

Representing the Professional Athlete in a Family Law Dispute

By Gerald Stotland



The professional athlete is perhaps the family law practitioner's most vulnerable and challenging client.

Exceptionally high earnings for a limited period are often coupled with a lifestyle to match. Aside from facing peer pressure for the ongoing acquisition of luxury items, the athlete is often inclined to indulge their "entourage" which includes family members.

In many instances, the athlete resists the counsel from their professional advisors, resulting in inadequate provisions for the future.

We cannot over emphasize the advantage of domestic contracts for those athletes who share their life with a partner either in a cohabiting relationship or marriage. This is a subject that will be addressed in a subsequent issue.

This issue follows a recent decision of the Superior Court of the Province of Québec rendered by the Honourable Justice Pierrette Rayle. Québec law prevents us from disclosing the names of the parties. In any event, it is the principle established and confirmed by the Court that should be of interest to the reader.

Facts

Our client, a professional athlete, was married in Russia in 1992 and joined an NHL team in the fall of the same year. Three (3) children were later born of the marriage.

Our client and his wife would generally reside in North America during the hockey season and return to Russia thereafter. Following the separation of

the parties in Russia in the spring of 1995, the wife returned to Quebec that summer and instituted divorce proceedings before the Superior Court of that Province. Coincidentally, the husband instituted divorce proceedings in Russia on the same day. A Decree of Divorce was rendered in Russia and the wife contested the validity of that Judgment. In November 1995, a Judgment of the Superior Court of Quebec ratified a provisional agreement by the parties on support issues.

The level of interim support was later increased substantially by the Superior Court in October 1998. The increase in child support to \$352,894 annually resulted from the Superior Courts strict application of the Child Support Guidelines and the fact that the husband's income had almost doubled since the first judgment. The Child Support Guidelines came into force subsequent to the original 1995 provisional order. Our client appealed the quantum of child support, contending that this amount far exceeded the needs of the children.

Spousal support was also increased to \$100,000 per annum. The divorce hearing took place in April 2000 and dealt with alleged arrears, child support, spousal support and the jurisdiction of the Quebec Courts.



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A. Jurisdiction

This issue is of particular relevance to the professional athlete. The terms domicile, residence, ordinarily resident and sometimes even citizenship can determine the jurisdiction of the Court. The Divorce Act specifies:

“a Court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.”

In this instance the Superior Court held that:

“To the extent that “ordinarily resident” means more than the mere fact of having a temporary place to live, and less than the legal concept of domicile, the Court concludes that this intermediate notion suggests some degree of permanency without the notion of exclusivity which is proper to the concept of domicile.”

The Superior Court dismissed the wife’s divorce petition but entertained her various demands for support, in part due to the husband’s acquiescence to the jurisdiction of the Court.

Strategically, it may not always be advantageous to raise the issue of jurisdiction at the outset of the divorce proceedings, specifically when the acquiescence of the parties cannot in itself confer jurisdiction.

B. Child support

Child support in Canada is determined by calculations in accordance with published tables. These tables provide for a base amount taking into consideration the revenue of the payor and the number of children to be supported. For those payors who earn in excess of \$150,000, an additional percentage of earnings is factored into the calculation.

It is this additional amount that can result in child support at an unusually high level. As mentioned, the provisional award for child support in the case at hand was \$352,894 per annum. This amount was appealed and was revised retroactively in the recent Superior Court decision.

The high annual income of the professional athlete can potentially result in an unrealistic child support order. Since the implementation of the guidelines, courts have been reluctant to scrutinise budgets submitted by the custodial parent detailing the children’s expenses. In most instances, the courts applied the guideline amount.

After studying the unique circumstances of the professional athlete in this case, Justice Rayle decided as follows:

Referring to the Guidelines:

A) “One must bear in mind that these rules are in place to achieve and serve one and only one purpose: meet (totally or partially) the needs of a child.”

B) “By setting guidelines, the legislator does not replace the objective of the support order as stated in the *Divorce Act*: it only means to facilitate the achievement of that purpose. This is why the legislator has provided that the table amounts, while presumed to meet the needs of a child, are not cast in stone. The Court may depart from the table amounts in order to avoid an injustice or to adapt to special circumstances.”

C) “Should the Court identify as *actual needs* only those which are immediately incurred? Particularly in a situation where the earning power of the father is assuredly short-lived, should the Court not consider that one of their actual needs is to provide for future education and other benefits which are normally available to children of privileged families? Should the Court not consider the best interest of the children from a long-term perspective when neither the father nor the mother has made provision to that effect?”

D) “It is not in the best interest of the children to shower them today with considerably more than what they need, while no adequate provision is being made for their future needs.”

Responding to the challenge, the Court crafted a support order which met the immediate needs of the children and also provided for their future. The sum of \$4,600 per month was allocated

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towards the monthly expenses of the three (3) children. An additional amount of \$5,600 per month was designated to fund a trust with the children as beneficiaries.

The Courts novel approach in this regard provides the family law practitioner with a child support model that deals with the child's future security and also assures the payor that a substantial portion of his monthly child support obligation will not be subject to squandering.

It is of interest that, in this instance, the husband had been contributing maintenance of \$6,666 net per month for his wife and children by complying with a judgment of the Court of Appeal which suspended the October 1998 Superior Court judgment. The wife claimed arrears of support in excess of \$600,000. The record demonstrates that the wife attempted to secure payment of the arrears by way of seizures and contempt of Court proceedings. The Court noted that:

"The Defendant's performances on the ice has been affected by the ongoing litigation and the bad publicity which he received as a result of the claim for arrears and the interviews given by the applicant to the local press."

The Court annulled all claims for accumulated arrears.

C. Spousal support

The wife now 32 years old arrived in North America at the beginning of the husband's professional hockey career. Following the separation of the parties

which took place in Europe in 1995, the wife decided to return to Canada with the three (3) children notwithstanding her precarious immigration status. Shortly after her arrival in Québec, the wife instituted the divorce proceedings.

Aside from child support of \$350,000 per annum, the wife sought spousal support of \$100,000 per annum, a lump sum payment of \$800,000 and other financial conclusions for an additional \$600,000.

The Court noted:

"The parties have been separated for 5 years, but Mrs. M. has yet to take a first step towards economic self-sufficiency. Her plans are very vague. She hopes to become a model or to study at university in an undisclosed field. When asked in cross-examination whether she expects to be supported by Mr. K. forever, she replies quickly: "Under Russian law, I would be entitled to support until the children are 18 years old." Unfortunately, such is not the law of the land in Canada and Mrs. M. cannot have the best of both legal systems."

The Superior Court concluded that there were no economic disadvantages suffered by the wife as a result of the brief marriage. The wife's asset position was considerably more advantageous than that prior to the marriage. The Court also considered:

A) the transitory maintenance received for the past 5 years;

B) additional time required by the wife "to reorganize her own life, re-enter the labour market and become self-sufficient".

Inasmuch as the wife did not have a career prior to the marriage, the Court concluded that it was not necessary to consider whether the responsibility of the children presented an obstacle to pursuing her career.

Under the circumstances, the Court found that the issue of spousal support would be most appropriately addressed by ordering a lump sum payment of \$300,000 in order to effect a "clean break".

The debate regarding the criteria to be applied in rendering indefinite spousal support orders continues. The present judgment however, provides incentive for the family law practitioner and the Courts to accept that an equitable solution can be found in providing ample compensation to the recipient by way of a lump sum. The responsibility of planning for the future then is entirely in the recipients hands. The payor on the other hand may have to make some sacrifice at the beginning but thereafter his financial responsibility extends to the maintenance of his children.

Agents, accountants, financial advisors and attorneys for the professional athlete can find it difficult to implement a program for their client in planning for their future. The client should be made aware that in the absence of accepting the advise of his advisors, certain conditions may be imposed upon the client by a Court in the future.

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