SUPREME COURT OF NOVA SCOTIA
Citation: O'Neil v. O'Neil, 2013 NSSC 44

Date: January 31, 2013
Docket:1201-58514
Registry: Halifax

Between:

Leonard Samuel Gerard O'Neil

Petitioner

and

Linda Margaret O'Neil

Respondent

Judge: Justice Carole A. Beaton

Date of Hearing: October 15, 2012

Written Decision: January 31, 2013

Counsel: Deborah Conrad and Jessica Chapman for the Applicant, Leonard O'Neil
Lynn Reierson and Amber Penney, counsel for the Respondent, Linda O'Neil

By the Court:

Background

[1] The Applicant Leonard O'Neil is required to pay spousal support of $3000.00 per month to his former wife, the Respondent Linda O'Neil pursuant to a Corollary Relief Judgement (hereinafter "the order") issued following a contested divorce trial reported as *O'Neil v. O'Neil,* 2005 NSSC 95 (hereinafter "the previous

decision"). Pursuant to the order the Applicant must also "maintain his existing medical insurance coverage for the [Respondent's] benefit for as long as it is available to him" and maintain "for as long as possible" a life insurance policy valued at $200,000.00 naming the Respondent as beneficiary. The Applicant's support obligation to the Respondent resulted from their thirty three year marriage, during which he practised medicine while she, a teacher by profession, was absent from the workforce for approximately twenty years.

[2] In August 2011, the Applicant indicated to the Respondent he intended to retire at the end of that year; he filed his Application to Vary on December 23, 2011 and retired December 31, 2011. That Application requested the court vary the order, specifically to terminate his obligation to pay support and to rescind the requirement that he fund the aforementioned insurance. The Applicant asserted pursuant to the *Divorce Act* R.S.C. 1985, c.3, that he had experienced a material change in circumstances occasioned by his retirement from his medical practice and a corresponding reduction in his income, which change would justify varying the order. A hearing was held on October 15, 2012.

[3] A divorce variation application is grounded in a consideration of the most recent order governing the parties' affairs. In this case it is noteworthy that the previous decision, which explained the order, tasked the Respondent with organizing her financial affairs in a prudent fashion going forward, given the eventuality of the Applicant's retirement, which has now occurred.

[4] The provisions of the *Divorce Act*, *supra* relevant to this application are:

> 17 (1) A court of competent jurisdiction may make on order varying, rescinding or suspending, prospectively or retroactively,
>
> a) a support order or any provision there of on application by either or both former spouses; ...
>
> ...
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

...

(7) A variation order varying a spousal support order should

(a) recognize any economic advantages or disadvantages to the former spouse arising from the marriage or its breakdown;

(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[5] The threshold question, before assessment of the merits of the Applicant's request for relief, is whether the evidence has established any change in the conditions, means, needs or circumstances of either party. The Applicant asserted that material change is found in the loss of employment income he has experienced as a result of his retirement, and the Respondent did not contest the same.

[6] The Respondent conceded section 17(4.1) of the *Divorce Act*, *supra* has been satisfied and there has been a change in the Applicant's circumstances since the making of the order, triggered by his retirement and corresponding reduction in income. Nonetheless, the Respondent maintained that despite said change, she remains dependant on the Applicant for spousal support and his Application should be dismissed.

The Parties' Children

[7] There was considerable evidence provided at the hearing regarding expenditures made by each party for their adult children, in the context of seeking the Court's scrutiny of each party's expenses and spending habits. At paragraph 93 of the previous decision the Court noted the Respondent's expenditures in relation to the children were "...unreasonable and excessive in the context of this family's finances". In her evidence before this court, the Respondent identified several instances since the previous decision when she has provided not

insignificant sums of money or monies worth to the parties adult children. The Respondent's Affidavit evidence was that "All three of our children call me in emergencies. I have not assisted them financially to any great extent based on Justice Legere Sers' advice". Cross examination revealed that statement was not entirely accurate, based upon details provided by the Respondent herself as to the quantum and/or purpose of some of those expenditures.

[8] The evidence established the Respondent's unhappiness regarding what she perceived as a lack of financial assistance provided by the Applicant to the parties children and in particular, most recently to the parties' daughter. The Respondent claimed the Applicant's unwillingness to assist the children with "urgent" financial circumstances has left her bearing the burden of such costs. The Applicant's position was that the Respondent has been unnecessarily depleting her income through unwarranted expenditures for the children. While this evidence assisted in providing some insight in to the parties' distinct approaches toward spending as it relates to their children, neither party has a legal obligation to financially support their independent adult children at this time.

[9] I am satisfied on the evidence that all three children of the parties, ranging in age from early to late thirties, are very well educated; while there are some health issues in play, none of the children have ultimately been prevented from achieving academic and employment success. I do not accept the Respondent's efforts to portray herself as overburdened with financially assisting the children, while attempting to portray the Applicant as having failed to live up to a financial obligation to the children. I am not persuaded that expenditures incurred by either parent on behalf of the children, given the children's respective ages and stages in life, can be considered as anything other than discretionary spending choices each party makes, funded from the income available to each of them. The manner in which each may assist the children, financially or otherwise, is entirely their individual choice.

Matters Not in Dispute

[10] There were numerous aspects of the evidence upon which it was clear there was little dispute or controversy. The evidence of and supporting documentation filed by each party allows me to conclude:

(a) The Applicant's RRSP contributions in the years post–divorce (Exhibit 1, Tab 3, Page 5) included:

(i) in 2007, $20,000
(ii) in 2008, $50,000
(iii) in 2009, $60,000
(iv) in 2010, $45,000

(b) The Applicant's current gross income of $7,060.40 per month or $84,724.80 per year consists primarily of monies drawn from his managed Registered Retirement Income Fund (RRIF) as of April 2012, combined with Old Age Security (OAS) and Canada Pension Plan (CPP) benefits.

(c) The Applicant's October 2012 sworn Statement of Property (Exhibit 1, Tab 9) identifies the total value of his RRIF at $698,857.38, discounted for tax at 33% to $468,234.45. The Applicant's other assets consist of Tax Free Savings Accounts (TFSAs) totalling $14,802.96, cash in an inactive business account remaining from his medical practice of $18,376.34, a life insurance policy in the face amount of $100,000.00 with an unknown cash surrender value, a vehicle valued at $5,436.00 and a joint interest in a lot of land assessed for tax purposes at $18,700.00. His sole liability is a credit card with a balance of $1500.00.

(d) The Applicant suffers from various health conditions which periodically interrupted his ability to practice medicine post-divorce. He testified he "continued to work through these years returning to work earlier than usual recovery times. I did so to honour my commitment to the Respondent and to save for my retirement". He reported working one year beyond his original anticipated retirement date.

(e) The previous decision divided matrimonial assets equally and gave the Respondent the option to sell or retain the matrimonial home, which had a 2005 value (net of disposition costs) of $176,807.00. At that time the Respondent, also suffering from various medical problems, chose to keep the home and provided an equalization payment to the Applicant. In the year the parties divorced the Respondent refinanced the previously mortgage free home on three occasions: to consolidate outstanding credit card debt at a lower interest rate, to pay outstanding legal fees incurred in the divorce litigation, and to raise cash of approximately $16,500.00.

(f) The Respondent's gross income of $5,365.00 monthly or $64,380.00 annually consists of employment income, rental income realized from the apartment in her home, Old Age Security (OAS) and Canada Pension Plan (CPP) benefits and spousal support paid by the Applicant, which support comprises approximately 56% of her income.

(g) The Respondent's January 2012 Statement of Property (Exhibit 6) identified assets consisting of an RRSP portfolio valued at just under $100,000.00, her home valued recently by her bank at $271,000.00 (before disposition costs) and tax assessed at $258,400.00, and a $1000.00 vehicle. The same Statement and the Respondent's *viva voce* evidence established her liabilities as a credit card debt of approximately $5000.00, a line of credit secured by her home equity of approximately $20,800.00, and a mortgage of $178,617.00. While the value of the Respondent's home appears to have increased over what it was at the time of the previous decision it is also apparent the Respondent has accumulated substantial debt over the same period.

(h) The Respondent has held a variety of part-time jobs since the previous decision was rendered, the most lucrative of which is her current employment as a teacher on a permanent part-time basis, earning approximately $1400.00 per month. At sixty-nine years of age the Respondent has numerous medical problems but expresses an intention to work for as long as she is able to do so,

presumably to maximize her ability to fund her lifestyle, although her present health issues impact the certainty of her future employability. The Respondent identified a litany of prescription medications she takes, which she reports are only affordable in light of the medical insurance the Applicant funds for her.

Issues

[11] The issues as they were identified by both parties are:

1. Has the Respondent's post-divorce spending and financial management been reasonable given her obligation to pursue economic self-sufficiency?

2. Would requiring the Applicant to continue with spousal support payments constitute "double-recovery" by the Respondent?

3. Should the Applicant's spousal support obligation be terminated?

The Applicant's evidence

[12] The Applicant's evidence centred around his position that since the previous decision of the court he has sacrificed the quality of his lifestyle in order to both meet his ongoing spousal support obligations and to save money to assist in funding his retirement years. In addition to the Applicant's sources of income (at paragraph 9(b)), cross examination confirmed he also receives a fluctuating annual rebate, never in excess of $1,500.00, through his life insurance policy with the Ontario Medical Association. I interpreted this evidence to mean that at very best the Applicant could anticipate as much as $125.00 in additional monthly income in any given year - a very modest amount.

[13] The Applicant reported his obligation to maintain insurance coverage for the Respondent costs $165.00 per month. At a cost of $250.00 per month, he also carries additional life insurance coverage payable to his estate, which he indicated is intended to benefit his children. The Applicant also pays for a seniors' drug insurance policy of $40.00 per month and Blue Cross coverage of $68.00 per

month. Given the state of his health, his medical related coverage is understandably important.

[14] Regarding the Applicant's Statement of Expenses dated December 13, 2011 (Exhibit 1, Tab 3) and his updated Statement of Expenses dated August 23, 2012 (Exhibit 2, Tab 6) he agreed in cross examination that in each he was, to a significant extent, projecting his monthly expenses. Two such examples were an allotment of $200.00 per month for as - yet not incurred household repairs or improvements and $550.00 per month for future purchase of a new vehicle. The Applicant's position was that in preparing the Statements he was intending to identify his *anticipated* expenses, quantified based upon: his past experience, his intention to live less frugally in future than he had previously been doing post-divorce, and what he hoped to accomplish post-retirement within the confines of a monthly budget.

[15] Cross examination also revealed several expenses contained in the statements that could be reduced and/or eliminated in light of apparent double accounting. I note that while a discounting of such items could potentially place the Applicant in a positive cash flow situation each month, the Statements did not account for or reflect his current spousal support obligation under the present order. The reality is that the monies presently available to the Applicant to fund his lifestyle , including any support obligation, are of a finite amount and represent the Applicant's current means available to respond to the Respondent's needs.

[16] In his updated Affidavit filed August 28, 2012 the Applicant informed the Court: " I have not re-married and do not have a common law partner". Through both annotations found in his August 2012 sworn Statement of Property and cross-examination it was established that he has been in a new relationship for several years, and while he has contemplated remarriage, his plans are currently "unsettled" as his partner has been unsuccessful in securing an annulment. I accept the Applicant's evidence that he and his partner maintain separate residences and separate expenses, and that he has identified only his own income, expenses and lifestyle costs, seeking to have the Court decide his Application based only on his financial situation. However, as argued by counsel for the Respondent, in the event the Applicant should marry in future, he would not be in a position to then argue that a change in his martial status could serve as a trigger for an argument of a change in circumstances as it might relate to the question of a spousal support obligation to the Respondent.

[17] The Applicant relied heavily on the previous decision wherein both parties, were directed to carefully manage and invest their assets in order to produce sufficient income to sustain them once the Applicant would retire, his future retirement having been contemplated and characterized by the trial judge as a "radical change in circumstances". The Applicant maintained the previous decision allowed the Respondent to attain self sufficiency by the time of his retirement and so his financial obligation to her should now cease.

The Respondent's evidence

David Parish

[18] The Respondent called accountant David Parish who prepares her income tax returns annually. Mr. Parish was obviously called to assist with the Respondent's position that she has engaged in appropriate financial planning as she was tasked to do by the trial judge. Mr. Parish confirmed authorship of a very brief February 13, 2012 letter (Exhibit 4, tab H) which stated: "I am writing to confirm with you that we have met at least once a year over the last 5 years to review your financial matters and to provide advice on keeping your house and other financial issues". It is noteable that the letter confirms advice provided concerning "keeping" the Respondent's home, which is distinguishable from advice about the merits of keeping versus selling the home, the significance of which will be discussed later. The letter was equally as vague as much of Mr. Parish's *viva voce* evidence; cross examination revealed he had either no ability to recall, or alternatively could not recall with specificity any regular or pointed discussions with the Respondent that would suggest a concrete and/or dedicated strategy of financial planning by or on her behalf.

[19] I did not form the impression Mr. Parish was in any way intending to be equivocal in his responses to many of the questions put to him. Rather, the whole of his evidence left the Court with the sense his professional relationship with the Respondent was historically unremarkable in nature, as his primary function was related to her annual income tax liability and preparation of her returns. Mr. Parish confirmed he has never helped the Respondent to prepare a "holistic" financial plan, but has at various times had discussions with her about trying to reduce her debt and expenses and maximize her retirement income. His evidence allowed me to conclude the Respondent never sought his advice before making her election to

keep the matrimonial home, versus selling it to invest the proceeds, nor did they discuss her decision to encroach on the equity in the previously unencumbered home by borrowing against it or her decision to liquidate certain RRSP's after separation. It was unclear from Mr. Parish's evidence when in time it was following the Respondent's election to keep the home that he had, as he reported, discussed with the Respondent the cash flow implications of selling her home, the tax implications of her employment and the tax implications of her investments.

[20] Mr. Parish reported that in the past he and the Respondent had analysed the income and expenses associated with her home and it "... usually worked out that there was not much difference between the costs of that and the cost of living elsewhere". He agreed with counsel for the Applicant that the Respondent claimed a larger loss for tax purposes in relation to her tenant on her 2011 income tax return than was claimed in her 2004 and 2005 income tax returns, which appeared to corroborate to an extent the Respondent's evidence that the current tax relief she gains through offsetting her housing expenses against her rental income makes her housing cost comparable to the Applicant's cost of renting an apartment.

The Respondent

[21] In her Affidavit the Respondent referenced the previous decision and noted that at the time of the divorce the court had given her " ...some very specific advice with respect to managing my finances and decisions regarding my home. I took Justice Legere Sers' comments to heart and I have attempted to follow her direction to the letter". The Respondent reported she has paid approximately $400.00 for financial advice — which seems an exceedingly modest sum — since the time of the previous decision, in the context of making "...extensive efforts to maximize my income and decrease my expenditures as advised by Justice Legere Sers". By contrast, the evidence of Mr. Parish did not support any suggestion of dedicated professional financial planning, but instead spoke to more general annual discussions about the Respondent's financial situation in the context of tax assessments/reviews.

[22] On cross-examination the Respondent readily agreed the previous decision identified the need for her to change her spending habits and secure appropriate financial advice, which she steadfastly maintained she had done. I disagree to the extent that while the Respondent did retain advice, I am not persuaded it was the type of advice that put into motion a comprehensive plan of the sort the previous

decision appears to have contemplated. Rather, I concluded on the Respondent's evidence that after the previous decision, she first chose to retain her home and then set about organizing the balance of her financial affairs to accommodate that choice.

[23] During cross examination the Respondent acknowledged that in the last full calendar year prior to the hearing (2011) her employment income had increased to over $17,000.00, up from zero in the year of separation (2004), and in the same time frame her pension income was up over $12,000.00. The Respondent was not prepared to agree that her post-divorce borrowing against the equity in her home has decreased her net worth; she maintained that her secured debts are insured so at her death no monies will be owed. There was no evidence before the Court to assist in understanding the ultimate effect of such coverage on the Respondent's debt load; indeed if the Respondent was correct that her death will eliminate her debt, that serves only to benefit her prospective beneficiaries and does nothing to address her present financial circumstances and the need to maximize her income potential.

[24] The Respondent maintained it is the Applicant who has had greater earning capacity and lived the more expensive lifestyle post-divorce, all the while involved in a new relationship which assists him in that lifestyle. The Respondent pointed to her frugal lifestyle, contrasted with the Applicant's ability to save money since divorce, which she has been unable to do owing to her lower level of income. The Respondent did not anticipate being able to retire in the foreseeable future and asserted she has not depleted her assets or managed them poorly as argued by the Applicant.

[25] Like the Applicant, the Respondent testified she too carries life insurance policies naming her estate and her children as beneficiaries. The Respondent stated that while the Applicant is not a beneficiary on her insurance policies she is a beneficiary on his on the basis that since the parties separated the Applicant has made over $100,000.00 a year more than she. The Court can safely infer the Respondent was actually referencing a recognition in the order that should the Applicant's income earning ability suddenly disappear the Respondent's then existing need for spousal support based on her financial dependancy arising from the marriage would to some extent be ameliorated through a policy payout to her. These types of protections for spousal support payees are often incorporated in

spousal support orders (*Slater v. Slater*, 2010 NSSC 353; *Murphy v. Murphy* 2002 NSSC 94).

Issue No. 1- Has the Respondent's post-divorce spending and financial management been reasonable given her obligation to pursue economic self - sufficiency?

[26] At paragraph 113 of the previous decision the court stated " ...both mother and father have to restructure their lifestyle to live within the collective means resulting from their individual investments and spousal support while [Dr. O'Neil] is able to continue employment." At paragraph 140 the Court noted "when retirement comes, both parties will have to live off their investments as equally divided", and at paragraph 141, there would be "radical change" when the Applicant retired and "...Should there be an inequity at that time, if it results from poor management of the Petitioner's investment or further depleted assets due to gifts or loans to her children, that should not been seen as sufficient or unforeseen to justify compensation by way of spousal support".

[27] The time for assessing the restructuring of respective lifestyles has now arrived with the Applicant's retirement and concurrent application. Had the parties never separated, the sharp reduction in the Applicant's income occasioned by his retirement would undoubtedly also have required an assessment and/or adjustment of the couple's lifestyle; the parties' divorce means that assessment must now happen across two households rather than only one.

[28] Regarding the contentious issue of the Respondent's decision to retain the former matrimonial home, she testified in her Affidavit (Exhibit 3) that :

> (67) ...I have debated the possibility of selling the house, but if I did so, I would have to spend money on other housing, and my tenant here helps me with expenses...The interest rate I could expect to receive on a safe investment is low. I have followed my financial advisor's advice from the date of separation to date.
>
> . . .
>
> (69) I would like to keep my house because I have lived here for 32 years and I receive more income from renting the downstairs apartment then I could earn investing the money from a sale of the property.

[29] In cross-examination too the Respondent spoke of her desire to keep the matrimonial home. She stated her preference to rent the apartment in her home year round, although the requirement that any tenant share her kitchen facilities has meant that to date she has only succeeded in attracting a student tenant and therefore the apartment is free over Christmas holidays and during the summer. This contradicted her direct evidence as to the enjoyment of having the apartment free during the same periods, for her children's use when they visit. A strong emotional connection to her home was an underlying theme in the Respondent's evidence and it was clear she does not see disposing of her home as a response to the reduction in the Applicant's income.

[30] During the hearing the Respondent held to her position that she had made a sound economic choice in retaining the matrimonial home and renting a portion of it to gain income tax relief. After agreeing with counsel for the Applicant that the previous decision had indicated (at paragraph 72) that the income from the home would have to equal or exceed the income from investment, the Respondent's follow up comment was " I am not getting much from my investments now".

[31] The previous decision expressed some skepticism about the Respondent's plan to retain the matrimonial home and rent a portion of it to realize income. In her evidence before this Court the Respondent asserted the home expenses she is able to write off against rental income prove her choice to have been sound, despite having borrowed approximately $30,000.00 to undertake renovations to the rental space. The Respondent testified she is "making money" under the current arrangement because she rents the property at a loss and gains income tax relief. As noted earlier, David Parish's evidence corroborated the same.

[32] The Respondent's emphasis throughout her evidence that selling her home could not have produced a better outcome for her by the time of the Applicant's retirement, and that she had made a good decision in retaining the home as opposed to selling it and raising monies for investment, is only her opinion. The Court was not provided with evidence by way of information, projection or estimate about what selling the home at any time since divorce may or may not have achieved for the Respondent by way of a rate of return and/or an investment income stream. The manner in which investing home sale proceeds might have compared to where the Respondent finds herself today in terms of annual income tax relief is unknown. Recognizing the burden in this matter rests with the

Applicant, and accepting the Respondent's evidence that the valuation of her home has increased since divorce, nonetheless it is difficult for the Court to definitively declare the Respondent made the better or more lucrative choice in retaining her home.

[33] What is clear is that the current asset to debt ratio of the Respondent leaves her less well off than the Applicant. Based on the Statements of Property filed in the hearing it is apparent that even if she sold her home today her net equity would not equate to that of the Applicant, even though part of his asset pool was acquired after divorce. That is not to suggest the Respondent has done nothing to safeguard her financial situation or has entirely failed to attend to her financial situation in the years after divorce. In *Boston v. Boston*, 2001 SCC 43 Major, J. on behalf of the Supreme Court of Canada discussed the obligation of a payee spouse to invest equalized assets:

> 58 The obligation of the payee spouse to generate investment income from the assets that she received on equalization is not an onerous one. It is not predicated upon insensitive standards on how the payee spouse should have managed her finances from the point of separation. Nor does it require investment-savvy decisions, premised upon an extensive knowledge of the marketplace. The obligation on the payee spouse to generate income from her assets would be satisfied by investing in a capital depleting income fund which would provide a regular annual income.

[34] What the Respondent has done, in effect, is to utilize her share of the equalized assets to produce a benefit equivalent to income, through the provision of tax relief, as opposed to having put equity to work to generate income. While scrutiny of her financial conduct post divorce does not reveal sophisticated investment decisions, what it does illustrate is that the Respondent has paid attention to her finances. The real question going forward will be how long the Respondent can justify her current arrangement now that the Applicant derives income not from employment, but primarily by drawing down on his most significant capital asset (the RRIF) which will deplete over time.

[35] The Respondent can hardly be characterized as living "in poverty", as her counsel suggested, albeit neither is she well-to-do on gross income of $64,380.00 per year. Her income tax returns established her employment income has increased over time since the previous decision. There can be no doubt, on the evidence as to her specific job searches, that the Respondent has made genuine efforts to seek

employment. I am satisfied she has been diligent in her job search endeavours since the divorce, and that part time employment is what she has been able to achieve. The Respondent has accomplished what the trial judge envisioned at paragraph 112 of the previous decision: "The Petitioner is articulate, able and suffers from no physical or mental impediment that would prohibit such part time employment as is possible given her age and stage in life" (emphasis added).

[36] Given the Respondent's age, the fact she was absent from the workforce for approximately twenty years and her ongoing medical conditions the evidence supports the conclusion the Respondent has conducted herself responsibly regarding that aspect of the goal of economic self-sufficiency that concerns a payee's effort to secure employment income. In that regard the present case is easily distinguishable on its facts from *Fisher v. Fisher* [2001], 190 N.S.R. (2d) 144, relied upon by the Applicant, wherein the wife did not pursue employment following the end of a 21 year marriage. There, the Court commented on the obligation of a spouse to promote economic self sufficiency within a reasonable period of time pursuant to the *Divorce Act*, *supra.* The evidence supports the Respondent has been diligent in capitalizing on her employment earning potential. Indeed it is recognized that likely many people in circumstances similar to those of the Respondent – absent from the workforce for an extended period of time while their spouse was the sole high income earner in the family unit – would have difficultly envisioning they might still be in the workforce as the Respondent is, even on a part time basis, at age sixty-nine.

[37] According to their respective evidence, neither the Respondent's nor the Applicant's monthly expenses appeared to be extravagant, although those amounts earmarked by both for items such as tithing, charities, holidays and life insurance constitute strictly discretionary spending. As an aside, while the cost of premiums for the insurance policies both parties maintain for the benefit of their children and/or estate may be modest in the grand scheme of their respective budgets it does beg the question as to why each party would continue to incur a cost from which they will personally never benefit, in the same hearing where each has argued a lack of funds.

[38] Eligibility for on-going spousal support after an asset division that leaves one party in possession of the matrimonial home was considered in *Boston, supra*:

> 59 When spousal support plays a compensatory role on marriage breakdown, it may be unreasonable to expect the payee spouse to generate investment income from the matrimonial home. As far as is practicable, the support payments should provide a level of income sufficient to maintain a lifestyle that is comparable to that enjoyed during the marriage. The ability to remain in the matrimonial home usually assists the payee spouse and the children in maintaining their previous lifestyle.
>
> 60 Each case depends on its own facts. Generally, the payee spouse would not be expected to sell or leave the matrimonial home, particularly if there are dependent children. However, in cases where the support order is based mostly on need as opposed to compensation, different considerations apply. It is not impossible to envisage circumstances where the value of the family home has become disproportionate to the means of the parties so that equity requires that it be sold and replaced appropriately....

[39] On the facts of this case the Respondent was, by her own choice, left with capital in the form of the parties' home. There are no dependent children here, but consideration of the cost of shelter for each party, identified in their Statements of Expenses– for the Applicant, a rent payment, and for the Respondent a mortgage payment plus real estate tax - reveals they are within sixty dollars of one another in that cost. While the Applicant rents an apartment and the Respondent has the advantage of a larger home, her cost is actually less than his.

[40] This Court can be satisfied that on the whole the Respondent has been reasonable in her obligation to pursue economic self-sufficiency. While the parties disagree as to the manner in which she has handled the potential for earning income from her most significant capital asset, overall the Respondent has not ignored the need to employ a method to consistently improve her financial situation, achieved by improving her annual tax position over time since the divorce. Concurrent with that, she has made reasonable efforts to gain employment income. Where the Respondent and Applicant have had the most divergence regarding their respective financial management has been with respect to accumulation of debt. Even sizable mortgage debt aside, the Respondent carries approximately $25,000.00 more in debt than the Applicant. This has come about, according to the evidence, because the Respondent is less debt adverse and the Applicant is a better saver.

[41] The evidence before this Court did not, on the whole, support that the Respondent has lived a lifestyle superior to that of the Applicant after divorce,

even if the parties disagree about discretionary spending. According to their Statements of Property and of Expenses, both live modestly, housed in moderate accommodations and driving dated vehicles

Issue No. 2 - Would an on-going support payment constitute "double-recovery" by the Respondent?

[42] Counsel for the Applicant maintained that the "starting point" for analysis of this question is found in those portions of the previous decision where it was identified the Respondent should obtain financial advice before deciding to retain the home, and as a result of the choice she made to do so, the Respondent should not now "re-profit" because she has less of an asset base than does the Applicant at his retirement date. The Applicant argued he has met his obligation to the Respondent and she is not entitled to benefit from his having maximized his savings and financial position after divorce. The Applicant urged the Court that spousal support cannot be the Respondent's "pension for life" and allowing her to continue to receive support from the Applicant's retirement savings would amount to "double dipping", as both parties would in effect be drawing on the proceeds of an asset already divided. In *Boston, supra* the Supreme Court of Canada defined "double dipping", also known as "double recovery", as follows:

> 34 The term "double recovery" is used to describe the situation where a pension, once equalized as property, is also treated as income from which the pension-holding spouse (here the husband) must make spousal support payments. Expressed another way, upon marriage dissolution the payee spouse (here the wife) receives assets and an equalization payment that take into account the capital value of the husband's future pension income. If she later shares in the pension income as spousal support when the pension is in pay after [page 429] the husband has retired, the wife can be said to be recovering twice from the pension: first at the time of the equalization of assets and again as support from the pension income.

[43] In this case the "pension" is in the form of the Applicant's RRIF, comprised of capital the Applicant took as his equalized share from the marriage combined with money he saved after divorce. The Applicant maintains his retirement was clearly factored into the previous court decision, where an order for equalization of matrimonial assets required the Respondent to manage her share in contemplation of the Applicant's eventual retirement. The Applicant argues that requiring

spousal support to continue would amount to a re-distribution of property already divided.

[44] The Respondent contrasted her situation with that of the Applicant, noting the parties had equal assets following the previous decision however the Applicant's worth now significantly exceeds her While the Applicant attributed his growth in assets to frugal living post divorce, the Respondent countered the Applicant has that money because after the divorce he continued to have the ability to earn $100,000.00 a year more than her. The Respondent maintained her economic disadvantage continues, related to her role during the marriage.

[45] In *Shurson v. Shurson,* 2011 NSSC 163, the Court was satisfied that given the payee wife's income earning capacity and her remarriage, in the face of the payor husband's unemployment it was appropriate to reduce spousal support to a nominal sum to reflect that the payee's standard of living was now equal to that of the payor. In doing so, the Court recognized that the concept of compensatory support in play meant there was no time limit on the payor's obligation. At paragraph 86, O'Neil, ACJ stated:

> ...Ms. Burgess has been significantly compensated by virtue of the parties' division of property, including pension entitlement. There is no doubt that the policy basis of the law governing property division, has as an objective, the sharing of the martial assets spouses acquired. However, the obligation to compensate a spouse is not always fully realized as a result of property division. When one spouse is left with an ongoing superior earning capacity, ongoing spousal support may be ordered with the goal in whole or in part, being the payment of compensatory support.

I accept that the Respondent's entitlement to compensatory support continues, despite the earlier equal division of property. While the standard of living of each of these parties cannot be said to be drastically different as between them on the evidence given, the Respondent's present situation is partly rooted in the requirement for compensation. She spent many years out of the workforce while the Applicant, as sole breadwinner, provided a comfortable lifestyle for the couple and their now grown children.

[46] In *Boston, supra* it was recognized that double recovery is sometimes unavoidable:

> 64 ...the court should, where practicable, focus on that portion of the payor's income and assets that have not been part of the equalization or division of matrimonial assets when the payee spouse's continuing need for support is shown (see *Hutchison, supra* at para. 9). In this appeal, that would include the portion of the pension that was earned following the date of separation and not included in the equalization of net family property."
>
> 65 ...In certain circumstances, a pension which has previously been equalized can also be viewed as a maintenance asset. Double recovery may be permitted where the payor spouse still has the ability to pay, where the payee spouse has made a reasonable effort to use equalized assets in an income producing way and despite this economic hardship from the marriage or its breakdown persists.

[47] Consistent with the instruction in *Boston, supra* to attempt a focus on the payor's assets acquired after divorce, the court in *Dolomont v. Dolomont* 2006 NSSC 25 did not eliminate the husband's spousal support obligation but reduced it from $1300.00 to $500.00 taking into account that the wife would soon receive old age security benefits (which would not constitute a change in circumstances).

[48] Counsel for the Respondent emphasized the Applicant continues to experience the advantages of the marriage through his income earning and saving ability after divorce. This court must tread carefully in not over-emphasizing the career advantage belonging to the Applicant; divorce is just that - the parties lives and their affairs are severed one from the other. In this case, there is a balancing to be achieved which comes in the recognition that while divorce meant the Respondent was no longer directly tied to the Applicant's fortunes, it cannot be entirely ignored that her position within the marriage contributed to her present situation, as the end of the marriage left her at a distinct economic disadvantage relative to the Applicant.

[49] The Applicant relied on *Guha v. Guha*, 2005 ABQB 698, arguing that like the payor retired physician in that case, his individual effort was a factor in allowing him to increase his investments substantially after divorce. As the Court stated in *Guha(supra):*

> 15. ... Over the last few years, the Applicant's increased income is attributable not only to his decision to work well past the usual

> retirement age, but also to his taking on employment in a remote location away from his home. This increased income did not flow simply from the economic advantage that the Applicant took away from the marriage. It involved an extraordinary effort by the Applicant, an effort undertaken by him in order to provide financial security in retirement for himself and his current wife. (emphasis added).

[50] Clearly the Applicant here made a concerted effort to save and maximize his retirement potential after divorce. However, *Guha*, *supra* also drew a distinction between the quality of effort exerted by the payor and that person's sheer earning power:

> 16. Certainly spousal support can continue after retirement: Sprang v. Sprang; supra; Boston v. Boston [2001] 2 S.C.R. 4.3 [2001] S.C.J. No. 45, at para. 61. Further, there are situations in which the economic advantage associated with a career may persist beyond retirement and provide an ongoing basis for compensatory support. This could be the case where the benefits of the former employment include a pension entitlement (subject to the "double recovery" issue discussed in Boston v. Boston). Possibly, it would also be the case where the career permitted the acquisition of assets that can be drawn on to provide a retirement income in excess of that available to the relatively disadvantaged partner. ...(emphasis added)

Part of the Applicant's retirement funds come from earlier divided matrimonial assets, but the evidence is clear the Applicant spent seven years after divorce maximizing his retirement income, an advantage not available to the Respondent, who at must of necessity continue to pursue employment.

[51] In *Kingsley v. Kingsley* [2006] O.J. No. 2250 the Court set out four factors to be considered in determining whether double dipping should be permitted:

> 1. Whether the claim for support is based on need or compensation.
>
> 2. Whether the payor spouse has the ability to pay.
>
> 3. Whether the payee spouse has made reasonable efforts to invest or use the equalized assets to produce income and despite these efforts, the economic hardship from the marriage or its breakdown persists.

> 4. Whether the principal asset transferred on equalization is the matrimonial home, the home is not extravagant in relation to the standard of living, and the costs of accommodation are not appreciably different from rental or other accommodation. [Paragraph 15]

[52] In the instant case all of those considerations may be answered in favour of the Respondent's position. The Respondent's economic disadvantage related to her role in the marriage continues and the Applicant has an ability to pay, albeit at a reduced amount to reflect his reduced income.

[53] In submissions counsel for the Respondent cited *Cymbalisty v. Cymbalisty*, 2003 MBA 138 wherein the Manitoba Court of Appeal endorsed that double recovery may be permitted and such a finding is not unusual or rare. Philips, J.A. stated:

> 26 The motions judge's rejection of the double recovery argument is consistent with the manner in which the *Boston* principles have been interpreted and applied in subsequent decisions of the courts. Professor Carol J. Rogerson, in "Developments in Family Law: The 2000-2001 Term" [5], commented (at p. 350):
>
> > "Over the long run, it is possible that the exception might replace the rule, in which case the response to "double dipping" generate by the majority ruling will be little different in practice from that favoured by the dissent – a flexible, case - by - case approach in which the entire pension may be considered for support purposes if, after reasonable use of equalized assets, a trial judge in his or her discretion decides that there is remaining need or disadvantage. *Boston* is unlikely to bring the desired degree of certainty to this area of law, and legislative reform remains a priority."
>
> 27 That viewpoint was a prophetic one. In cases where the payor spouse has retired on pension and sought a reduction of the spousal support obligation, courts across the country have found circumstances and factors that support continuing need or disadvantage and permit double recovery...

The parties in this case do, on the evidence before me, fit within that category of cases where a form of double dipping is justified and must be permitted.

[54] In many respects the situation of the parties here mirrors that of the husband payor and wife payee in *Slater v. Slater*, 2003 NSSF 4, wherein Gass, J. found:

> 18 This was a traditional marriage during which the husband pursued a livelihood and ran a business which was the financial mainstay of the family. Following the dissolution of the relationship the wife received the house free and clear and he kept his pension. She was at an economic disadvantage as a result of the marriage breakup and she is still at an economic disadvantage. She does have the house and she used the funds that were paid out to her to cover the mortgage payment to supplement her income at the time. There has been a fundamental change in circumstances since the order was last confirmed.
>
> 19 The Applicant, Mr. Slater, has experienced a significant decrease in his income with the termination of his long-term disability benefits, upon attaining the age of 65. Mrs. Slater has on the other hand experienced an increase in income upon attaining the age of 65. ...
>
> . . .
>
> 23 In this situation, Mr. Slater's pension was accounted for in the division of matrimonial property. She received the matrimonial home and a lump sum payment sufficient to enable her to have that property free and clear. In exchange, Mr. Slater was to keep his pension and the motor vehicle. It was contemplated that this was roughly an equal division of the matrimonial assets.

The Court concluded the wife had a need for ongoing support which had not diminished, however the husband's ability to pay had been "dramatically affected", and in balancing those two factors a reduction in monthly spousal support from $1000.00 per month to $350.00 per month was found to be warranted. Similarly, in this case, the Applicant's ability to pay has been significantly, although not wholly eroded.

Issue No. 3 - Should the Applicant's spousal support obligation be terminated?

[55] There is no merit in the Applicant's submission that the previous decision reflected that spousal support was intended to continue only for so long as the Respondent was working. The trial judge could have said exactly that, but did not provide a termination date or identify an event that would signal an end to the Applicant's spousal support obligation. What the trial judge did do was identify

the onus on the Respondent to work toward self-sufficiency and made it clear the Applicant's future retirement would constitute a "radical change", however the decision stopped short of imposing a time limit on spousal support.

[56] The thrust of the Applicant's case at hearing was that the equitable division of assets in the divorce judgment appropriately compensated each party for the economic consequences of the marriage and its breakdown and was sufficient to ensure that both parties, with appropriate financial planning, would be provided for after his retirement. I cannot agree that the economic consequences to the Respondent of the breakdown of the marriage had an automatic end date that coincided with the Applicant's retirement date. It is clear the Respondent continues to be reliant on spousal support. The Respondent has not ignored her obligation to generate income from the equalized matrimonial assets. She has health issues as significant as those of the Applicant, she is slightly older than the Applicant, and it is apparent she will need to continue to work indefinitely, even in the face of a contribution by the Applicant, all related to her having been economically disadvantaged by her role in and the ending of the marriage.

[57] Having found that the Respondent's dependency still persists and the Applicant remains in a position to fund it, the Applicant's obligation going forward must reflect that he has experienced almost a fifty percent reduction in his gross income over what it was in the last year prior to his retirement, and that the income gap between the parties has narrowed to a difference of approximately $20,340.00. Each party will now be forced to further adjust their lifestyle so as to live on less, due to the Applicant's retirement having reduced what he can afford to pay and the need for a corresponding reduction in the quantum of spousal support. Without suggesting either party now lives lavishly, each will have to continue to sacrifice – the Applicant because a portion of his reduced income will continue to go to spousal support, and the Respondent because she will receive less spousal support. It is recognized that the practical, but not intended, effect of this decision may well be that it ultimately serves as a catalyst for the Respondent to dispose of her home.

Conclusion

[58] For the reasons set out herein, I am satisfied it is appropriate to vary the Applicant's monthly spousal support obligation from $3000.00 per month to $1000.00 per month, effective November 1, 2012. Payments made to the Respondent by the Applicant since that date shall be credited to the Applicant by

requiring that he meet his ongoing monthly obligation through actual transfer of $900.00 per month (while receiving credit for $1000.00 per month) until such time as he has been fully “reimbursed” for any overpayment made between November 1, 2012 and the date the Variation Order is issued.

[59] Counsel for the Applicant shall prepare a Variation Order giving effect to the terms of this decision, which shall be consented to as to form only by counsel for the Respondent.

[60] The evidence supported that the advantage the Respondent realizes from the coverage available to her through medical insurance premiums paid by the Applicant is significant relative to the burden it places on the Applicant. Similarly the security that life insurance paid by the Applicant in favour of the Respondent provides is significant relative to the devastating consequences to the Respondent in the event of the Applicant’s demise while support is still payable. Absent any evidence that the Applicant is no longer eligible to purchase such coverage, it is only reasonable that these provisions of the previous decision remain undisturbed and not be varied at this time.

J.