NOVA SCOTIA COURT OF APPEAL
Citation: *Phinney v. Phinney*, 2002 NSCA 168

Date: 20021231
Docket: CA 183106
Registry: Halifax

Between:

Elizabeth D. Phinney

Appellant

v.

Carl S. Phinney

Respondent

Judges:	Roscoe, Freeman and Bateman, JJ.A.
Appeal Heard:	December 9, 2002, in Halifax, Nova Scotia
Held:	Appeal allowed in part per reasons for judgment of Bateman, J.A.; Freeman and Roscoe, JJ.A. concurring.
Counsel:	Katherine A. Briand, for the appellant Edward J. McNeill, for the respondent

Reasons for judgment:

[1] This is an appeal by Elizabeth D. Livingstone (formerly Phinney) from an order, *inter alia*, varying spousal support.

BACKGROUND:

[2] The parties were married in 1987 after two years of cohabitation and separated in January of 2000. They have two children, Aaron Carl Phinney born February 22, 1993 and Ashley Elizabeth Phinney born June 29, 1994.

[3] The children have resided with their mother since separation. Nominally, custody is joint, although the father, by choice, exercises only limited access with the children. Child support is fixed in accordance with the **Guidelines** at $567.00 monthly.

[4] From a time shortly after the separation, Mr. Phinney has lived in a common law relationship with Janice Hicks. There are no children of that relationship. Ms. Hicks has access with her two teenage children who live with their father.

[5] The Divorce proceeding was heard by Justice Hilroy Nathanson in Supreme Court in November of 2000. The resulting decision is reported as **Phinney v. Phinney** at [2000] N.S.J. No. 393 (Q.L.). The trial judge summarized the parties' circumstances at that time:

> ¶ 4 The parties were married in 1987. Both were employed at the time. The wife continued to work until 1992. Because of complications of pregnancy, she was advised to take time off. The first child, Aaron, was born on February 22, 1993, and the second child, Ashley, was born on June 29, 1994. The parties agreed that the wife would remain at home with the children until they started to attend school. They considered that there was no financial benefit for her to work while they paid the expenses of daycare. She was out of the work force for approximately four years. During that period, she also provided child care in her home for children of neighbours. Aaron is now seven years of age, and in Grade II. Ashley is six years of age, in Grade I. Both of the parties are now 35 years old.
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> ¶ 5 On account of the husband's employment, they moved several times. The wife was able to obtain employment in each location while she was in the workforce and, when she was not, she provided child care in their home. After Ashley entered school, the wife started a one year teachers' assistant program at

> the Institute for Early Childhood Development Services at Truro. The parties separated in January, 2000. The wife did not attempt to obtain part-time employment or summer employment. She had previously trained and worked as a hair stylist; she testified that she no longer liked hairdressing. She had also worked as a waitress, and had training in the banking and financial field.
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> . . .
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> ¶ 7 In October, the wife moved out of the matrimonial home to Salt Springs, Pictou County, where she thought that she would be more likely to secure employment as a substitute teacher [assistant] after she completed her studies. The husband continued to pay the expenses of the matrimonial home. He paid spousal support for 11 months after the separation, and is also paying one-half of the wife's re-training expenses by agreeing to pay one-half of an RRSP loan borrowed for her education. She testified that she has graduated and was being interviewed for placement on the substitute teachers' list, but employment as a substitute teacher [assistant] is not assured. The matrimonial home is in the process of being sold.
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> ¶ 8 The husband has lived with a girlfriend in a common law relationship subsequent to the date of separation. His financial information reflects expenses for both of them. He testified that she does not contribute significantly to the household finances. Nor does she work, although she has started to upgrade with high school courses. He testified that she was going through a divorce and was stressed.
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> ¶ 9 The wife is optimistic that she will be called to work as a substitute after her name is placed on the list. Whether she will indeed be called will depend on circumstances beyond her control. She testified that, as a substitute, she could be able to work 15 hours a week to a maximum of 25 hours, if she is needed and called. She believes her income would then be $11.86 per hour. If she could secure a permanent position, it would likely be for a total of 25 hours per week. She did not know when permanent positions might be open or the likelihood of her being able to secure one. She will need a vehicle for work; her van needs repairs. She will also require child care for the children when she works. She hopes to be able to take a two year sign language course in the future.

[6] Because the parties' financial circumstances were uncertain at the time of the hearing the judge provided in his decision as follows:

> ¶ 13 I have tried to take into consideration all the factors in s. 15.2(4) of the [Divorce] Act and have tried to keep in mind the objectives set out in ss. (6). However, it is extremely difficult, if not impossible, to properly consider the

> condition, means and needs of the spouses in their present circumstances. A good deal of the financial and employment information supplied to the Court is vague or uncertain. This is especially so in regards to the circumstances of the wife which are, and for some time to come may be, in a state of flux. I consider it desirable to base a decision upon the known, proven facts rather than upon assumptions which may turn out to be too optimistic or excessively pessimistic.
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> ¶ 14 The Court orders that the husband shall pay to the wife the sum of $750.00 per month by way of spousal support.
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> ¶ 15 The Court further orders that such amount shall be paid until after the wife receives a third pay cheque from employment as a substitute teacher. Thereafter, the amount shall be reduced by $1.00 for every $4.00 of gross income which the wife earns from her employment. This should give some hope that the wife may in due course become economically self-sufficient, and should not be a disincentive for her to work.
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> ¶ 16 Whether or not the wife secures employment as she presently expects , approximately one year from the date of this decision the matter of quantum and duration of spousal support should be judicially reviewed. Either party is at liberty to make a summary application before the end of the year 2001 for such review of by a judge of the Family Court, of the Family Division of the Supreme Court, or of the Supreme Court, as may be appropriate.
> (Emphasis added)

[7] On October 19, 2001 Mr. Phinney initiated the review process authorized by the trial judge. He applied to vary "the quantum and/or duration of spousal support payable . . .". On December 28, 2001, Ms. Livingstone cross-applied to vary (increase) the access exercised by Mr. Phinney and for an order that the children be maintained on Mr. Phinney's employment medical insurance plan. The Court was also asked to rule on miscellaneous other matters in dispute arising from the division of their limited assets.

[8] The applications came on for hearing before Justice John Murphy of the Supreme Court on February 18, 2002. As is relevant to this appeal, the Chambers judge ordered that the monthly spousal support reduce effective March 1, 2002, to $500 monthly, then reduce again on September 1, 2002 to $350 monthly, again to $200 on September 1, 2003 and to terminate completely with the last payment on August 1, 2004. The judge also fixed arrears of maintenance directing a monthly payment plan between March 2002 and August 2002, with the effect that Ms.

Livingstone would continue to receive, until that date, a monthly amount approximating what she had been receiving, through a combination of regular monthly spousal support and arrears. Ms. Livingstone appeals.

[9] To describe these parties as embittered would be a substantial understatement. Their animosity toward one other was evident in the manner in which each testified.

[10] Mr. Phinney feels that he has paid spousal support long enough. He believes that, as a means of retribution for his breakup of the marriage, Ms. Livingstone is not making reasonable efforts to find employment. He sought immediate reduction in the spousal support with complete termination within the year.

[11] Ms. Livingstone, on the other hand, was adamant in her evidence, that she would not work as a hairdresser again. Before the breakdown of the marriage, the parties agreed that she would train as a teaching assistant. This would be particularly suitable employment because her hours of work would coincide with those of the children and they could therefore avoid the expense of childcare. She was enrolled in that course at the time of separation, although it was interrupted by the marriage breakdown. She did finish the course by October of 2000. In order to become eligible for a job, she needed to complete the time equivalent of three months working as a substitute assistant. At the time of the variation hearing before the Chambers judge she had yet to accumulate the qualifying experience. That work was only available on an "on call" basis with minimal notice. She could not take alternate employment in the interim because she would not then be available to do the substitute work when offered.

[12] Her position is set out in the following paragraphs of her January 10, 2002 Affidavit:

> 20. THAT I have not pursued any positions for hair dresser, waitress or working in building supply stores nor at Tim Horton's nor do I have any intention of doing so. The Petitioner and I decided before our separation that I would get my teaching degree and that would be the field I would pursue employment in. He cannot now complain that I am at fault for doing exactly what we always planned I would do, particularly where my plans were set aside for 13 years to accommodate his making his own career in the field of his choice.

> 21. THAT my search for employment, even in the fields he has suggested, is hampered by the fact that the Petitioner absolutely and categorically refuses to take the children any more than the minimum standard set out in the existing Family Court Order. In the 365 days of 2001, he had the children a total of 60 days, including an extended period of one week out of his five week vacation period. When I have asked him to take the children for longer on his vacation times, his response is that he is "not giving up his vacation for the kids."

[13] Ms. Livingstone did not object to a time limited order permitting sufficient time for her to "establish myself in my chosen career". She suggested three years.

[14] Ms. Livingstone had worked at a local service station from October to December of 2001. There, the employer had allowed her to miss work when teaching assistant substitute work was available. That job did not last. While she could remain available for daytime substitute work by accepting minimum wage evening employment, in such a case she would clear very little over and above necessary childcare costs and have little time for the children.

[15] As a teaching assistant Ms. Livingstone would earn $11.86 per hour for a minimum of 15 and a maximum of 25 hours per week ($780 to $1300 monthly during the academic year). She would require limited, if any, child care because her hours would correspond to the school hours of the children. Ms. Phinney testified that, despite diligent efforts, from the time of completing her teaching assistant's course in October or 2000 to the time of the hearing before the Chambers judge in February of 2002, she has not been offered sufficient substitute teaching work to accumulate the necessary three months experience. She testified that she had applied for "jobs in both day care centers and as teaching assistants locally and in Truro" but has not been accepted for any of the positions. She provided no confirmatory details of those applications.

[16] At the time of the hearing Mr. Phinney exercised access with the children for one 24 hour period on the weekend, 24 hours from Christmas night to Boxing Day night and one week during their summer school vacation. Ms. Livingstone asked the court to order that Mr. Phinney exercise additional access. The judge reluctantly declined to so order, citing the parents complete inability to communicate with each other and taking into account Mr. Phinney's resistance to additional time with the children.

[17] Mr. Phinney was subsequently transferred from New Glasgow to Halifax. The one day per week access was, from his standpoint, no longer workable. In a later hearing the judge ordered that Mr. Phinney have the children with him for one weekend per month and one week during the summer school vacation.

[18] The minimal matrimonial assets of the marriage were divided equally at the time of divorce. There was little equity for either party.

[19] Ms. Livingstone's budget is $1900 monthly for herself and the two children. In addition to the total support of $1317 monthly, Ms. Livingstone receives the maximum child tax benefit and supplement of either $408 or $448 monthly (the evidence is unclear) on account of her low income. That government subsidy will be reduced at some point as her income increases. It appears from the evidence that Mr. Phinney does not take serious issue with the contents of her budget save for a forty dollar monthly expenditure on a child psychology correspondence course.

[20] Mr. Phinney is employed, as he was at the time of the Divorce, as a service technician with IKON Office Solutions at a gross annual income of $41,000 plus a car allowance. At the time of the hearing he was paying combined spousal and child support of $1317 monthly, the spousal portion being tax deductible. He maintains that he is running a deficit of about $600 monthly.

[21] Mr. Phinney's budget for himself and Ms. Hicks, his common law partner, is $3136 monthly. This includes all of his vehicle expenses and a monthly debt reduction payment of $569. In addition to his income Mr. Phinney receives a lump sum car allowance of $316 together with a per work kilometre mileage reimbursement. The former is a taxable benefit. The vehicle expenses total $704 monthly, not reduced by the mileage reimbursement or the net lump sum allowance, which net allowance I would estimate to be about $250 monthly. Before debt service and reducing Mr. Phinney's car expenses to an estimated net amount of about $350, he is budgeting about $2200 monthly for his two adult household. Ms. Hicks is not employed. She contributes her spousal support of $312 monthly, which, due to the fact that she has no other income, is not taxable.

ANALYSIS:

[22] This was a review hearing, as distinct from an application to vary requiring a demonstration of a change in circumstances. (see **Schmidt v. Schmidt** (1999), 1 R.F.L. (5th) 197; B.C.J. No. 2757 (Q.L.)(C.A.) and **Bergeron v. Bergeron** (1999), 2 R.F.L. (5th) 57; O.J. No. 3167 (Q.L.) (Ont.S.C.J.)). Thus the section of the **Divorce Act**, R.S. 1985, c. 3 (2nd Supp.), guiding the disposition of spousal support is 15.2:

> **15.2** (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.
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> . . .
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> (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.
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> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
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> (*a*) the length of time the spouses cohabited;
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> (*b*) the functions performed by each spouse during cohabitation; and
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> (*c*) any order, agreement or arrangement relating to support of either spouse.
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> (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.
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> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
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> (*a*) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

> (*b*) apportion between the 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;
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> (*c*) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
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> (*d*) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[23] It is clear from the comments of Nathanson J. at ¶ 5 above that, in providing for the review hearing, he was responding to the fact that the parties' financial picture was clouded. The language used by the judge does not suggest that he was telegraphing a call for the termination of spousal support upon review or that, at that point, he was concerned about Ms. Livingstone's bona fides in seeking employment.

[24] Time limited spousal support orders in marriages of reasonable duration where one party has been out of the workforce and children remain dependent are not the norm. With the decision in **Moge v. Moge**, [1992] 3 S.C.R. 813; 43 R.F.L. (3d) 345, the Supreme Court of Canada responded to years of judicial over-emphasis on the promotion of spousal self-sufficiency and a clean-break between the parties after divorce. In **Moge**, the Court found that the trial judge had erred in giving dominance to the objective of encouraging self-sufficiency to the exclusion of the other factors in s. 17(7) (which is the equivalent of s. 15.2(6) under consideration here). The Court noted that not only is the promotion of self-sufficiency just one of several support objectives, it is a qualified one. L'Heureux-Dubé J., writing for the majority of the Court, said in **Moge** at p. 853 (S.C.R.):

> It is also imperative to realize that the objective of self-sufficiency is tempered by the caveat that it is to be made a goal only "in so far as practicable". This qualification militates against the kind of "sink or swim" stance upon which the deemed self-sufficiency model is premised. (See Bailey, *supra*, at p. 633, and *Droit de la famille* -- 623, [1989] R.D.F. 196 (Que. C.A.), at pp. 201-2.)

[25] Upon marriage breakdown it is often difficult to predict, with any certainty, the financial futures of the parties, particularly that of a spouse who has been out of the work force and has ongoing child care responsibilities. That uncertainty casts doubt on the propriety of limited term orders as the norm. I would agree with the

comments of McEachern C.J.B.C., as he then was, in **Nataros v. Nataros** (2000), 4 R.F.L. (5th) 290; B.C.J. No. 264 (Q.L.)(C.A.):

> ¶ 6 Second, the trial judge time limited the maintenance award to 30 months. This was the estimate of the time that would take her to complete her education. Having regard to the authorities cited to us, particularly *Sitwell v. Sitwell* (1998), 108 B.C.A.C. 278; *Coulter v. Coulter* (1998), 114 B.C.A.C. 135; *Swiderski v. Dusseault* (1998), 108 B.C.A.C. 194, all judgments of this Court; and *Kent v. Frolick* (1996), 23 R.F.L. (4th) 1 (Ont.C.A.), it is apparent that time-limited orders for maintenance are not the usual rule. I do not suggest that a time-limited order should never be made or included in a maintenance order, but in this case I think the order is too severe as presently stated as this tragedy may not play out strictly as expected.

[26] The issue of time limited spousal support was addressed in **Bildy v. Bildy** (1999), 44 R.F.L. (4th) 81; O.J. No. 501 (Q.L.)(C.A.). The facts are adequately captured in the headnote:

> The parties were married for 13 years. The wife was 39 years old and the husband was 40. The husband was a partner in a major law firm. In 1996, his gross practice income was $251,436. The wife had a grade 12 education. She had worked as a secretary before the birth of the parties' eldest child, never earning more than $27,000 per annum, and had not worked outside the home for over eight years. The wife was granted custody of the two children of the marriage, who were nine and 11 years old. The trial judge ordered the husband to pay child support of $30,000 per annum for each child and spousal support of $30,000 per year for a period of five years. The wife appealed.

[27] In time-limiting the support the trial judge had commented (at (1997), 28 R.F.L. (4th) 315; O.J. No. 1980 (Q.L.) (Ont.Ct.Gen.Div.):

> 10 . . . I get the impression from the Applicant's evidence and the manner in which she answered questions that she continues to harbour considerable bitterness and resentment towards Mr. Bildy and for that, or perhaps other reasons, is not anxious to return to work and become self-supporting. I was not assured by her evidence that she has any intentions of doing so in the near future or that she feels any obligation to do so. . .

[28] On appeal, in extending the time within which the spousal support would terminate, Finlayson J.A. said, for the court:

14 It is unfortunate that this matter was presented to the trial judge with such limited options. On this record, the appellant has never earned as much as $30,000 a year and it is acknowledged that that figure by itself would not make her self-sufficient. The goal in this case must surely be to encourage her to be self-sufficient, while still recognizing that support payments will be necessary from the respondent for some time in the future. With respect, the trial judge was in error in placing so much emphasis on self-sufficiency in this case.

15 As was said by Osborne J.A. in *Linton v. Linton* (1990), 1 O.R. (3d) 1 (Ont. C.A.)at pp. 35-6 (R.F.L.):

> The objective of self-sufficiency must be assessed in the context of the marriage, particularly in a marriage involving a long period of cohabitation. To do otherwise is to recognize inadequately the economic value of the functions of child care and household management, and the economic disadvantages accruing as a result of a long-term absence from the work-force.
>
> In my view, the provisions of s. 15 [of the *Divorce Act*] require both need and self-sufficiency to be considered as above stated. The "once a secretary always a secretary" support model is not reasonable in a marriage of long duration. It does not adequately address the factors and objectives set out in subss. 15(5) and 15(7).
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> . . .
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> Although I acknowledge that self-sufficiency may lead to a clean break, it must be remembered that the objective of self-sufficiency, as referred to in s. 15(7)(d), is qualified. Thus, the clean break approach to support must be viewed as having a limited legislative underpinning.

16 This was a marriage of 13 years duration and the children are presently 11 and 9 years of age. They will require continuous supervision by the appellant until they are in their late teens. Additionally, the spousal support payments are not overly generous in the first place and are subject to the obligation of the appellant to pay the equalization payment until 2004. In my view, an order for the continuation of the $30,000 spousal support payment until the year 2006 gives adequate recognition to the need to encourage the appellant to take some positive steps towards self-sufficiency by finding employment. At that time, either of the parties should have the right to review the quantum of the support payments.

[29] The parties' financial situation in **Bildy** is clearly not comparable to that here, however, it is my view that the general comments are applicable.

[30] Considering Ms. Livingstone's training and experience, taking into account the fact that she has been out of the work force for a period of time and the fact that she has the principal care of the children, it is misleading to speak of her achieving "self-sufficiency" in the near term. Mr. Phinney has moved on and sees his obligation to contribute to Ms. Livingstone's support as a limited term one, irrespective of her financial situation. He masks that view using the language of "self-sufficiency". Mr. Phinney apparently sees no connection between Ms. Livingstone's standard of living and that of the children nor does he acknowledge that her earning potential is impaired by her ongoing child care responsibilities.

[31] On these facts, Ms. Livingstone's obligation is to make all reasonable efforts to maximize her financial contribution to her support and that of the children. In assessing what those "reasonable efforts" are, it is appropriate to take into account the roles assumed in the marriage and the parties' respective abilities to earn income and to consider, as well, the demands of caring for the children. The latter consideration is mandated by s. 15.2(6)(a) of the **Divorce Act** insofar as it requires the court to take into account, ". . . <u>disadvantages</u> to the spouses arising from the marriage or its breakdown" and by s. 15.2(6)(b) which directs that the Court "apportion between the spouses any financial consequences arising from the care of any child of the marriage <u>over and above</u> any obligation for the support of any child of the marriage" (my emphasis). Referring again to the majority judgment in **Moge**, **supra** at pp. 862-3:

> The curtailment of outside employment obviously has a significant impact on future earning capacity. . . .
>
> Often difficulties are exacerbated by the enduring responsibility for children of the marriage. The spouse who has made economic sacrifices in the marriage also generally becomes the custodial parent, . . . The diminished earning capacity with which an ex-wife enters the labour force after years of reduced or non-participation will be even more difficult to overcome when economic choice is reduced, unlike that of her ex-husband, due to the necessity of remaining within proximity to schools, not working late, remaining at home when the child is ill, etc. The other spouse encounters none of these impediments and is generally free to live virtually wherever he wants and work whenever he wants.

[32] Ms. Livingstone's search for employment is fettered by the needs of the children. Any financial gain from work after their school hours, which run from 8 a.m. to 3 p.m., is eroded by the cost of the child care expenses that would be necessary. The children's school hours also impact on the geographic area within which Ms. Livingstone can seek employment. Absent before and after school child care arrangements, she cannot leave home in the morning until the children have left for school at 8 a.m. If she is to be there for them after school, she must leave work in time to be home by 3 p. m.

[33] A relevant factor, raised on the evidence, is Mr. Phinney's minimal interest in having contact with his children, leaving the substantial burden upon Ms. Livingstone. His access with the children, even before his recent move, was by his choice, substantially less than that which might be considered reasonable. Consequent on his move to Halifax, his access, again by choice, is even more limited. Mr. Phinney must accept the reality that this election on his part leaves the mother with virtually unremitting care of the children. This is clearly a financial consequence, disadvantage and hardship resulting from the marriage breakdown (s. 15.2(6)(a), (b) and (c)).

[34] With respect, it is my view that the judge over emphasized the desirability of spousal self-sufficiency in comparison to the other objectives of s. 15.2(6). In that regard he erred.

[35] The judge did not make an express finding that Ms. Livingstone had not made reasonable efforts to contribute to her own support. The abrupt reduction in the spousal support had the effect, however, of eliminating any realistic possibility that she could qualify for and find work as a teaching assistant. The reduction regime would necessitate Ms. Livingstone taking employment, if not immediately, certainly by September of 2002, when the maintenance dropped to $350 monthly. At best, that left only the months of March, April, May and June for her to both qualify for work and find related employment, recognizing that July and August are non-school months.

[36] Ms. Livingstone is entitled, in my view, to some additional time to qualify and locate employment as a teaching assistant. It is her position that the spousal support should be eventually terminated but proposes that it be maintained at the current level for a further three years. I agree with the Chambers judge that the

record supports the fixing of an order which will provide an incentive to Ms. Livingstone to more actively and realistically pursue employment.

[37] Ten months have elapsed since the variation hearing. We are advised by her counsel (with the agreement of Mr. Phinney's counsel) that with the August reduction Ms. Livingstone found it necessary to accept minimum wage employment, although we do not know the details. She has therefore, presumably, been unable to pursue the teaching assistant qualifying work and, therefore, a position in the field, since school ended in June of this year.

DISPOSITION:

[38] Adopting but modifying the reduction plan ordered by the Chambers judge, I would vary the order to provide that:

> The spousal support continue at $750 monthly until December 30, 2003.
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> On January 1, 2004 the spousal support shall reduce to $500 monthly and continue at that rate until the later of December 30, 2004 or further order of the Court.
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> Commencing January 1, 2005 the spousal support shall reduce to $350 monthly and continue until December 30, 2005 when the spousal support shall further reduce to $200 monthly and continue until final termination with the payment on December 1, 2006.
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> The arrears which have accumulated as a result of the variation of the Chambers judge's order shall be calculated and, along with those fixed at that hearing , shall be paid in a lump sum not later than January 30, 2007.

[39] In the event that Ms. Livingstone secures ongoing employment as a teaching assistant, she shall, within 30 days, advise Mr. Phinney, in writing, of the terms of that employment with supporting documentation including her rate of pay, anticipated or actual deductions and hours of work as well as the cost of any related child care expenses. In such event he shall be at liberty to apply to the court for a review (variation) of the quantum and duration of continuing spousal support above ordered.

[40] While I cannot fetter the discretion of a future court on such an application, I will clarify my intention in providing for a review at Mr. Phinney's option should Ms. Livingstone find work as a teaching assistant. It is not my expectation that the program of spousal support will necessarily reduce or terminate in such event. That decision will be for the court hearing that application and depend upon the hours of work obtained, the rate of pay and should take into account any child care costs, commuting expenses and other miscellaneous costs associated with the employment.

[41] These are difficult financial times for both households. There is, however, some room to manoeuvre. Mr. Phinney's budget relates to the support of himself as well as his partner Janice Hicks. She receives spousal support of $312 monthly and is not employed. She does not have primary responsibility for the care of her teenage children. While she maintains that she is attempting to upgrade her high school credits in order to gain admission to a Community College course, the evidence in that regard is doubtful. Presumably, she could temporarily postpone that goal and readily find the kind of employment which Mr. Phinney believes is now available to Ms. Livingstone. In that way Ms. Hicks could contribute more equitably to the Phinney/Hicks household expenses. This need not be a long term arrangement, but an interim plan which will enable Mr. Phinney to hold the line while Ms. Livingstone puts herself in better position to contribute to her own support.

[42] With respect to the other grounds of appeal, we are not satisfied that the Chambers judge erred in relation to the claim for compensation for the devaluation of the assets.

[43] Due to the limited financial circumstances of the parties, Mr. Phinney shall pay to Ms. Livingstone disbursements only, as taxed or agreed.

Bateman, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.