# COURT OF APPEAL FOR ONTARIO

CITATION: Politis v. Politis, 2021 ONCA 541
DATE: 20210728
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Tulloch, Nordheimer and Jamal JJ.A.

BETWEEN

Catherine Elizabeth Politis

Applicant (Appellant and
Respondent by way of cross-appeal)

and

Themistocles Politis

Respondent (Respondent and
Appellant by way of cross-appeal)

Herschel I. Fogelman and Lauren Daneman, for the appellant and respondent by way of cross-appeal

James D. Singer, for the respondent and appellant by way of cross-appeal

Heard: April 6, 2021 by video conference

On appeal from the order of Justice E. Llana Nakonechny of the Superior Court of Justice, dated February 27, 2020, with reasons reported at 2020 ONSC 1306.

On cross-appeal from the costs endorsement of Justice E. Llana Nakonechny of the Superior Court of Justice, dated April 9, 2020.

**Tulloch J.A.:**

## A. INTRODUCTION

[1] The parties were married for 25 years. They separated in 2008, when they were both 48 years old. By the time of trial, the parties had been separated for eleven years and the appellant had resided with her new partner, Mr. Burleigh, for at least eight years.

[2] After a six-day trial, the trial judge held that the appellant established a prima facie entitlement to spousal support on both a compensatory and needs-based model. The trial judge reduced the spousal support payments that the respondent owed to the appellant, reasoning that the appellant's second spouse had an increasing obligation to contribute. The trial judge further ordered the support payments to terminate as of October 2026. The trial judge awarded costs of $45,000 all-inclusive to the appellant.

[3] On appeal, the appellant submits that the trial judge erred in law in her determination of the quantum and duration of spousal support. The respondent cross-appeals the costs order awarded against him at trial.

[4] For the reasons that follow, I would dismiss both the appeal and the cross-appeal.

## B. OVERVIEW OF THE FACTS

[5] As noted above, the parties were married for 25 years. They had three children together. The children are now adults and independent.

[6] The appellant has a high school education. She was a full-time homemaker and caregiver to the parties' children throughout the marriage. She has not been employed since separation. She was diagnosed with Lyme disease in October 2012, affecting her ability to re-enter the workforce. At trial, her position was that she had no ability to earn income or contribute to her own support.

[7] The respondent is a civil engineer. He earns income through his own professional corporation, which he has owned since 1992.

[8] At the time of separation, the parties did not have any significant assets, besides the matrimonial home, which was significantly encumbered. The net proceeds of sale were $113,263.05. Neither party paid any equalization payments to the other.

[9] In 2015, the appellant brought a motion for interim spousal support. On November 13, 2015, the motion judge ordered the respondent to pay spousal support in the amount of $5,288 per month on an interim basis, based on an imputed income of $200,500. The respondent paid the outstanding arrears of support, totalling $52,880, to the appellant from his share of the net proceeds of the sale of the family home. In calculating the quantum of interim support, the motion judge took into consideration a monthly amount contributed by Mr. Burleigh to the appellant's expenses.

[10] At trial, the appellant sought increased monthly spousal support for an indefinite period. She argued that the respondent underpaid support as his income was actually higher than the income imputed by the motion judge. For his part, the respondent sought a termination of spousal support, and credit for overpayments made to the date of trial. His position was that the entirety of his support obligation should shift to the appellant's new partner.



## C. DECISION BELOW

[11] There were three issues before the trial judge: (1) whether the appellant was entitled to spousal support; (2) if so, what was the respondent's income for the purpose of calculating spousal support; and (3) what was the effect of the appellant's cohabitation with her new spouse on entitlement to, as well as quantum and duration of, spousal support. Additionally, the trial judge determined the quantum of costs to be awarded in relation to these proceedings.

[12] The sections that follow summarize the trial judge's conclusions on each of these issues, in turn.

### (1) The Appellant's Entitlement to Spousal Support

[13] The trial judge found that the appellant had established a prima facie entitlement to spousal support on both a compensatory and needs-based model. On this issue, the trial judge made the following findings of fact: the parties had a long-term marriage; the appellant was a stay-at-home parent, but the respondent

assisted her with home and parenting responsibilities when he could; as a result of the appellant's age, health, lack of education and work experience, she had a difficult time re-entering the workforce following separation; and she cannot be self-sufficient based on her own income or assets.

**(2) The Respondent's Income for Support Purposes**

[14] For the quantum of spousal support, the starting point was determining whether the amount imputed to the respondent's income in the interim order was appropriate. The appellant sought an adjustment upward, while the respondent sought credit for overpayment.

[15] While the respondent's income deviated somewhat from the amount imputed by the motion judge in the two years since the interim order was issued in 2015, the trial judge found that the sums paid to the appellant ultimately balanced out. Accordingly, the trial judge decided that: "On balance, and taking into account the means, needs, and circumstances of the Applicant and the financial support she received from Mr. Burleigh in the relevant years, neither an increased payment nor a credit for overpayment is appropriate in this case."

**(3) The Effect of the Appellant's Common Law Spouse on the Quantum and Duration of Spousal Support**

[16] The trial judge found that the appellant and Mr. Burleigh began a committed relationship in 2009 and began cohabitating in 2011. She noted that a spouse's re-

partnering does not disentitle her to spousal support but does affect quantum and duration.

[17] The trial judge found that the appellant enjoys a standard of living with Mr. Burleigh that is comparable to, or better than, the standard of living that the parties enjoyed during their marriage. The trial judge concluded that “while a greater portion of the Applicant's need should now be met by Mr. Burleigh, the economic loss from her marriage to the Respondent has not been completely compensated by the support paid by the Respondent to date.”

[18] The trial judge disbelieved several aspects of the appellant’s evidence, including: that she had no knowledge of Mr. Burleigh’s financial circumstances; and that she was obligated to repay a loan to Mr. Burleigh on a monthly basis. According to the trial judge, the appellant’s evidence concerning her financial arrangement with Mr. Burleigh did not “ring true.”

[19] The trial judge found that the appellant received a net financial benefit from Mr. Burleigh in the amount of at least $3,100 per month. The trial judge grossed-up this amount to a notional income of $44,268 per year. The respondent’s income was $193,816. The trial judge determined that the Spousal Support Advisory Guidelines formula (“SSAGs”) range for this income differential contemplates both needs based and compensatory support. She further identified the SSAGs formula

range as follows: $4,673 at the low end, $5,452 at the mid range, and $6,185 at the high end.

[20] In determining the amount of support to be paid by the respondent, the trial judge considered the SSAGs ranges, the partially compensatory and initially partially needs-based nature of the applicant's entitlement, as well as the benefit she receives from her cohabitation with Mr. Burleigh. The trial judge concluded that spousal support payments should not be terminated as the appellant had not yet been fully compensated for her economic loss. However, the trial judge reduced the amount owed based on her significantly decreased need given her second spouse's ability to support her.

[21] As of November 1, 2019, the respondent was ordered to pay spousal support in the amount of $3,000 per month up to and including October 1, 2024. Commencing November 1, 2024, the respondent was ordered to pay spousal support to the appellant in the amount of $1,500 per month up to and including October 1, 2026. Thereafter, the trial judge held that spousal support shall terminate.

[22] The respondent was also ordered to pay $10,446.50 to the appellant to reimburse her for debts paid by her on the respondent's behalf.

### (4) Costs

[23] The trial judge awarded costs of $45,000 all inclusive to the appellant. On balance, she found that the appellant was the more successful party based on the claims made by the parties in the pleadings and at trial, as well as the outcome of the trial. She was entitled to a portion of her costs.

## D. ISSUES RAISED BY THE APPELLANT

[24] The appellant argues that the trial judge erred in her determination of the quantum and duration of spousal support because she deviated from the values generated by the SSAGs formula. Additionally, the appellant argues that the trial judge effectively double-counted the contributions of the appellant's new spouse, first as a source of income and then as benefits paid to the appellant.

## E. STANDARD OF REVIEW IN RELATION TO THE APPELLANT'S GROUNDS OF APPEAL

[25] Before addressing each of these issues, it is important to briefly set out the applicable standard of review as it shapes the contours of the discussion below.

[26] This court should not overturn a support order "unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong": *Hickey v. Hickey*, [1999] 2 S.C.R. 518, para. 12. This court is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently. This deferential posture is

informed by both the discretion involved in making support orders and the importance of finality in family law litigation.



## F. ANALYSIS OF THE APPELLANT'S GROUNDS OF APPEAL

[27] As noted above, the appellant first takes issue with the trial judge's determination of the quantum and duration of spousal support, namely, she asserts that the trial judge "deviated" from the SSAGs formula ranges of support entitlement and from the Rule of 65. She also asserts insufficiency of reasons. As I will explain, I disagree.

### (1) SSAGs Guidance

[28] The appellant is correct in pointing out that the ranges generated by the *Spousal Support Advisory Guidelines* (Ottawa: Department of Justice, 2008) formulas are the presumptive starting point for awarding support: *McKinnon v. McKinnon*, 2018 ONCA 596, [2018] O.J. No. 3487, at para. 24; *Slongo v. Slongo,* 2017 ONCA 272, 137 O.R. (3d) 654, at paras. 105-106. While not binding, the SSAGs should not be lightly departed from: *Slongo,* at para. 105. Any departure requires adequate explanation: *McKinnon,* at para. 24. That being said, while the SSAGs formula offers a valuable tool in assessing a reasonable amount of spousal support, there are complicating factors that must be considered: *Gray v. Gray,* 2014 ONCA 659, 50 R.F.L. (7th) 257, at para. 45.

[29] Where, in my view, the appellant's position errs is in equating the principled guidance offered in the SSAGs *as a whole* with the values generated by the short-hand formulas. Those formulas are intended to be used as tools only and, according to the SSAGs themselves, cannot be applied automatically in every case.

[30] Re-partnering in particular is a circumstance that the SSAGs suggest, at s. 14.7, requires case-by-case decision-making:

> Where the recipient remarries or re-partners with someone who has a similar or higher income than the previous spouse, eventually – faster or slower, depending upon the formula adopted – spousal support would be extinguished. We have been unable to construct a formula with sufficient consensus or flexibility to adjust to these situations, despite considerable feedback that a formula would be desirable. In this final version, we still have to leave the issues surrounding the recipient's remarriage or re-partnering to individual case-by-case negotiation and decision making.

[31] Re-partnering is also specifically contemplated by the SSAGs as a reason to revisit entitlement to support and consider terminating it. On the topic of re-partnering, the SSAGs state at §13.8:

> Entitlement may then be revisited for any number of reasons – the recipient finding employment, the recipient's remarriage or re-partnering, the payor's retirement or loss of employment, etc. – and support may be terminated if entitlement has ceased.

[32] Section 16 the *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice, 2016), echoes the sentiment in instructing that re-partnering "does not mean the automatic termination of spousal support, but support is often reduced and sometimes even terminated." This depends on "whether support is compensatory or non-compensatory, as well as the length of the first marriage, the age of the recipient, the duration and stability of the new relationship and the standard of living in the recipient's new household."

[33] Here, the original support was awarded on both a compensatory and needs basis. The trial judge's explanation for deviating from the SSAGs formula range is clear with respect to both bases of support entitlement and reveals no error in principle.

[34] First, it is clear from the trial judge's reasons that she viewed the contributions of the appellant's new spouse as sufficient to meet the appellant's needs. The trial judge found that the appellant enjoys a standard of living that is comparable to, or better than, the standard of living she enjoyed during the marriage. The trial judge viewed the appellant's new relationship as "lengthy and one of permanence." The trial judge also rejected the appellant's evidence that she was under any obligation to repay her new spouse for the financial assistance he provided her during their relationship. These factual findings support the trial

judge's conclusion that re-partnering diminished the appellant's needs-based entitlement to spousal support.

[35] In this way, the trial judge's deviation from SSAGs formula ranges on this point was not in error, but rather was consistent with the SSAGs overall guidance.

[36] Second, the trial judge's reasons explain her decision with respect to the partially compensatory nature of the appellant's support entitlement, and similarly disclose no error in principle. On this point, the trial judge said as follows:

> In my view, the time has not yet come when the Applicant has been fully compensated for her economic loss and the Respondent's obligation to pay support to her can end. However, it is appropriate for the amount of support and the ranges themselves to be reduced, based on the increasing obligation of the Applicant's second spouse to contribute to her need.

[37] The trial judge also noted that at the time of trial, the respondent had paid the appellant spousal support for about nine years. Given the considerable length of the parties' marriage, the respondent was ordered to continue to pay support until 2026, albeit on a reduced basis. By then, the trial judge found that the appellant will be compensated for any economic loss associated with the dissolution of the marriage.

[38] Again, the trial judge's approach was consistent with the overall guidance in the SSAGs, is owed considerable deference, and I see no reason to interfere.

[39] I would dismiss this ground of appeal.

**(2) The Rule of 65**

[40] The appellant also takes issue with what she refers to as the trial judge's deviation from the "Rule of 65", as set out in s. 3.3.3 of the SSAGs – that is, where the length of cohabitation in years plus the recipient's age at the date of separation equals or exceeds 65, indefinite spousal support is appropriate: *Climans v. Latner,* 2020 ONCA 554, 449 D.L.R. (4th) 651, at para. 3.

[41] Here again, the appellant's position fails to consider the more nuanced explanations provided in the SSAGs. Section 7.5.3 of the SSAGs explains further:

> The *without child* support formula provides that indefinite (duration not specified) support will be available even in cases where the marriage is shorter than 20 years **if the years of marriage plus the *age* of the support recipient *at the time of separation* equals or exceeds 65.** In a shorthand expression, we described this as the "rule of 65". [Emphasis in original.]

[42] The SSAGs make very clear at s. 13.8 that indefinite support is not permanent support:

> Under the Advisory Guidelines duration of spousal support will be indefinite, under both formulas, where the parties have been married for 20 years or more, or where the "rule of 65" applies. But indefinite support, under the Guidelines as under the current law, does not necessarily mean that support is "permanent" or "infinite", only that the duration has not been specified. We have purposely changed the language in this final version to convey that notion; our new terminology is "indefinite (duration not specified)". Duration may be specified at some point in the future and support terminated, if entitlement ceases. [Emphasis added.]

[43] Moreover, the SSAGs explain at s.7.5.3 that the Rule of 65 is, "intended to respond to the situation of older spouses who were economically dependent during a medium length marriage and *who may have difficulty becoming self-sufficient given their age* (emphasis added)".

[44] As already mentioned above, re-partnering is highly relevant to what otherwise might be an insurmountable difficulty in becoming self-sufficient. Given the trial judge's findings that the appellant's standard of living was now comparable to, or higher than what it was during the marriage, I see no error in this aspect of the trial judge's reasons either.

[45] I would dismiss this ground of appeal.

**(3) Accounting for Mr. Burleigh's Contributions**

[46] Finally, the appellant alleges that the trial judge effectively double counted Mr. Burleigh's contributions – first as a source of income, and second as benefits paid by Mr. Burleigh – as justification for her order outside of the SSAGs formula ranges. I do not read the trial judge's reasons in the same light. The impugned comments are as follows:

> I am satisfied that the Applicant receives a net financial benefit from Mr. Burleigh in the amount of at least $3,100 per month: half of the $5,500 he contributes to the household expenses and the $350 alleged debt repayment. Grossed up for tax at 19%, this results in a notional income of $44,268 per year. The *SSAG* range for the Applicant's income of $44,268 and the Respondent's income of $193,816 is $4,673 at the low

> end, $5,452 at the mid range, and $6,185 at the high end. The amounts in this range contemplate both need-based and compensatory support.

[47] She then goes on to state that "it is appropriate for the amount of support and the ranges themselves to be reduced, based on the increasing obligation of the Applicant's second spouse to contribute to her need."

[48] Again, the SSAGs guidance on the need for case-by-case decision-making in the face of re-partnering cited above is apposite.

[49] I would dismiss this ground of appeal as well.

## G. CONCLUSION ON THE APPEAL OF THE SUPPORT ORDER

[50] I would dismiss the appeal.

## H. CROSS APPEAL OF COSTS

[51] The respondent seeks to cross-appeal the costs order, dated April 9, 2020, in the sum of $45,000. This cross-appeal requires leave pursuant to s. 133(b) of the *Courts of Justice Act* and r. 61.03.1(18) of the *Rules of Civil Procedure.* The respondent argues that the trial judge erred in the following ways: (a) by effectively disregarding the nature, calculations and purpose of the respondent's offer to settle; (b) by determining that the appellant was the more successful party at trial; (c) by failing to take into account each party's behaviour during trial and thereby committing an error in principle; and (d) by taking into account the outcomes of a

pre-trial and mid-trial motion on the costs awarded for the trial, in effect double-counting.

[52] In *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at para. 126, Rothstein J. held that "costs awards are quintessentially discretionary." Discretionary costs decisions should only be set aside on appeal if the court below "has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27. None of the respondent's arguments meet this exacting standard. Accordingly, leave to appeal the costs order is granted. However, I would dismiss the cross-appeal of costs.

## I. CONCLUSION AND DISPOSITION

[53] I would dismiss the appeal and, while I would grant leave to appeal the costs order, I would dismiss the cross-appeal of the costs order.

[54] If the parties cannot agree on the disposition of costs of the appeal, they may make brief written submissions of no more than two pages, plus a costs outline, within ten days of the release of these reasons.

Released: July 28, 2021 "M.T."

"M. Tulloch J.A."
"I agree. I.V.B. Nordheimer J.A."
"I agree. M. Jamal J.A."