

N.M.G. (appellant) v. D.S.S. (respondent)
(S1-CA-1234; S1-CA-1237; 2012 PECA 14)

Indexed As: D.S.S. v. N.M.G.

Prince Edward Island Court of Appeal
Jenkins, C.J.P.E.I., McQuaid and Murphy, JJ.A.
July 17, 2012.

Summary:

The parties entered into a separation agreement under which the husband relinquished his right to have the wife's much more lucrative pension funds divided in return for the husband paying a reduced amount of child support (\$500 per month rather than the \$1,039 per month prescribed by the Federal Child Support Guidelines for the husband's income). The agreement also provided in clause 50 that, if the wife applied for additional child support, she was to be responsible for all of the husband's legal costs and such an application would result in the equalization of the pensions. The wife applied for additional child support. She was ordered to pay the husband's costs to date and to provide security for costs (see [2011] Nfld. & P.E.I.R. Uned. 70). The wife sought a divorce with corollary relief to be granted at a later date and to have significant portions of the agreement set aside. The husband sought an order for the division of the wife's pension, for costs and for security for costs.

The Prince Edward Island Supreme Court, in a decision reported at (2012), 321 Nfld. & P.E.I.R. 233; 996 A.P.R. 223, held that clause 50 of the separation agreement was enforceable. The court determined the pension equalization and granted orders relating to costs and security for costs. The wife appealed.

The Prince Edward Island Court of Appeal allowed the appeal, setting aside the orders relating to costs and security for costs below.

Editor's Note: Certain names in the following case have been initialized or the case otherwise edited to prevent the disclosure of identities where required by law, publication ban, Maritime Law Book's editorial policy or otherwise.

Family Law - Topic 3263

Separation agreements, domestic contracts and marriage contracts - Enforcement - Conditions precedent - The parties entered into a separation agreement under which the husband relinquished his right to have the wife's much more lucrative pension divided in return for the husband paying child support of \$500 per month rather than \$1,039 per month - Under clause 50, if the wife applied for additional child support, she was to pay all of the husband's legal costs and such an application would result in the equalization of the pensions - The wife applied for additional child support - Campbell, J., found that clause 50 was enforceable, granting the husband's motion for orders for costs and security for costs, including an order barring the wife from further proceedings in the divorce action until payment was made - The Prince Edward Island Court of Appeal allowed the wife's appeal, setting aside the orders relating to costs and security for costs below - A

reversible error occurred where Campbell, J., decided the issue of the wife's liability to pay legal costs under clause 50 without first or simultaneously deciding whether the challenged special provision for child support was valid and enforceable under s. 15.1 of the Divorce Act - It was also incorrect to state that the bargain was for the parties to make and that it was not for the courts to intervene - A court could only approve an agreement regarding child support on being satisfied that the requirements of s. 15.1 had been met - All of the issues had to be decided together - Clause 50 was an ancillary enforcement provision - It was premature to order costs payable under the agreement on a separate motion without all of those matters being fully heard and decided - Finally, the order for security for costs and barring proceedings ran contrary to the core Divorce Act provisions that created a right for the children to child support under the amounts payable in the Federal Child Support Guidelines - See paragraphs 20 to 31.

Family Law - Topic 3357

Separation agreements, domestic contracts and marriage contracts - Effect of agreement - Maintenance of children - [See **Family Law - Topic 3263**].

Family Law - Topic 4001

Divorce - Corollary relief - Maintenance and awards - Jurisdiction of a court to grant maintenance (incl. automatic increases and reservation re future applications) - [See **Family Law - Topic 3263**].

Family Law - Topic 4006.1

Divorce - Corollary relief - Maintenance and awards - Awards - To children - Effect of agreements - [See **Family Law - Topic 3263**].

Family Law - Topic 4045.1

Divorce - Corollary relief - Maintenance - Child support guidelines (incl. nondivorce cases - General (incl. interpretation) - [See **Family Law - Topic 3263**].

Family Law - Topic 4179

Divorce - Practice - Costs - Security for costs (incl. on appeal) - [See **Family Law - Topic 3263**].

Family Law - Topic 4180

Divorce - Practice - Costs - Enforcement of order for costs - [See **Family Law - Topic 3263**].

Cases Noticed:

Van de Perre v. Edwards - see K.V.P. v. T.E.

K.V.P. v. T.E. (2001), 275 N.R. 52; 156 B.C.A.C. 161; 255 W.A.C. 161; 2001 SCC 60, refd to. [para. 24].

Willick v. Willick, [1994] 3 S.C.R. 670; 173 N.R. 321; 125 Sask.R. 81; 81 W.A.C. 81, refd to. [para. 26].

Counsel:

N.M.G., on her own behalf;
D.S.S., on his own behalf.

This appeal was heard at Charlottetown, P.E.I., on May 24, 2012, by Jenkins, C.J.P.E.I., McQuaid and Murphy, J.J.A., of the Prince Edward Island Court of Appeal. On July 17, 2012, Jenkins, C.J.P.E.I., delivered the following written reasons for judgment for the court.

Appeal allowed.

Editor: Sharon McCartney

Family Law - Topic 3357

Separation agreements, domestic contracts and marriage contracts - Effect of agreement - Maintenance of children - The parties entered into a separation agreement under which the husband relinquished his right to have the wife's much more lucrative pension divided in return for the husband paying child support of \$500 per month rather than \$1,039 per month - Under clause 50, if the wife applied for additional child support, she was to pay all of the husband's legal costs and such an application would result in the equalization of the pensions - The wife applied for additional child support - Campbell, J., found that clause 50 was enforceable, granting the husband's motion for orders for costs and security for costs, including an order barring the wife from further proceedings in the divorce action until payment was made - The Prince Edward Island Court of Appeal allowed the wife's appeal, setting aside the orders relating to costs and security for costs below - A reversible error occurred where Campbell, J., decided the issue of the wife's liability to pay legal costs under clause 50 without first or simultaneously deciding whether the challenged special provision for child support was valid and enforceable under s. 15.1 of the Divorce Act - It was also incorrect to state that the bargain was for the parties to make and that it was not for the courts to intervene - A court could only approve an agreement regarding child support on being satisfied that the requirements of s. 15.1 had been met - All of the issues had to be decided together - Clause 50 was an ancillary enforcement provision - It was premature to order costs payable under the agreement on a separate motion without all of those matters being fully heard and decided - Finally, the order for security for costs and barring proceedings ran contrary to the core Divorce Act provisions that created a right for the children to child support under the amounts payable in the Federal Child Support Guidelines - See paragraphs 20 to 31.

Family Law - Topic 4001

Divorce - Corollary relief - Maintenance and awards - Jurisdiction of a court to grant maintenance (incl. automatic increases and reservation re future applications) - The parties entered into a separation agreement under which the husband relinquished his right to have the wife's much more lucrative pension divided in return for the husband paying child support of \$500 per month rather than \$1,039 per month - Under clause 50, if the wife applied for additional child support, she was to pay all of the husband's legal costs and such an application would result in the equalization of the pensions - The wife applied for additional child support - Campbell, J., found that clause 50 was enforceable,

granting the husband's motion for orders for costs and security for costs, including an order barring the wife from further proceedings in the divorce action until payment was made - The Prince Edward Island Court of Appeal allowed the wife's appeal, setting aside the orders relating to costs and security for costs below - A reversible error occurred where Campbell, J., decided the issue of the wife's liability to pay legal costs under clause 50 without first or simultaneously deciding whether the challenged special provision for child support was valid and enforceable under s. 15.1 of the Divorce Act - It was also incorrect to state that the bargain was for the parties to make and that it was not for the courts to intervene - A court could only approve an agreement regarding child support on being satisfied that the requirements of s. 15.1 had been met - All of the issues had to be decided together - Clause 50 was an ancillary enforcement provision - It was premature to order costs payable under the agreement on a separate motion without all of those matters being fully heard and decided - Finally, the order for security for costs and barring proceedings ran contrary to the core Divorce Act provisions that created a right for the children to child support under the amounts payable in the Federal Child Support Guidelines - See paragraphs 20 to 31.

Family Law - Topic 4006.1

Divorce - Corollary relief - Maintenance and awards - Awards - To children - Effect of agreements - The parties entered into a separation agreement under which the husband relinquished his right to have the wife's much more lucrative pension divided in return for the husband paying child support of \$500 per month rather than \$1,039 per month - Under clause 50, if the wife applied for additional child support, she was to pay all of the husband's legal costs and such an application would result in the equalization of the pensions - The wife applied for additional child support - Campbell, J., found that clause 50 was enforceable, granting the husband's motion for orders for costs and security for costs, including an order barring the wife from further proceedings in the divorce action until payment was made - The Prince Edward Island Court of Appeal allowed the wife's appeal, setting aside the orders relating to costs and security for costs below - A reversible error occurred where Campbell, J., decided the issue of the wife's liability to pay legal costs under clause 50 without first or simultaneously deciding whether the challenged special provision for child support was valid and enforceable under s. 15.1 of the Divorce Act - It was also incorrect to state that the bargain was for the parties to make and that it was not for the courts to intervene - A court could only approve an agreement regarding child support on being satisfied that the requirements of s. 15.1 had been met - All of the issues had to be decided together - Clause 50 was an ancillary enforcement provision - It was premature to order costs payable under the agreement on a separate motion without all of those matters being fully heard and decided - Finally, the order for security for costs and barring proceedings ran contrary to the core Divorce Act provisions that created a right for the children to child support under the amounts payable in the Federal Child Support Guidelines - See paragraphs 20 to 31.

Family Law - Topic 4045.1

Divorce - Corollary relief - Maintenance - Child support guidelines (incl. nondivorce cases - General (incl. interpretation) - The parties entered into a separation agreement under which the husband relinquished his right to have the wife's much more lucrative

pension divided in return for the husband paying child support of \$500 per month rather than \$1,039 per month - Under clause 50, if the wife applied for additional child support, she was to pay all of the husband's legal costs and such an application would result in the equalization of the pensions - The wife applied for additional child support - Campbell, J., found that clause 50 was enforceable, granting the husband's motion for orders for costs and security for costs, including an order barring the wife from further proceedings in the divorce action until payment was made - The Prince Edward Island Court of Appeal allowed the wife's appeal, setting aside the orders relating to costs and security for costs below - A reversible error occurred where Campbell, J., decided the issue of the wife's liability to pay legal costs under clause 50 without first or simultaneously deciding whether the challenged special provision for child support was valid and enforceable under s. 15.1 of the Divorce Act - It was also incorrect to state that the bargain was for the parties to make and that it was not for the courts to intervene - A court could only approve an agreement regarding child support on being satisfied that the requirements of s. 15.1 had been met - All of the issues had to be decided together - Clause 50 was an ancillary enforcement provision - It was premature to order costs payable under the agreement on a separate motion without all of those matters being fully heard and decided - Finally, the order for security for costs and barring proceedings ran contrary to the core Divorce Act provisions that created a right for the children to child support under the amounts payable in the Federal Child Support Guidelines - See paragraphs 20 to 31.

Family Law - Topic 4179

Divorce - Practice - Costs - Security for costs (incl. on appeal) - The parties entered into a separation agreement under which the husband relinquished his right to have the wife's much more lucrative pension divided in return for the husband paying child support of \$500 per month rather than \$1,039 per month - Under clause 50, if the wife applied for additional child support, she was to pay all of the husband's legal costs and such an application would result in the equalization of the pensions - The wife applied for additional child support - Campbell, J., found that clause 50 was enforceable, granting the husband's motion for orders for costs and security for costs, including an order barring the wife from further proceedings in the divorce action until payment was made - The Prince Edward Island Court of Appeal allowed the wife's appeal, setting aside the orders relating to costs and security for costs below - A reversible error occurred where Campbell, J., decided the issue of the wife's liability to pay legal costs under clause 50 without first or simultaneously deciding whether the challenged special provision for child support was valid and enforceable under s. 15.1 of the Divorce Act - It was also incorrect to state that the bargain was for the parties to make and that it was not for the courts to intervene - A court could only approve an agreement regarding child support on being satisfied that the requirements of s. 15.1 had been met - All of the issues had to be decided together - Clause 50 was an ancillary enforcement provision - It was premature to order costs payable under the agreement on a separate motion without all of those matters being fully heard and decided - Finally, the order for security for costs and barring proceedings ran contrary to the core Divorce Act provisions that created a right for the children to child support under the amounts payable in the Federal Child Support Guidelines - See paragraphs 20 to 31.

Family Law - Topic 4180

Divorce - Practice - Costs - Enforcement of order for costs - The parties entered into a separation agreement under which the husband relinquished his right to have the wife's much more lucrative pension divided in return for the husband paying child support of \$500 per month rather than \$1,039 per month - Under clause 50, if the wife applied for additional child support, she was to pay all of the husband's legal costs and such an application would result in the equalization of the pensions - The wife applied for additional child support - Campbell, J., found that clause 50 was enforceable, granting the husband's motion for orders for costs and security for costs, including an order barring the wife from further proceedings in the divorce action until payment was made - The Prince Edward Island Court of Appeal allowed the wife's appeal, setting aside the orders relating to costs and security for costs below - A reversible error occurred where Campbell, J., decided the issue of the wife's liability to pay legal costs under clause 50 without first or simultaneously deciding whether the challenged special provision for child support was valid and enforceable under s. 15.1 of the Divorce Act - It was also incorrect to state that the bargain was for the parties to make and that it was not for the courts to intervene - A court could only approve an agreement regarding child support on being satisfied that the requirements of s. 15.1 had been met - All of the issues had to be decided together - Clause 50 was an ancillary enforcement provision - It was premature to order costs payable under the agreement on a separate motion without all of those matters being fully heard and decided - Finally, the order for security for costs and barring proceedings ran contrary to the core Divorce Act provisions that created a right for the children to child support under the amounts payable in the Federal Child Support Guidelines - See paragraphs 20 to 31.