finding that the wife, despite her training, could not find full-time employment, then such employment was not reasonably foreseeable, therefore, a temporal limitation of the maintenance was arbitrary and inappropriate.

There are, in this writer's view, many situations where terminal maintenance orders are entirely appropriate - where there is an event certain, which will happen in the future, and render the wife self-supporting, for example, where the wife is enrolled in a program of studies with a guarantee of employment upon completion; where assets will be available on a certain date in the future (e.g. proceeds from the sale of a house; maturity of a debenture) which will result in the wife's self-sufficiency; where children will become sufficiently independent to render it cost effective for the wife to resume employment, and employment is certain (Watts v. Watts (1981), 22 R.F.L. (2d) 309 (B.C.S.C.)).

More difficult, is the assessment of the propriety of a temporal limitation where the wife is enrolled in a program of study and employment is not guaranteed upon completion. In such instances, it is suggested, the court will most probably have heard some evidence as to the benefit to be derived by the wife from pursuit of her studies. Surely the court should not endorse the wife's training at the expense of the husband, without concluding that it would result in increased self-sufficiency. Conversely, a wife who is seeking the court's endorsement of her training should call evidence as to expected employment upon completion. In this situation, terminal maintenance may well be in order, assuming that the court finds the wife's pursuit of training is reasonable and, on the balance of probabilities, will result in employment.

Most problematic is the use of terminal maintenance orders as an incentive to a malingering spouse to become self-supporting. Once again, however, if the court has determined that a spouse is not making reasonable efforts to provide for her own self-sufficiency, then so too the court must have determined that there are opportunitities available which would render the spouse self-sufficient, and accordingly a terminal maintenance order works no hardship. Chouinard, J. in Messier, supra, clearly stated that one spouse is not to "luxuriate in idleness at the expense of the other" - the court must then have the discretion through

the use of terminal orders, to ensure that this does not occur.

There is no basis, it is suggested, for the "irrational" fear of terminal orders which appears to prevail in the minds of lawyers and the courts. A terminal order is no less variable than any other award under the Divorce Act (Canada). Section 11(2) provides that:

> "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 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."

Simply because the court has decreed that maintenance will end on a date certain, it does not follow that if circumstances are ultimately different from those projected by the court, the order for maintenance cannot be extended. Indeed, authority would indicate that the application to extend need not even be made prior to the termination date for the maintenance period (Scobell v. Scobell (1980), 21 R.F.L. (2d) 109 (B.C.C.A.)).

The propriety of a maintenance order with a temporal limitation simply turns upon the court's assessment that on the balance of probabilities this wife is likely to be employed at a certain time. Pronouncement of such an order does nothing more than serve to reverse the burden of

proof. On any application to extend, it would be incumbent upon the recipient to satisfy the court that she has made all reasonable efforts to become self-supporting. This is arguably a much fairer treatment than leaving to the husband the burden of proving that the wife has not made reasonable efforts to secure employment, when such information is not readily available to him.

It would be of assistance, however, for the court making the terminal order, to include in its decision a summary of its assumptions as to future circumstances, so as to provide background for the subsequent court which may be considering an application to extend.

There are other situations quite apart from those above, where terminal maintenance is appropriate. The court may find that the obligation of the husband should be limited to providing support during a reasonable period of rehabilitation, irrespective of the probability of actual employment at conclusion - for example, where the marriage has been of relatively short duration with minimal economic disadvantage - the wife may be near completion of a course of studies which was interrupted by marriage. In such circumstances it may be entirely appropriate for the court to order maintenance for a sufficient period only to enable the former wife to complete her training.

A related consideration is whether the court, on any application to vary terminal maintenance, should draw a

distinction between "court ordered terminal maintenance" and "settlement agreements containing provisions for terminal maintenance". Where the parties have themselves structured a final settlement, the wife in consideration of a greater share of capital may agree to terminal maintenance. The court, it is submitted, should be loathe in such instances to extend the maintenance, save in the event of a catastrophic change in circumstances (Webb v. Webb (1984), 39 R.L.F. (2d) 113 (Ont. C.A.)). A court, considering altering such an agreement should be prepared to review the termination of maintenance within the context of the whole package - both capital and support. Unfortunately, in most jurisdictions, settlements or orders as to assets are not subject to variation. Despite this fact, the court will have a more accurate picture of the equity of variation if it reviews the complete settlement.

On the other hand, court ordered terminal maintenance, unless explicitly tied to the order as to assets, should be reviewable within the usual perameters "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".

Conclusion

There is not a ready solution to the balancing of interests in maintenance cases. The court must continue to

determine questions of maintenance on a case by case basis and avoid rigidity. A sense of fairness "in these particular circumstances" must prevail. It is, however, helpful for a court to set out general principles whenever possible, such as the obligation of the recipient spouse to make all reasonable efforts to contribute to her own support.

As stated by Chouinard, J. in Messier, the obligation of inter spousal support should not continue indefinitely. Maintenance is not a pension for life - and in the appropriate circumstances, terminal orders should be used and, it is submitted, are available, even in the face of the Messier decision.