

2012 ONSC 3617
Ontario Superior Court of Justice

Shabotynsky v. Shabotynsky

2012 CarswellOnt 10927, 2012 ONSC 3617, [2013] W.D.F.L. 1446, 222 A.C.W.S. (3d) 1020

Oksana Shabotynsky, Applicant and Nicholas Shabotynsky, Respondent

Greer J.

Heard: June 7-12, 2012
Judgment: June 21, 2012
Docket: FS-10-365043

Counsel: Julie **Stanchieri**, for Applicant
Francine Sherkin, for Respondent

Subject: Family; Property

Related Abridgment Classifications

Family law

VIII Support

VIII.1 Issues common to child and spousal support

VIII.1.b Interim support

VIII.1.b.iii Miscellaneous

Headnote

Family law --- Support — Spousal support under Divorce Act and provincial statutes — Interim support — Variation, extension or termination

Parties were married almost 35 years and had three children — Two children were married — One child, aged 27, attended university in France — Husband claimed child continued to be dependant at costs of \$30,000 to husband — Wife brought motion for interim spousal support — Motion granted — Husband occupied matrimonial home registered in wife's name — Wife occupied basement apartment in six-plex registered in wife's name — Wife was retired teacher — Husband had dental practice — Wife carried raising of children and running of home as well as being full-time teacher until retirement — Wife helped with running of rental property while parties were together — Wife contributed to husband's ability to set up practice and expand it — Wife should not continue to be disadvantaged on interim basis with small amount of spousal support wife was receiving — Change in spousal support was retroactive to when wife started asking for more spousal support — Income of \$223,000 was not unreasonable to be used for husband's income — Wife's income was \$43,000 — Husband was to pay interim spousal support of \$6,373 per month.

Table of Authorities

Cases considered by Greer J.:

Davies v. Quantz (2010), 2010 CarswellOnt 10064, 100 R.F.L. (6th) 156, 2010 ONSC 416 (Ont. S.C.J.) — considered

Statutes considered:

Canada Pension Plan, R.S.C. 1985, c. C-8

Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3

s. 33(8) — considered

s. 33(8)(a) — considered

s. 33(8)(b) — considered

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Federal Child Support Guidelines, SOR/97-175

s. 7 — referred to

Greer J.:

1 The Applicant, Oksana Shabotynsky, (“the Wife”) brings on an interim/temporary Motion asking the Court to order the Respondent, Nicholas Shabotynsky, (“the Husband”) to pay to her, on a temporary without prejudice basis, spousal support of \$7,066 per month. This amount is based on what she says is the Husband’s 2010 income of \$223,000, pursuant to the Spousal Support Advisory Guidelines.

2 In addition, the Wife asks for further disclosure by the Husband with respect to written questions put forward by her business valuator, David Lind. She asks that this be done within 7 days of the date of my Order on this Motion. She further asks for an Order that Mr. Lind be given access, within 14 days, to the Husband’s dental practice to complete the business valuation and that the Husband arrange to meet with Mr. Lind to answer any follow-up questions he may have within 14 days of that meeting.

3 Lastly, the Wife sets out in paragraph 3 of the Notice of Motion, a list of expenses in categories relating to the business records and the Husband’s Income tax returns for 2010 and 2011, and asks that he produce all his outstanding bank and credit card statements not yet produced as of May 26, 2013. A chart setting out the missing documents is attached to the Notice of Motion.

4 The Husband’s counsel moved to adjourn the Motion, saying that the issues were significant and important and required more time than the 1 hour allotted to it. She said it should be scheduled as a long motion. She pointed to the fact that the Wife had produced two long affidavits with many exhibits attached to them. She said she did not think she had had sufficient time to completely respond to it. She pointed to the family issues of the family’s debts, whether the 27 year old daughter was a child of the marriage for child support purposes, the complexity of the Husband’s business assets and the fact that the Wife wanted to add-back certain amounts to the Husband’s declared income. She also said that the Husband was unable to attend the Motion and wanted to be there but had to attend a dental conference in New York.

5 The Wife’s counsel opposed the move to adjourn the Motion. She pointed to the fact that the Husband had received a copy of the Wife’s income analysis report in January 2012 and knew that she would be asking for an increase in spousal support. Discussions had taken place where the Wife wanted further disclosure from the Husband but none was forthcoming. The Husband had been given 6 different dates in May to have the issue dealt with on a temporary basis but no date was forthcoming. The June 7 date was then booked. The Wife was concerned as there was a Settlement Conference scheduled for July 4, 2012, while the parties were still operating under an inadequate spousal support temporary 2012 Order. The Wife had even served a “With Prejudice Offer” on May 18, to move things ahead, but it was ignored. The Wife’s materials were served two weeks in advance but the Husband was on notice many weeks earlier that unless they could reach an agreement, a Motion would be brought.

6 I refused to adjourn the Motion. It came on before me on a day when I was able to provide the parties with extra time to present their cases. In my view, it was imperative that the interim/temporary Motion be heard before the Settlement Conference was held. Had it not been heard, the Settlement Conference may have been adjourned, as there was a massive amount of material to be presented, I had no confidence that the parties would be in a position to present Offers of Settlement at such a Conference, given the disparity in their positions. In addition, I had read all the materials, as I knew the adjournment was opposed. I was prepared for the Motion if the adjournment was not granted by me. Lastly, the Wife had been receiving a nominal amount of spousal support of \$1,700 per month, which had been agreed upon before either party had expert reports and business valuations. Her lifestyle, as set out in the materials, showed that she required additional spousal support.

7 The adjournment argument took about 1/2 hour and the Motion proceeded for 1 1/2 hours that day and was adjourned over to June 14, where it continued for an additional 2 1/2 hours. The parties were therefore given, in total time, the equivalent of a long motion.

Some background facts

8 The parties had been married for 34 1/2 years, when they separated on July 31, 2010. Over those past 2 years the parties have attended two Case Conferences, which the Wife says resulted in no Court Orders and no issues having been settled between them, other than the fact that she receives \$1,700 net of tax as spousal support. Early on in the parties' litigation, her then counsel had requested that she be given \$5,000 per month as interim spousal support so this Motion was not a surprise.

9 The parties have three adult daughters. The elder two are married and I am told that the middle daughter works part-time in the Husband's busy dental practice. The 27 year old daughter, Anna, is enrolled in an International Law Degree programme in France. The Wife says Anna has told her that intends not to finish in school and may have an opportunity for a full-time job in the government.

10 The Husband has been claiming the daughter Anna as a dependant and says that she continues to be a dependant at a cost of \$30,000 a year to him in child support. She stays with the Husband when she returns to Canada on vacations.

11 The parties' two major assets, other than the Husband's dental practice, are real properties. The Husband currently occupies the matrimonial home at 99 Eden Drive, Toronto, valued at \$1,200,000. It is subject to a mortgage of \$525,000. The Wife occupies a 485 ft. square basement apartment in a 6-plex registered in her name on 3 Chestnut Hills Crescent, Toronto, having a value of \$925,000. It is subject to a mortgage of \$555,000. Both properties are registered solely in the Wife's name and both have almost an equal amount of equity in them.

12 The Wife is a retired teacher. Her current Financial Statement sworn in 2012 shows that she receives monthly pension income of \$3,942.34, temporary spousal support of \$1,700. Supply teaching income of \$300, interest and investment income of \$250 and a negative rental income of (\$5,946.84).

13 The Husband's current Financial Statement dated February 2011 shows his income as \$111,276 based on his 2009 income. Of that amount, \$683 per month is CPP pension. He claims, in his budget that he spends \$3,000 per month on school fees for Anna. That is, he spends \$36,000 a year on a 27 year old daughter, while he is only prepared to give his Wife \$1,700 per month.

14 The Wife says that in September 2010, the Husband represented that his income was \$161,000 per year. His income, however, comes from his professional dental corporation ("SDPC"). In that year alone, the corporation made \$1,294,998. It employs some technicians and a receptionist but also owns another company, Vizok Services Inc. ("Vizok"), which is said to operate a technical/hygiene service business. The Wife knows that she owns shares in Vizok but no separate valuation of that company has ever been presented to her.

15 The Wife says that the Husband lives a comfortable lifestyle in the matrimonial home. While married they accumulated certain assets, with all three daughters attending private school. She said the Husband still eats at expensive restaurants, especially when he travels abroad. She says he also attends conferences in "exotic locations" and sometimes takes his staff, as he did in June 2011. She says he has travelled to Scotland, England, Austria, Costa Rica, France and New

York since their separation. In addition, she says, in 2009 he purchased a camera worth \$9,000.

The Husband's Dental Practice

16 The Wife does not accept that the Husband's dental practice, valued in 2011 by Vivian Alterman, is worth "nothing", as he claims. That practice had been valued 7 years previously at \$452,790 by ROI Corporation, which specializes in valuing dental practices. The goodwill at that point was valued at \$310,620. This valuation, says the Wife, was used to help the Husband borrow against their home, for extensive renovations to the practice. In addition, in 2006, the Husband purchased a second practice from a retiring dentist for \$400,000. When the Wife tried to hire ROI to currently value the Husband's practice, he claimed ROI was in a conflict. ROI disagreed, but rather than engage in a costly court battle on this issue, the Wife sought another valuator.

17 The Wife hired David Lind of Professional Practice Sales ("PPS") in October 2011 in order to value the Husband's dental practice. The Wife says that the Husband has not cooperated in providing access by Mr. Lind to certain records and to see patient charts, even though Lind has provided a confidentiality agreement.

18 The Wife also retained the services of Paul Mandel of Collins Barrow to provide a determination of the Husband's income. He, too, wants to question the Husband about his business expenses and deductions. The Wife, however, feels stymied by delays and non-answers to questions raised by her counsel and valutors over many months.

19 In her valuation dated July 7, 2011, of the Husband's practice, Ms. Alterman values the goodwill at \$475,000 but after various deductions, concludes that the practice has a negative value of (\$19,000). She also values Vizok at NIL and includes it as part of the practice rather than a free-standing entity.

20 On page 3 of Schedule 2 of her report, Ms. Alterman, in examining the Husband's 2010 income, adds back certain automobile expenses, Rogers wireless, marketing and meals and entertainment totalling \$11,455. She agrees that this amount should be added to the Husband's income to determine his true income. She uses a 50% figure of the business expense figure to add back.

21 On January 25, 2012, Mandel's Preliminary Income Report was sent to the Husband's Counsel. That Report calculated the Husband's income as follows:

1. 2008 - \$279,000
2. 2009 - \$255,000
3. 2010 - \$223,000

The three-year average is \$252,000.

22 The Wife, however, for purposes of this interim/temporary Motion is prepared to accept the 2010 figure of \$223,000 to be used for calculating spousal support. Mandel, however, in add-backs says that he added back all automobile expenses in excess of \$3,000 per year. For purposes of these calculations, Mandel added back only the automobile expenses on a without prejudice basis. If the issue of add-backs became one for Trial, Mandel would provide what he says should be additional add-backs to the Husband's income. Using the Alterman figures at 50% for other add-backs, Mandel says the automobile expense figure, to be add-back, is approximately \$20,000. Mandel says that this figure should be grossed up for income tax purposes. Thus the add-back comes to \$41,000.

23 The Husband produced a copy of his 2011 Income Tax Notice of Assessment during the Motion. It shows his 2011 income as \$194,722. With the add-backs his own valuator used, the income comes to \$206,177, with no gross-up for tax.

The Wife's Income

24 The Wife's 2011 Income Tax Return shows a decrease of her income to \$48,191.98. Since she receives the spousal support net of tax, it is not included. If the \$20,400 in spousal support is added to this, her actual income is \$68,591.98. Since

she has shown a loss of \$5,414 on her rental income property, it has also reduced her taxable income. The Wife says that the six-plex required many repairs and maintenance which had not been done for many years.

25 The Wife points to the fact that she lives in the basement apartment of the six-plex, being the smallest and lowest in rent when it was rented to a tenant at \$900 per month. She has updated the apartment and paid herself about \$4,558 for the painting and redecorating she did in the whole building, which is reflected in her 2010 Income Tax Return. Her income in 2010 was \$57,041.77.

26 Using the Spousal Support Advisory Guidelines with the Wife's income for 2010 and the Husband's at \$223,000, the range would be \$5,463 at the low end and \$7,066 at the high end. She seeks the \$7,066 at the high end based on her 2011 income. This would provide her with about 50% of the parties' Net Disposable Income. She says she has lived in a frugal manner and outlines how her standard of living has been reduced since the parties separated.

27 The marriage was an extremely long one of 34 1/2 years. The Wife has forgone going to the theatre and opera and reduced the amount of gifts she gives to family members. She has travelled nowhere and can no longer afford to entertain family and friends, she says. She no longer can afford a cleaning woman and has spent little on clothes and other personal needs. She outlines in paragraphs 29, 30 and 31 of her Factum, how drastically her life has changed since the separation. Her Husband, on the other hand, continues to enjoy the family home, which is large and comfortable, with a piano, excellent sound system, lots of sunshine and space to keep things.

28 The Husband, although not having moved by way of Motion in this regard, says that the Wife is underemployed and should be working full-time as a teacher, despite the fact that she retired on full pension a few years ago. He says there should be add-backs to the Wife's income, including more in the way of rental income, and benefits she receives from living in the basement apartment.

Analysis

29 The Wife says that saying she should return to work full-time is an attempt by the Husband to try to deflect the Court from what has been asked by her in her Notice of Motion. Why would the Court say that a retired teacher had an obligation to return to work full-time, given what the Husband's professional income is? In the alternative, why would the Court say that she should work the maximum number of days possible as a supply teacher, given the cutbacks in educational expenses and given that new teachers are available to supply teach, if needed?

30 In my view, the Husband is denigrating the fact that the Wife has always worked either as a teacher or in the home raising the parties' three children, running the household and contributing to the parties' acquisition of assets throughout this long marriage. At this point, and on an interim/temporary basis in determining what is proper spousal support for the 2012 year, I see no need to even consider if there should be add-backs to the Wife's income.

31 On the other hand, the Husband gets many professional deductions from his income and his own valuator has concluded that there should be the add-backs as noted above in these Reasons. The Husband says he is carrying the debt load of the family, yet most of it relates to the very items already mentioned in buying another dental practice and in making improvements to his dental facilities by borrowing against the equity in the matrimonial home.

32 When the Motion was being heard by me, I told counsel that I would not consider a 27 year-old daughter registered in a second degree in a European university as still a dependant and a child of the marriage. She is able to obtain summer employment abroad. She may be entitled to borrow for her education. She should not be supported by her father at the expense of spousal support for her mother. For example, the Husband can deduct the spousal support from his income, so that even at the high end of \$7,066, since the Husband is at the highest income-tax bracket, it effectively would only cost him \$3,500 per month. The daughter's educational costs therefore may not be taken into account by the Husband for spousal support purposes.

33 Case law supports the Wife's position that she should be entitled to spousal support based on the SSAG's. Section 33(8) of the *Family Law Act*, R.S.O. 1990, c.F.3 sets out the purposes of an Order for the support of a spouse. Subsection (a) says the Court should recognize the spouse's contribution to the relationship and the economic consequences of the

relationship for the spouse. Here the Wife carried the raising of the children and the running of the home as well as the profession of a full-time teacher until retirement. This is a hugely significant contribution to the parties' marriage and relationship.

34 The Wife also, as set out in subsection (b), contributed to the Husband's ability to be able to set up his professional corporation and expand his dental practice, as well as assist him to be able to purchase another practice by allowing their matrimonial home to be encumbered with debt to effect the expansion. She also helped with the running of the rental property while the parties were together.

35 As was noted in para. 50 of *Davies v. Quantz*, 2010 CarswellOnt 10064 (Ont. S.C.J.):

Where one spouse, in a marriage with children, has become a full-time homemaker or has worked outside the home part time or has worked as a secondary earner, there will be disadvantage and loss at the end of the marriage, usually warranting compensatory support. This compensatory rationale is encompassed by the first of the four objectives of spousal support, in s.15.2(6)(a) of the *Divorce Act*.

36 The Wife should therefore not continue to be disadvantaged on an interim/temporary basis with the small amount of support she is currently receiving. I agree with the Wife that the change in the spousal support figure should be retroactive to January 2012, when she first started asking for more support than she was receiving going back to 2010. It is also the date when her valuator's report was given to the Husband. The issue of any additional retroactive support can be left to the Trial Judge.

37 The Husband says the Wife's Motion should be dismissed since it is really to change the 2010 spousal support agreed to on a temporary basis. He says what he has been paying is reasonable. He says the picture being painted by the Wife is inaccurate and are "holes in the facts." He does agree, however, that the Wife worked throughout their marriage and both have long time careers.

38 Much of the Husband's Factum deals with the Wife's income and not his own. He says her teacher's pension is guaranteed, while his own income is not. This really has no relevance to how much spousal support she is entitled to. He also wants any SSAG calculations to include one child as a dependant. I have refused to do this for the reasons set out herein. He says she took early retirement in 2004, at a time when she was earning \$90,000. There is no evidence that her pension today, is not the full pension for her years of service. She was entitled to retire.

39 The Husband has provided many different SSAG calculations based on various amounts of income for him and the Wife, with and without one adult child calculated into the formula. He continued on others to include an expense of \$2,500 for Section 7 expenses, which I see no validity to, given that I have found the daughter Anna not to be a dependant. The only scenario provided by the Husband, which I found to be somewhat realistic was the one where his income is shown as \$216,000.

40 In one of his calculations, the Husband imputes \$30,000 income to the Wife for a total income of \$93,228. This would give a spousal support range from \$3,837 at the low end, with the mid-range being \$4,476 and the high, \$4,974. The \$216,000 for him is made up of his 2011 declared income, plus the add-backs his valuator says should be added back. The problem with this calculation, is that the Husband has added-back the amount of \$30,000 to the Wife's income. There was no Motion on the issue of an add-back for the Wife and I find it of no relevance in the Motion before me.

41 A SSAG calculation has been provided based strictly on the Husband's 2011 income of \$194,722 and the Wife's 2010 income at \$57,042, with no add-backs. It produces spousal support calculations of \$4,302 at the low end, \$5,020 at the mid-range and \$5,528 at the high end. The Wife's income does not include the spousal support currently being paid. The high end gives the parties a 50:50 split.

42 One SSAG calculation based on the Husband's \$223,000 figure as calculated by Mandel includes the add-on of automobile expense for 2010, and the Wife's \$48,192 for 2011 (with the rental loss calculated in) gives a low range of \$5,463, a mid-range of \$6,373 and a high of \$7,066. The high range represents the 50:50 NDI split.

43 In my view, the \$223,000 figure to be used for the Husband's income is not unreasonable. The Husband's 2011 income is \$194,722 and with the \$40,000 add-back based on Mandel's calculation, including the gross-up, it would be \$234,722 but this was not a figure that either party put forward, given the late arrival of the Husband's Notice of Assessment for 2011.

44 I have therefore chosen that SSAG calculation, which shows the mid-range of \$6,373 per month, as shown on the SSAG calculation with the Husband's income for 2010 at \$223,000 and the Wife's at \$48,192, as being the appropriate interim/temporary spousal support to be paid to the Wife commencing January 1, 2012. The Husband shall be given credit for the amounts he had paid to date and he will have the advantage of the tax deduction for the year. Any arrears of spousal support shall be paid by the Husband at \$300 per month from the date of this Order until fully paid. No one mentioned whether an SDO should issue or not. In the event the parties agree on how the support should be paid monthly, they may in writing waive the SDO being issued.

45 As for the parties' differences as to who has not made proper disclosure and what still remains outstanding, they each disagree with what remains outstanding. The Wife has provided Schedule A to her Notice of Motion and sent a letter dated May 18, 2012, "With Prejudice" which is an offer to settle all disclosure items so that time would not have to be taken up on the Motion about disclosure. In my view this is a reasonable offer and it should have been accepted. An Order shall go that the disclosure shall be conducted in the manner as set out in that letter and any documentation not already provided by the Husband, shall be produced within 20 days of this Order. The dates mentioned in paras. 2 and 3 of the May 18, 2012 letter shall be changed to read mid-July 2012. Disclosure is never perfect. With the balance to be done in this matter, it will either move the parties to settle or they shall set the matter down for an early trial.

Costs

46 If the parties cannot agree on Costs, they may make brief written submissions to be sent to me at Osgoode Hall, no longer than 3 pages in length plus docket, a bill of Costs and case law. In the event there were any Offers to Settle, these shall also be sent to me. The Applicant shall submit her submissions within 30 days of the date of this Order, with the Respondent having 10 days thereafter to respond, and the Applicant 7 days thereafter for any Reply.
