Unofficial English Translation of the Judgment of the Court

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| Droit de la famille — 21771 | | | | | 2021 QCCA 702 |
| COURT OF APPEAL | | | | | |
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| CANADA | | | | | |
| PROVINCE OF QUEBEC | | | | | |
| REGISTRY OF | | | MONTREAL | | |
| No: | 500-09-028934-206 | | | | |
| (500-12-332269-160) | | | | | |
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| DATE: | April 23, 2021 | | | | |
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| CORAM: | | THE HONOURABLE | | ALLAN R. HILTON, J.A.  MARK SCHRAGER, J.A.  PATRICK HEALY, J.A. | |
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| APPELLANT – Plaintiff | | | | | |
| v. | | | | | |
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| LO… CA… | | | | | |
| RESPONDENT – Defendant | | | | | |
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| JUDGMENT | | | | | |
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1. The appellant appeals from a judgment rendered on April 30, 2020, by the Superior Court, District of Montreal (the Honourable Madam Justice Guylaine Duplessis), which granted the parties’ divorce, ordered the respondent to pay the appellant spousal support of $ 2,200 per month subject to a two-year review term, and dismissed the appellant’s application for a provision for costs.[[1]](#footnote-1)
2. This appeal raises questions regarding the imposition of the review term on support payments, the calculation of the quantum of support, and the dismissal of the application for a provision for costs.
3. Given the high standard of review in this matter, the appellant has not persuaded us to intervene.

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1. The appellant argues that the trial judge erred in imposing a review term on the respondent’s obligation of support when the overall analysis of the appellant’s needs, the length of the marriage, and the functions performed by the parties during their marriage weigh strongly in favour of spousal support without a term or, at the very least, with a reasonable review term. Specifically, the appellant argues that the judge erred in giving undue weight to the economic self-sufficiency objective of s. 15.2(6)(d) of the *Divorce Act*.
2. She first submits that her financial situation is a direct result of her role in their traditional marriage, that they mutually agreed that she would change careers in 2000 and become a financial security adviser, and that she worked part-time so that she could take care of the children and household chores. She adds that the judge erred in not considering the appellant’s efforts to achieve financial independence and that the two‑year review term was simply unrealistic in the circumstances. She also submits that the judge decided *ultra petita* by imposing a shorter term than the four years proposed by the respondent.
3. Section 15.2(3) of the *Divorce Act*[[2]](#footnote-2) provides that the court may limit the duration of a spousal support order.
4. The Court has repeatedly held that specifying a term is exceptional and must be justified by real and concrete circumstances.[[3]](#footnote-3) While appellate courts must generally show deference in cases concerning support, the imposition of a term for spousal support is an exception to this principle: [translation] “The Court shows less deference with regard to these issues and will not hesitate to intervene to vary, even rescind, the term when there has been an error.”[[4]](#footnote-4)
5. The imposition of a term is justified in particular where the recipient of support is able to work and has real possibilities of becoming financially self-sufficient that no longer depend on the marriage or its failure, but rather on the recipient’s personal or professional choices.[[5]](#footnote-5)
6. Where the circumstances do not justify the imposition of a term, it is still possible to provide for a review term, for example to encourage the former spouse to make serious efforts to improve their financial situation.[[6]](#footnote-6)
7. Contrary to what the appellant asserts, the trial judge is not bound by the parties’ applications regarding support issues[[7]](#footnote-7) and has a broad discretion when determining the obligations of each party under the *Divorce Act*.
8. It was thus open to the judge to impose a two-year review term rather than a fixed four-year term, especially since a review term is different from a fixed term. The latter is final, whereas the former puts the onus on the support recipient to return to court to justify the extension.
9. The judge noted that, since her career change in 2000, the appellant’s income has not been significant,[[8]](#footnote-8) that the respondent had been asking the appellant to increase her income and decrease her expenses prior to the breakdown of the marriage,[[9]](#footnote-9) and that the breakdown of the marriage was in part related to financial pressure resulting from the appellant’s lack of effort in this regard.[[10]](#footnote-10) Although the judge’s conclusions about the appellant’s efforts to achieve financial independence are harsh,[[11]](#footnote-11) they are nevertheless findings of fact that the appellant has not shown to be tainted by any palpable and overriding error. The circumstances show that the appellant’s precarious situation is a result of not only the breakdown of the marriage, but also her own choices. In the circumstances, it was not an error to impose a review term.[[12]](#footnote-12)
10. The two-year term in this case is also not affected by a palpable error, particularly as the evidence shows that the issue was discussed between the parties in 2017, before their separation.
11. The appellant correctly affirms that the support recipient’s financial independence must be assessed in light of the parties’ standard of living and their actual earning capacity.[[13]](#footnote-13) However, the case law specifies that it is not necessary to keep up the status quo for this standard if the parties were living beyond their means.[[14]](#footnote-14) The evidence shows that, although their standard of living was not extravagant, it was too high considering their financial resources, as they were unable to substantially reduce their debt while they lived together.[[15]](#footnote-15)
12. Although she was 54 years old at the time of the judgment under appeal, the appellant has almost 20 years of experience and is accomplished in her field. Despite her undeniable potential,[[16]](#footnote-16) she has not demonstrated that she made any serious effort to increase her income. Since it is a review term, the spousal support may be continued if the appellant shows that, despite her serious effort and the steps she has taken, she has not been able to achieve financial independence.

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1. On the issue of calculating support, the judge reduced the amount provided for as an RRSP loan by $100.[[17]](#footnote-17) It is understood that she considered the amounts on lines 44 and 48 of Form III to be duplicates. The appellant submits that they are actually two distinct sources of contributions, one being a monthly contribution to her RRSPs (line 44), and the other (line 48), a repayment of an RRSP loan taken out in 2018.
2. There is no documentary evidence before the Court on this issue, and the appellant’s testimony does not clearly demonstrate that the judge erred in a way that would justify the Court’s intervention in this regard.
3. As for her argument that the judge erred in converting the net support amount to a taxable amount, the appellant is simply wrong.

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1. The appellant submits that the judge failed to consider all of the factors to be analyzed when ordering a provision for costs. In particular, she alleges that the judge did not take into account the great disparity in the parties’ incomes and misjudged the respondent’s ability to pay. The appellant also argues that the judge erred in dismissing the application for a provision for costs solely on the basis of her inadequate assessment of the appellant’s attitude.
2. The award of a provision for costs depends on the needs of the person seeking it and the financial means of that person’s support debtor. It is [translation] “by no means automatic, as the creditor has the responsibility to manage their income adequately to ensure their fair share of the costs.”[[18]](#footnote-18) While the creditor is not required to liquidate assets or to incur debt to assert their rights, [translation] “it must also be remembered that the provision for costs is not designed to finance unnecessary litigation [but rather] to ensure some equality of power between the parties.”[[19]](#footnote-19) That being said, the Court must consider the proceedings and how they unfold to identify the relevant factors in the case, with the conduct of the parties playing a key role in the exercise of judicial discretion.[[20]](#footnote-20)
3. Although the trial judge addressed only the appellant’s conduct in the section on the application for provision for costs, it is clear from the judgment under appeal that she considered all of the factors listed above and that she properly exercised her discretion.
4. Here, the income disparity between the parties ― $33,783.78 for the appellant and $234,777 for the respondent[[21]](#footnote-21) ― does indeed weigh in favour of awarding the provision.[[22]](#footnote-22) The appellant insists on this criterion, while also emphasizing that she does not have the means to assert her right to spousal support and that she has had to cash in some RRSPs.
5. However, the evidence accepted by the judge showed that the respondent has little liquidity despite his high income and that the parties’ net assets after the partition of the family patrimony and the partnership of acquests were similar.[[23]](#footnote-23) Turning to the appellant’s needs and means, the trial judge noted that, despite significant withdrawals from her RRSPs, the appellant was unable to explain them and provided very little evidence to support her financial needs, which she evaluated at a net amount of $80,499.48, even though she has been living alone since 2017 and does not pay any expenses for her children.[[24]](#footnote-24)
6. After assessing the actual cost of many of the expenses claimed by the appellant, the judge found that the appellant’s financial needs were less than what she had alleged and reduced the amount to $52,116.[[25]](#footnote-25) The appellant has not shown any error in the judge’s assessment. While she should not have to liquidate her assets or go into debt to assert her rights, the appellant must also manage her income adequately to ensure her fair share of costs. It appears from the parties’ testimonies that this is not the case.
7. Moreover, the judge found that the appellant engaged in conduct resulting in unnecessary costs,[[26]](#footnote-26) for example by unjustifiably insisting throughout the proceedings that all communications take place through the parties’ lawyers, including the simple forwarding of medical receipts, despite the attempts by the respondent and his lawyer to dissuade her.
8. Such conduct, which multiplies costs unnecessarily, has been recognized in the case law as a reason to refuse to award a provision for costs.[[27]](#footnote-27)

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1. **FOR THESE REASONS, THE COURT:**
2. **DISMISSES** the appeal, without costs given the nature of the dispute.

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|  | | PATRICK HEALY, J.A. |
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| Mtre Josée Dionne | | |
| DUNTON RAINVILLE | | |
| For the appellant | | |
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| Mtre Mireille Vanasse | | |
| BRUNET & ASSOCIÉS, AVOCATS INC. | | |
| For the respondent | | |
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| Date of hearing: | April 16, 2021 | |

1. *Droit de la famille — 20642*, 2020 QCCS 1463 [Judgment under appeal]. [↑](#footnote-ref-1)
2. *Divorce Act*, RSC 1985, c 3 (2nd Supp). [↑](#footnote-ref-2)
3. *Droit de la famille — 19201*, 2019 QCCA 272 at para 14; *Droit de la famille* — *17336*, 2017 QCCA 281 at para 3; *Droit de la famille — 172645,* 2017 QCCA 1775 at para 24; *Droit de la famille — 142647*, 2014 QCCA 1961 at para 39; *Droit de la famille* — *142449*, 2014 QCCA 1791 at para 26, leave to appeal to SCC refused, 36191 (16 April 2015); *Droit de la famille — 141110*, 2014 QCCA 996 at para 6; *Droit de la famille* — *132381*, 2013 QCCA 1505 at paras 163-164; *Droit de la famille — 102718*, 2010 QCCA 1889 at para 85; *Droit de la famille — 082701*, 2008 QCCA 2040 at para 3. See also *Droit de la famille — 2190*, J.E. 95-1037 at 3, 1995 CanLII 5475 (C.A.). [↑](#footnote-ref-3)
4. *Droit de la famille — 17336*, 2017 QCCA 281 at paras 3-5; *Droit de la famille — 19651*, 2019 QCCA 699 at para 15. [↑](#footnote-ref-4)
5. *Droit de la famille* — *103038*, 2010 QCCA 2074 at paras 72-79; *Droit de la famille — 162823*, 2016 QCCA 1874 at paras 28-30; *Droit de la famille — 161273*, 2016 QCCA 915 at paras 27-28; *Droit de la famille — 142449*, 2014 QCCA 1791 at para 28; *Droit de la famille — 121521*, 2012 QCCA 1144 at para 49; *Droit de la famille — 09859*, 2009 QCCA 747; *Droit de la famille — 09408*, 2009 QCCA 397 at paras 45-53; *L.(R.) c. F.(J.)*, J.E. 2003-1648, 2003 CanLII 47985 at paras 25-26 (C.A.); *Droit de la famille — 18734*, 2018 QCCS 1448 at para 80; *Droit de la famille — 143159*, 2014 QCCS 6068 at para 26. [↑](#footnote-ref-5)
6. *Droit de la famille — 191160*, 2019 QCCA 1098 at para 26; *Droit de la famille — 151555*, 2015 QCCA 1112 at para 45; *Droit de la famille — 14146*, 2014 QCCA 193 at paras 57-59; *Droit de la famille — 12103*, 2012 QCCA 146 at paras 8-10. [↑](#footnote-ref-6)
7. *Droit de la famille — 17739*, 2017 QCCA 629 at para 50; *Droit de la famille - 08192*, 2008 QCCA 232 at paras 40-42; *M.S. c. F.D*., 2001 CanLII 27961 at paras 54-55 (C.A.); *R.B. c C.B*., 1986 CanLII 3907 (C.A.). [↑](#footnote-ref-7)
8. Judgment under appeal, *supra* note 1 at para 118. [↑](#footnote-ref-8)
9. *Ibid.* at para 22. [↑](#footnote-ref-9)
10. Judgment under appeal, *supra* note 1 at para 121. [↑](#footnote-ref-10)
11. *Ibid.* at paras 53-62, 123-124. [↑](#footnote-ref-11)
12. *Droit de la famille* — *103038*, 2010 QCCA 2074 at para 72; *Droit de la famille — 162823*, 2016 QCCA 1874 at paras 28-30; *Droit de la famille — 121521*, 2012 QCCA 1144 at para 49; *Droit de la famille — 09859*, 2009 QCCA 747 at para 13. [↑](#footnote-ref-12)
13. *G.V. c. C.G.*, 2006 QCCA 763 at para 103; *L.S. c. A.C.*, 2006 QCCA 888 at para 37. [↑](#footnote-ref-13)
14. *Droit de la famille — 09196*, 2009 QCCA 194 at para 2. [↑](#footnote-ref-14)
15. Judgment under appeal, *supra* note 1 at paras 23, 24 and 26. [↑](#footnote-ref-15)
16. What matters is [translation] “the actual ability to find and hold a job” (Michel Tétrault, *Droit de la famille : L’obligation alimentaire*, 4th ed, vol 2 (Cowansville, Que.: Yvon Blais, 2011) at 565). See also: *Droit de la famille — 132381*, 2013 QCCA 1505 at para 170; *Droit de la famille — 162823*, 2016 QCCA 1874 at paras 28-30. [↑](#footnote-ref-16)
17. Judgment under appeal, *supra* note 1 at para 108. [↑](#footnote-ref-17)
18. *Droit de la famille — 112800*, 2011 QCCA 1624 at para 8. [↑](#footnote-ref-18)
19. *L. D. c. M. J.*, 2005 CanLII 11160 at para 141 (QC CS), aff’d: *M.J. c. L.D.*, 2006 QCCA 1374 at para 54. See also *Droit de la famille — 172961*, 2017 QCCA 1994 at para 32; *Droit de la famille – 2244*, [1995] R.D.F. 401 at paras 23-29, 1995 CanLII 4672 (QC CA). [↑](#footnote-ref-19)
20. *L. D. c. M. J.*, 2005 CanLII 11160 at paras 141-143 (QC CS), aff’d: *M.J. c. L.D.*, 2006 QCCA 1374 at para 54; *Droit de la famille — 18230*, 2018 QCCS 421 at para 33. [↑](#footnote-ref-20)
21. Judgment under appeal, *supra* note 1 at paras 78, 83 at 113. [↑](#footnote-ref-21)
22. *Droit de la famille — 19201*, 2019 QCCA 272 at para 31. [↑](#footnote-ref-22)
23. The respondent estimates this amount to be $453,842.12: Defendant’s Statement of Income and Expenditures and Balance Sheet, September 24, 2019. The actual amount is $453,534.12: Consent to Partial Judgment on Corollary Relief signed by the parties on August 30, 2019, and September 6, 2019. The judge determined that it would be $387,247.22 for the appellant, [translation] “excluding the $39,000 held in trust with her attorney”: Judgment under appeal, *supra*, note 1 at para 105. There is thus less than $30,000 difference between the parties’ assets in this case. [↑](#footnote-ref-23)
24. Judgment under appeal, *supra* note 1 at paras 100-106 and 108. [↑](#footnote-ref-24)
25. *Ibid.* at paras 107-109. [↑](#footnote-ref-25)
26. *Ibid.* at para 153. [↑](#footnote-ref-26)
27. *Droit de la famille — 2013*, 2020 QCCA 19 at para 19; *Droit de la famille — 19582*, 2019 QCCA 647 at paras 43-44; *Droit de la famille — 172961*, 2017 QCCA 1994 at paras 32-33; *Droit de la famille — 142142*, 2014 QCCA 1562 at paras 134, 135; *L.S. c. A.C.*, 2006 QCCA 888 at para 78. [↑](#footnote-ref-27)