

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *Cottreau v. Pothier*, 2002 NSCA 150

**Date:** 20021128

**Docket:** CA 179511

**Registry:** Halifax

**Between:**

Kenneth Roger Cottreau

Appellant

v.

Shirley Eileen Pothier

Respondent

**Judges:**

Bateman, Cromwell and Saunders, J.J.A.

**Appeal Heard:**

November 28, 2002, in Halifax, Nova Scotia

**Written Judgment:**

December 2<sup>nd</sup>, 2002

**Held:**

**Appeal dismissed per oral reasons for judgment of Bateman, J.A.;  
Cromwell and Saunders, J.J.A. concurring.**

**Counsel:**

Gregory M. Warner, Q.C. and Michelle Christenson, for the  
appellant  
Laurie C. LaViolette, for the respondent

Reasons for judgment:

[1] This is an appeal by Kenneth Roger Cottreau from a decision of Justice Deborah K. Smith of the Supreme Court of Nova Scotia (Family Division). Justice Smith granted Shirley Eileen Pothier's application for continued spousal support, which support was originally ordered in the amount of \$2600.00 monthly, pursuant to a Divorce proceeding in August of 1999. This was a longstanding, "traditional" marriage, with no issue concerning Mr. Cottreau's ability to pay support.

[2] Mr. Cottreau subsequently applied to Justice Hiram Carver of the Supreme Court to terminate the spousal support. At the time of that hearing Ms. Pothier was enrolled in an Office Technology Program from which she was expected to graduate in June of 2001. The application to vary at that time was precipitated when Ms. Pothier, who had been pursuing a different course of study at the time of the divorce, withdrew due to failing grades. She was unable, at that point in the academic year, to gain entry into another training program but did take two courses which she successfully completed. Those courses counted as credit toward the Office Technology program. Ms. Pothier was confident of finding employment upon completion of her training.

[3] It was Mr. Cottreau's submission, and accepted by Justice Carver, that Ms. Pothier was not making sufficient efforts to contribute to her own support. By decision dated September 19, 2000 Justice Carver said, in part:

At this time, I am directing her present spousal support of \$2600.00 per month terminate by the end of September, 2001 unless upon application she is able to show otherwise to the satisfaction of the Court.

[4] On September 11, 2001 Ms. Pothier applied to the Supreme Court to vary the "Carver order" by removing the provision that spousal support would terminate and continuing the maintenance in a reduced amount.

[5] According to the evidence before Justice Smith, Ms. Pothier did successfully graduate from the Office Technology Course in June of 2001 and obtained a casual position as an administrative assistant with the R.C.M.P. In September of 2001 Ms. Pothier was uncertain whether the casual employment would continue, thus her application to vary.

[6] When a competition was eventually held to permanently staff the casual position with the R.C.M.P., Ms. Pothier did not pass the skills test and was therefore ineligible to be hired for the position. By January of 2002 she was unemployed. Ms. Pothier was in receipt of Employment Insurance of \$1508 monthly at the time of the hearing before Justice Smith in April, 2002. Mr. Cottreau's annual income remained at about \$80,000 as it had been at time of trial and the subsequent variation hearing.

[7] At that hearing Mr. Cottreau argued that the "Carver order" was a limited term order, thus requiring Ms. Pothier to demonstrate that there had been a material change in circumstances as a pre-condition to variation. It was Ms. Pothier's position that the "Carver order" was a "review order", not requiring a material change for variation.

[8] The judge determined that proof of a material change in circumstances was not necessary for a variation of the "Carver order". Mr. Cottreau says that in so deciding the judge erred. It is unnecessary for us to deal with that submission in view of the fact that the judge found, in the alternative, that Ms. Pothier had established a material change in circumstances "based on the fact that her economic self-sufficiency has not materialized as anticipated by Justice Carver in his September 19<sup>th</sup>, 2001 decision". We are satisfied that in so concluding the judge did not err.

[9] The judge ordered maintenance sufficient to make up the shortfall between Ms. Pothier's Employment Insurance and her monthly budget. This amounted to a need of \$855 monthly which the judge grossed up by 24% to \$1125 to account for income tax. The effect of this order was to reduce the amount of support which had been ordered at trial by in excess of 50%. A ground of appeal as to the propriety of the tax gross up was abandoned at the hearing. (see **Lisevich v. Lisevich** (1995), 20 R.F.L. 4<sup>th</sup> 435; A.J. No. 1124 (Q.L.)(C.A.) and **Vincent v. Vincent** (1995), 15 R.F.L. (4<sup>th</sup>) 273; N.J. No. 252 (Q.L.) (C.A.)).

[10] There being no error on the part of the trial judge, the appeal must be dismissed. The appellant shall pay to the respondent costs in the amount of \$1500 plus disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:

Cromwell, J.A.

Saunders, J.A.