

CANADA / JUDGMENT

Strang v. Strang

[1992] 2 SCR 112

COURT

Supreme Court of Canada

DECIDED

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Strang v. Strang

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Date

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Report

[1992] 2 SCR 112

Case number

22066

Judges

La Forest, Gérard V.; L'Heureux-Dubé, Claire; Gonthier, Charles Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Stevenson, William; Iacobucci, Frank

On appeal from

Alberta

Subjects

Family law

Notes

SCC Case Information: 22066

Decision Content

Strang v. Strang, [1992] 2 S.C.R. 112

Donald W. Strang Appellant

v.

Marie Jane Strang Respondent

Indexed as: Strang v. Strang

File No.: 22066.

1992: April 1; 1992: June 11.

Present: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Stevenson* and Iacobucci JJ.

on appeal from the court of appeal for alberta

Matrimonial law -- Maintenance -- Application to vary -- Change of economic circumstances on part of contributing spouse -- Pension income sole source of income on forced early retirement -- Maintenance to be derived from pension income -- Pension contributions divided on divorce -- Whether or not "double dipping" -- Whether or not maintenance properly reduced in light of changed economic circumstances -- Divorce Act , 1985, S.C. 1986, c. 4, s. 17.

Appellant, a chartered accountant, and respondent, a bookkeeper with grade 10 education, were divorced after a 29-year marriage. During much of the marriage, respondent cared for the children and the home. When respondent returned to the workforce, her income reflected her inexperience and limited education. At the conclusion of the contested trial, respondent was awarded maintenance of \$1000 per month for an indefinite period. Respondent also received her share of the divided matrimonial property. In fixing a value for appellant's Government of Alberta pension, appellant's contributions were taken into account but the employer's contributions were ignored. Appellant was required to pay respondent one half of his contributions to the plan as her allotment of the pension fund.

Appellant applied to vary the maintenance order when he was forced to take early retirement and his sole source of income became his annual \$28,000 pension. The judge hearing the application found that appellant's circumstances had changed and reduced the monthly maintenance to \$500. The Court of Appeal varied the date the reduced maintenance was to become effective. Two issues were raised here. First, whether "double dipping" was occurring with respect to maintenance payments derived from appellant's pension income. Secondly, whether the court should have exercised its jurisdiction to cancel the spousal maintenance ordered by the court in the decree nisi as a result of the change in appellant's circumstances.

Held: The appeal should be dismissed.

The issue of double dipping did not arise here. The method of evaluating appellant's pension used at the time of the divorce consisted of a very rough, after tax, division of appellant's contributions to the pension fund. It did not take into account the employer's contributions or attempt to assign a value to these contributions as future pension income. This "contribution method" is not an accurate means of assessing a pension's worth as a future asset and does not

amount to a true division of the pension's value as future property. It was accordingly not unjust to treat the post-retirement income from appellant's pension as "means" which he could use to pay maintenance to respondent. If there were some overlap between the inclusion of a small portion of the pension in the matrimonial property division in the present case and using its income as a source for maintenance payments, it was so minimal that it should not be taken into account.

The chambers judge did not fail to exercise his discretion properly by terminating the spousal support order as a result of the change in appellant's circumstances. This exercise of discretion was made after a careful review and assessment of the facts and the applicable law and the decision was approved by the Court of Appeal. Several specific findings of fact were made. It was not practical given respondent's age and her lack of training to require her to become more self-sufficient. Respondent's present employment status was causally connected to the marriage. Appellant's diminished ability to continue to support respondent was a valid change in circumstances when considering whether a variation should be made.

Cases Cited

Referred to: *Linton v. Linton* (1990), 1 O.R. (3d) 1.

Statutes and Regulations Cited

Divorce Act, 1985, S.C. 1986, c. 4, s. 17.

APPEAL from a judgment of the Alberta Court of Appeal (1990), 107 A.R. 111, 26 R.F.L. (3d) 113, dismissing an appeal and cross-appeal from the re-hearing (1989), 100 A.R. 208, at p. 210, 23 R.F.L. (3d) 17, of an application to vary maintenance (1989), 100 A.R. 208, 23 R.F.L. (3d) 13. Appeal dismissed.

Brenda L. Stothert-Kennedy, for the appellant.

Doris I. Wilson, for the respondent.

The judgment of the Court was delivered by

//Cory J.//

Cory J. -- This is an appeal from a judgment of the Alberta Court of Appeal dismissing the appellant Donald W. Strang's appeal and the respondent Marie Jane Strang's cross-appeal from a decision of a judge in chambers granting an application to vary the maintenance payable by the appellant to the respondent under the decree nisi. Only the appellant has appealed to this Court.

The parties in this case were married in 1954. Shortly after the marriage, the appellant became a chartered accountant. Throughout the marriage, he was the primary wage earner, eventually becoming a senior civil servant with the Government of Alberta. During the marriage, the parties moved several times, including once to Caracas, Venezuela, in order to further the appellant's career.

The respondent had a grade 10 education. Prior to the marriage, she worked as a bookkeeper and continued to do so until the birth of the couple's first child in 1957. At the appellant's request, the respondent did not work outside the home until 1979 when, again in compliance with her husband's wishes, she returned to the work force. In the intervening period, the respondent spent all her time caring for the children and the home.

The parties separated in 1981. After twenty-nine years of marriage, they were divorced in 1983. At the conclusion of the contested trial, the respondent was awarded maintenance in the amount of \$1,000 per month for an indefinite period. At the time she was earning approximately \$1,000 gross a month in part-time wages, while the appellant had a gross annual salary of approximately \$66,500.

In addition to the spousal maintenance, the respondent received her share of the divided matrimonial property. The significant aspect for the purposes of the present case was the division of the appellant's pension from the Government of Alberta. In fixing a value for this pension, only the appellant's contributions of \$30,000 were taken into account. The employer's contributions to the fund were ignored. One half was then subtracted for a notional tax assessment, leaving \$15,000. The final division in half of this figure left the appellant required to pay the respondent \$7,500 as her allotment of the pension fund.

On December 31, 1988, the appellant's position was terminated and he was forced to take early retirement. At the time, he was 58 years old and earning a gross annual salary of \$72,228, while the respondent was 59 years old and earning approximately \$1,400 per month gross. His income for 1989 was \$101,028, comprised of severance pay of one year's salary and \$28,800 in annual pension. This pension was his sole projected income for the future. Although the appellant swore in his affidavit that he did not intend to seek work, the evidence was that in fact he was actively seeking, albeit unsuccessfully, full- or part-time work. The respondent continued to work in low paying clerical jobs.

The appellant applied for an order varying the decree nisi under s. 17 of the Divorce Act, 1985, S.C. 1986, c. 4. Upon a rehearing of the matter necessitated by a misunderstanding as to the involuntary nature of the retirement, Cooke J. granted the appellant's application for a variation in the decree nisi and ordered that the support payments of \$1,000 continue until March 1, 1990, after which time the maintenance payments were to be reduced to \$500 per month. The appellant's appeal and the respondent's cross-appeal to the Alberta Court of Appeal were both dismissed.

Divorce Act, 1985, S.C. 1986, c. 4

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; or

- (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
- (2) A person, other than a former spouse, may not make an application under paragraph (1)(b) without leave of the court.
- (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.
- (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody 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 only the best interests of the child as determined by reference to that change.
- (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.
- (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.

...

- (10) Notwithstanding subsection (1), where a support order provides for support for a definite period or until the happening of a specified event, a court may not, on an application instituted after the expiration of that period or the happening of that event, make a variation order for the purpose of resuming that support unless the court is satisfied that
- (a) a variation order is necessary to relieve economic hardship arising from a change described in subsection (4) that is related to the marriage; and
 - (b) the changed circumstances, had they existed at the time of the making of the support order or the last variation order made in respect of that order, as the case may be, would likely have resulted in a different order.
- (11) Where a court makes a variation order in respect of a support order or a custody order made by another court, it shall send a copy of the variation order, certified by a judge or officer of the court, to that other court.

Court of Queen's Bench (1989), 100 A.R. 208, 23 R.F.L. (3d) 13. Rehearing (1989), 100 A.R. 208, at p. 210, 23 R.F.L. (3d) 17.

Cooke J. found that the forced retirement of a person 58 years of age is a change in the condition, means, or other circumstances of the appellant within the meaning of s. 17(4) of the Divorce Act, 1985. The chambers judge then directed his mind to the considerations set out in s. 17(7) of the Divorce Act, 1985 and found, at p. 213, that any suggestion that the respondent could become more self-sufficient was "simply not practical given her age and training". He ordered the appellant to continue paying \$1,000 per month until March 1990, at which time the amount would be reduced to \$500 per month.

Court of Appeal (Hetherington J.A. for the Court) (1990), 107 A.R. 111, 26 R.F.L. (3d) 113.

The appellant appealed the decision of Cooke J. on two grounds. First, the appellant contends that the pension payments received by the appellant were "property" rather than "income" and should not have been considered in assessing maintenance payments. The second issue argued by the appellant was that the chambers judge erred in reducing, rather than eliminating, the support payments to be paid to the respondent. The Court of Appeal declined to decide the first issue, stating at p. 112:

... In our view the onus was on Mr. Strang to establish that his pension payments were property by calling or producing evidence to this effect. He did not do so. The chambers judge could not find that these payments were property rather than income available for the payment of maintenance, in the absence of any evidence to that effect.

With respect to the appellant's second argument, Hetherington J.A. held that the chambers judge did not err in reducing, rather than eliminating, the maintenance payments set out in the decree nisi. The Court of Appeal dismissed the appellant's appeal.

The respondent cross-appealed on the basis that Cooke J. erred in considering the supplementary affidavit of the appellant after the decision of March 16, 1989, but before judgment was entered. Further, the chambers judge was said to have also erred in reducing the support payments. The Court of Appeal held, at p. 112, that Cooke J. did not err in his reasoning or findings and specifically found that "the forced retirement of Mr. Strang was a change of circumstances as those words are used in the Divorce Act ". The Court of Appeal dismissed the respondent's cross-appeal and varied the order of Cooke J. by stipulating that the reduced maintenance payments were to commence on January 1, 1990.

There are two issues raised by this case. First, the appellant contends that the Court of Appeal erred in failing to consider that continued payment of spousal maintenance by the appellant from his pension income to the respondent is a further division of the appellant's pension, an asset valued and divided by the trial judge in 1983. This, it is argued, results in a double recovery on the pension and should not be permitted.

Second, the appellant contends that the chambers judge erred in failing to exercise the court's jurisdiction to cancel the spousal maintenance ordered by the court in the decree nisi as a result of the change in the appellant's circumstances.

The submissions of the parties on the issues are straightforward. The appellant contends that the courts in Alberta have placed pensions in the category of "property" and not "maintenance assets". As such, when a pension has been valued and divided between the divorcing parties, it can no longer be considered by the trial judge as a maintenance asset. After a division of the pension has been made, to consider and make use of the income from the pension would constitute double recovery from that particular marital asset.

The respondent's argument is based on s. 17(4) of the Divorce Act, 1985. This section requires the court to determine whether there has been a change in the condition, means, needs or other circumstances of either former spouse. The consideration by the chambers judge of Mr. Strang's assets to determine his means to pay maintenance quite properly, according to the respondent, included the pension. This interpretation of "means" is consistent with the historical interpretation of the term as including all pecuniary resources, capital assets, income from employment or earning capacity, and other sources from which the person receives gains or benefits. The qualification of the pension as "property" under a provincial matrimonial property act, the respondent argues, is irrelevant to the determination which must be made under the Divorce Act, 1985 of the means of the payor.

These submissions need not be addressed. The issue of double accounting or "double dipping", as it has been called, simply does not arise on the facts of this case. The method of evaluation of the appellant's pension used at the time of the divorce consisted of a very rough, after tax, division of the appellant's contributions to the pension fund. It did not take into account the contributions of the employer. Nor did it attempt to assign a value to these contributions as future pension income. This "contribution method" is subject to criticism. It is certainly not an accurate means of assessing a pension's worth as a future asset. It is clear that there existed at the time of the

parties' divorce other, more accurate, methods of assigning a value to the pension as a matrimonial property asset. They were not utilized by the parties. However, this is not the relevant consideration. What is relevant is that the method chosen cannot be said to amount to a true division of the value of the pension as future property. This being so, the appellant cannot argue that it is unjust to treat the post-retirement income from his pension as "means" which he may use to pay maintenance to the respondent.

If there is indeed some overlap between the inclusion of a small portion of the pension in the matrimonial property division in the present case and using its income as a source for maintenance payments, it is so minimal that it should not be taken into account. See for example *Linton v. Linton* (1990), 1 O.R. (3d) 1, at p. 29, per Osborne J.A., where the same approach was followed.

In the case at bar, both the trial judge and the chambers judge expressly reviewed the circumstances of the parties and considered the property division and its ramifications before ordering support. To the extent that there might be any overlap resulting from the inclusion of a small portion of the appellant's pension it must be assumed that it was taken into account by the courts below. There is no injustice resulting from the treatment of the appellant's post-retirement income from his pension as "means" which can be used to pay maintenance to the respondent.

The second issue is whether the chambers judge failed to exercise his discretion properly by terminating the spousal support order as a result of the change in the appellant's circumstances. Many specific findings of fact were made both in the course of the original trial and the chamber judges' evaluations of the circumstances of the marriage and of the divorce. The chamber judge found quite properly that it was not practical in light of the respondent's age and her lack of training to require her to become more self-sufficient. As well, he found that the respondent's present employment status was causally connected to the marriage. He recognized, however, that the diminished ability of the appellant to continue to support his wife was a valid change in circumstances when considering whether a variation should be made. He thus reduced the amount by one half to \$500 per month. I see no reason to interfere with this exercise of discretion. It was made after a careful review and assessment of the facts and the applicable law. The decision was approved by the Court of Appeal. No error was made by that court.

In the result, I would dismiss the appeal with costs to the respondent.

Appeal dismissed with costs.

Solicitors for the appellant: Witten Binder, Edmonton.

Solicitors for the respondent: Bishop & McKenzie, Edmonton.

* Stevenson J. took no part in the judgment.

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