TAB 22F

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Case Comment:

Stobo v Stobo, 2016 ONSC 5805 (CanLII)

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Case Commentary: *Stobo v. Stobo*, 2016 ONSC 5805 ("*Stobo*")

By John Guest, April 6, 2017

I. Issues

1. Does the Court have jurisdiction under the *Family Law Act* ("*FLA*") to hear a motion to vary the quantum of spousal support provided for by a separation agreement which was filed under the *FLA* if the parties were divorced at the time the agreement was filed?
2. Does the separation agreement, once filed under the *FLA*, become a court order for the purpose of a variation of spousal support under the *Divorce Act*?

II. Brief

The divorced parties signed a separation agreement in which the Applicant was to pay the Respondent spousal support. Over time, two amending agreements were signed which increased the quantum of support. The Applicant's income was involuntarily reduced and he brought a Motion to Change requesting a variation of spousal support pursuant to s. 17 of the *Divorce Act*.

Justice Doyle found that since the parties were divorced, they did not meet the definition of a "spouse" under s. 29 of the *FLA.* Since the court's jurisdiction to vary spousal support under s. 37 of the *FLA* is limited to spouses, the court had no jurisdiction under the *FLA* to vary the agreement.

The Court reviewed its legislative authority under s. 17 of the *Divorce Act* and found it was limited to the variation of spousal support provisions in court orders. The Court rejected the Applicant's argument that filing an agreement under the *FLA* made the agreement a court order for the purpose of a variation under the *Divorce Act*. Since the divorce order did not contain corollary relief, there was no order capable of a variation under the *Divorce Act*. The proper procedure to hear the issue of spousal support was through a *de novo* Application for corollary relief pursuant to s. 15.2 of the *Divorce Act*.

III. Background

Relationship and Financial Background

Prior to the parties' marriage on July 8, 1978, the Respondent mother was a qualified teacher in Calgary. The family moved to England so the Applicant father could study law. While the Applicant studied, the Respondent worked to support their family.

Once the parties returned to Ontario, the Applicant started work in private practice and the Respondent cared for their three children on a full-time basis and worked part-time as an English teacher. In 1981, the Applicant obtained work with the government before returning to private practice in 2001. The parties separated in 2002 and on the date of separation, the Applicant was earning $150,000 per annum.

Separation Agreement and Amendments

The parties entered into a separation agreement on October 23, 2006, which settled property, child support, and required the Applicant to pay $6,500 per month in spousal support. The parties were divorced on February 15, 2010, and their divorce order did not provide for any corollary relief.

As the Applicant's income increased, the parties signed two more amending separation agreements. The most recent amending agreement was signed on August 2014, which increased spousal support to $8,615 per month. The agreement did not state that the parties may vary support on a material change of circumstances and, while the parties considered the SSAG ranges in determining the quantum of support, they did not apply them.

Reduction of Income and Motion to Change

Less than a year after the parties agreed to increase the quantum of support, the Applicant's income was involuntarily reduced to $424,000 per year because his law firm changed the way it allocated points. The Applicant brought a Motion to Change pursuant to section 17 of the *Divorce Act* asking the Court to find there had been a material change of circumstance and argued that since his income had been reduced by 19%, the court ought to simply reduce the spousal support by 19%.

The Respondent argued that this matter should be heard as an initial application for corollary relief under s. 15.2 of the *Divorce Act*, because the divorce order did not contain any corollary relief.

IV. Analysis

(1) Can the parties vary their agreement under s. 37 of the *FLA*?

The Applicant filed the agreement with the court under s. 35 of the *FLA*, which permits enforcement under subsection (2)(a) and, under subsection (2)(b), allows the agreement to be varied under s. 37 of the *FLA*. Justice Doyle found that a variation under s. 37 of the *FLA* applies "…to an agreement of *the spouses* as if it was an order of the court.[1]"

Were the parties considered spouses under the *FLA*? In *Stobo* this was not a contentious issue since the parties agreed that they were not. Section 29 of the *FLA* expands on the definition of spouse in s. 1 as a dependant who is owed support under Part III of the Act, or is married, or has cohabited for not less than three years. Justice Doyle agreed with the parties and found that their variation cannot take place under the *FLA* since a variation under s. 37 of the *FLA* is limited to spouses.[2]

(2) Does the separation agreement, once filed under the *FLA*, become a court order for the purpose of a variation of spousal support under the *Divorce Act*?

The Court reviewed the legislation and noted that section 17 of the *Divorce Act* provides, among other things, that a court may make an order "varying, rescinding or suspending, prospectively or retroactively" a "*support order* or any provision thereof on application by either or both former spouses…[3]"

The Court reviewed the jurisprudence and found that the 2007 decision of *Gobeil v. Gobeil* from the Manitoba Court of Appeal was similar to the case at bar.[4] The Manitoba

[1] *Stobo v. Stobo*, 2016 ONSC 5805, at para. 24. Emphasis added.
[2] *Ibid.* at para 25.
[3] *Ibid.* at para 26-27 and see s. 17 of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.).
[4] *Stobo v. Stobo,* 2016 ONSC 5805, at para 33-34 and 37 considering *Gobeil v. Gobeil*, 2007 MBCA 4.

Court of Appeal found that where a divorce order is silent as to corollary relief, the parties may not seek a variation under s. 17 of the *Divorce Act* since that section applies only to court orders, even if the parties explicitly contemplated in the agreement that it can be varied by a court.[5]

Justice Doyle considered whether there was any reason why filing a separation under the *FLA* might change the analysis in *Gobeil v*. *Gobeil* and concluded there was not. Her Honour found that there was no jurisprudence suggesting the registration of an agreement under the *FLA* has the effect of 'transposing it into a support order' for the purposes of federal legislation. The registration of the agreement means only that it is capable of variation under the *FLA*, so long as the parties are actually spouses under that Act.[6]

The Court concluded that its jurisdiction to hear the issue of spousal support is limited to an Application for corollary relief under s. 15.2 of the *Divorce Act* and, since there was no such application before the court, Justice Doyle invoked Rule 2(3) and invited counsel to return to determine the next step, which may include amending pleadings.

I have been informed that amended pleadings have indeed been filed and the matter is scheduled to be heard on June 13th, 2017.

V. Conclusion and Commentary

Stobo is an extremely helpful case to keep in mind if you want to avoid the uncomfortable situation of watching your client's eyes glaze over as you attempt to explain the byzantine procedural reasons why their pleadings need to be amended or, worse yet, why your client has to pay costs because their motion was dismissed.

Counsel should take *Stobo* as another reminder to verify the court's statutory jurisdiction before proceeding under Rule 8 or Rule 15 of the *Family Law Rules*. If you rely solely only on the *Family Law Rules*, you may be misled into bringing a Motion to Change in a situation where the court has no jurisdiction to hear the motion.

[5] *Gobeil v. Gobeil*, 2007 MBCA 4 at para 25-26.
[6] *Stobo v. Stobo*, 2016 ONSC 5805, at para. 40-42.

The Importance of the Choice of Procedure

The litigants in *Stobo* did not misapprehend the procedure. In short, the Applicant wanted to narrow the scope of the court's review to the change in income since the last amending agreement, by requesting a variation under s. 17 of the *Divorce Act*. By requesting a *de novo* Application under s. 15.2 of the *Divorce Act*, the Respondent wanted to broaden the scope of court's inquiry by considering factors such as the original separation agreement and the roles the parties played in the relationship while they were still cohabiting.

Justice Doyle reviewed the scope of the court's inquiry under a variation pursuant to s. 17 of the *Divorce Act*, which requires a two-step approach under the Supreme Court's decision in *Droit de la famille* – 091889 ("*L.M.P.")*.[7] The approach requires the Court to first determine whether the threshold for a variation has been met. For spousal support, the threshold is whether there has been a "change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order.[8]"

Justice Doyle considered the extent of the change required under *L.M.P.*, which was dealt with by Justice MacKinnon in *Walts v. Walts*, where the court found that the change must be substantial and "if known at the time, would likely have resulted in a different order.[9]" Once the threshold is met, the court then adjusts the order to reflect the change. The Court's inquiry is limited to the change that occurred since the original agreement or order.[10]

By contrast, an application for spousal support as corollary relief under s. 15.2 of the *Divorce Act* requires the court to consider factors under s. 15.2(4), such as the length of time the spouses cohabitated, the functions performed by each spouse during cohabitation and any order or arrangement relating to support of either spouse.[11] The

[7] *Droit de la famille - 091889*, (*sub nom. L.M.P. v. L.S.*) [2011] 3 S.C.R. 775 (S.C.C.).
[8] *Divorce Act*, *supra.*, s. 17(4.1).
[9] *Stobo v. Stobo*, 2016 ONSC 5805, at para. 31 considering *Walts v. Walts*, 2016 ONSC 4777 at para 11.
[10] *Ibid.*
[11] *Divorce Act*, *supra.*, s. 15.2(4).

Respondent argued this requires the court to examine the original separation agreement and not just a change since the amending agreement.

Despite the difference in the statutory schemes, it's not clear that the procedure will ultimately dictate the result in such a clear-cut way and it will be interesting to see how the Court applies the factors under s. 15.2(4) to *Stobo*. It is worth noting that Philip Epstein discusses *Stobo* in his November 21, 2016, newsletter and wrote that the result may very well be the same with a *de novo* hearing since he believes the principles in *L.M.P.* will nonetheless govern the outcome of the case.

What is the Scope of the Procedural Findings in *Stobo?*

Two important questions arise from the *Stobo* decision: first, is the practice point in *Stobo* limited to spousal support or does it also apply to child support and custody and access; and, second, does it matter whether the parties were spouses under the *FLA* at the time they filed their agreement?

These questions are addressed in *Verhey v. Verhey*,[12] which is a recent decision by Justice Shelston that applies the analysis in *Stobo* and confirms that it is of course applicable for other variations under the *Divorce Act*. Justice Shelston clarified that the court's jurisdiction to vary spousal support under s. 37 of the *FLA* is still available to divorced parties – so long as they were spouses under the *FLA* at the time the agreement was signed and filed with the court. Jurisdiction to vary under s. 37 of the *FLA* is lost if the divorce order deals with spousal support as part of the corollary relief.[13]

[12] *Verhey* v. *Verhey*, 2017 ONSC 837: The parties filed a final separation agreement with the court before the divorce order was issued. The court found the divorce order did not contain any explicit corollary relief. Applying *Stobo*, there is no jurisdiction available under the *Divorce Act* for a variation. A month after the divorce, the parties signed an amending agreement varying spousal support. After the payor's income was reduced, a change of the spousal and child support terms was requested. The Court found no *FLA* jurisdiction to vary spousal support in the amending agreement since the parties were divorced at the time they signed the amending agreement. Interestingly, the Court found that it has jurisdiction to vary child support presumably because the parties were spouses under the *FLA* when they signed and filed the first agreement which set out the child support payments.

[13] See *ibid.* at para 19-26 for an excellent review of the jurisprudence.