SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Colter v. Colter*, 2015 NSSC 2

Date: 2015 01 08
Docket: 1201-66830 (SFHD-85004)
Registry: Halifax

Between:

Kathleen Elaine Colter

Petitioner

v.

Keith Gerald Colter

Respondent

Judge: The Honourable Justice Leslie J. Dellapinna

Heard: December 15, 2014

Counsel: Jennifer Schofiled for the Petitioner
Bernard Thibault for the Respondent

By the Court:

BACKGROUND

[1] The Petitioner, Kathleen Colter, and the Respondent, Keith Colter, were married on October 25, 1997.

[2] Together they had two children, Keegan, who is now 16 years of age and Liam who is 13.

[3] The parties separated on December 21, 2012 after a marriage of approximately 15 years.

[4] The evidence suggests that theirs was a traditional marriage. The Petitioner's primary role was that of a homemaker and caregiver to the parties' children (the first of whom was born just a year after the parties were married) and the Respondent was the family's primary income earner.

[5] The Petitioner initiated these divorce proceedings by way of a Petition for Divorce issued February 22, 2013. At that time she also filed a Notice of Motion for Interim Relief. That motion was heard by the Honourable Justice Lynch of this Court on April 9, 2013. The parties agreed on a joint and shared parenting arrangement with the parties sharing the care of the children on a week on week off schedule. The parties also agreed that the Respondent would pay to the Petitioner interim child support in the sum of $1,472.00 per month based on his 2012 income of approximately $109,570.00 and the Petitioner's 2012 income of $1,423.00. They were unable to agree on the amount of interim spousal support to be paid. After hearing evidence Justice Lynch ordered the Respondent to pay to the Petitioner spousal support in the sum of $1,600.00 per month.

[6] At the request of counsel a Settlement Conference was scheduled. That Settlement Conference took place on May 7, 2013 with the Honourable Justice Campbell. While no final agreement was reached on that day, shortly thereafter the parties did reach an agreement. The terms of that agreement were put in the form of a Consent Order which was issued on September 5, 2013. That order was not a Corollary Relief Order because by that time the parties had not yet been separated for a full year which was the means by which the Petitioner intended to prove

marriage breakdown according to her Petitioner for Divorce. Nevertheless paragraph one of the Consent Order reads:

> "The parties agree that this order shall be incorporated into and form part of the Corollary Relief Order."

[7] The order provides for the continuation of the shared week on week off care arrangements with respect to the children. It contains the parties' agreement with respect to a final division of property pursuant to the ***Matrimonial Property Act*** R.S.N.S. 1989, c.275 and it also includes the parties' agreement with respect to the payment of child support and spousal support. For the purpose of that order the Petitioner's income was stated to be $15,232.00 and the Respondent's was stated to be $108,170.59. The Petitioner's income had increased because following the interim hearing she obtained her current employment.

[8] It was agreed that the Respondent would pay to the Petitioner child support in the sum of $1,253.00 each month beginning July 1, 2013. Paragraph four says, among other things, "This amount is based on setting off each party's income as applied to the Nova Scotia table amounts for two children."

[9] The parties also agreed that the Respondent would pay spousal support to the Petitioner in the sum of $1,000.00 per month beginning July 15, 2013. Paragraph eight of the order says in part:

> "Kathleen will immediately and continuously pursue, in a diligent and dedicated manner, employment at full-time hours to secure her own self-sufficiency as soon as possible. Her failure to do so will require her detailed explanation at any subsequent review hearing."

[10] On January 17, 2014 the Respondent, who was employed in the IT field, was terminated from his employment. On February 25, 2014 he filed a Notice of Variation Application pursuant to section 17 of the ***Divorce Act*** seeking to vary the child and spousal support provisions of the September 5, 2013 Consent Order citing the loss of his employment. The Petitioner opposed his application.

[11] The Respondent's application was heard by me on April 30, 2014. At that time I rendered an oral decision. I do not intend to repeat the entire decision here. However, the evidence disclosed that the Respondent had received what was described as a severance package from his former employer in an amount that was roughly equivalent to 35 weeks of his base salary plus some additional payments.

Because of that "package" I concluded that there had not been a material change in the Respondent's circumstances that would warrant a variation at that time.

[12] I did however direct that the matter be reviewed again in July, 2014 prior to the expiration of the 35 weeks.

[13] In the course of the Respondent's evidence he said that he had taken the so-called severance package money and applied it to his line of credit. It was my decision that while he was free to do as he wanted with his severance payment he could just as easily have set the money aside and used it as a replacement for his lost income and continue to meet his child and spousal support obligations while at the same time pay interest on his line of credit.

[14] I conducted a conference with the parties and their counsel on July 11, 2014. I was advised then that the Petitioner's living arrangements had changed. I was told that as of June 2014 she began cohabiting with a partner. I was also told that the Respondent was developing his own business and was receiving an income from that business. I directed that a review hearing be held. Filing directions were given and the scheduling office set the matter down for a hearing to take place on October 8, 2014.

[15] According to the running file in the Court's file a telephone conference took place between counsel for the parties and Associate Chief Justice O'Neil on September 29, 2014. At that time Associate Chief Justice O'Neil gave the parties further directions but the October 8th hearing date was not changed.

[16] On October 8th I was not available but the matter appeared before the Honourable Justice Wilson. Again according to the running file, there was some discussion regarding disclosure and the matter was adjourned for a one day hearing before me on December 15, 2014. The matter proceeded on that day and this decision results from that hearing.

[17] Counsel requested that I conduct the matter as a divorce trial and I was asked to incorporate the terms of the Consent Order into the Court's Corollary Relief Order subject to any changes that the Court might order with respect to child and spousal support.

[18] The evidence included affidavit evidence from the parties, statements of their income and their expenses, evidence of the Petitioner's partner's income and expenses and an affidavit from the Respondent's previous counsel who represented

him in negotiations with his former employer. That affidavit was entered into evidence with the consent of the Petitioner's counsel. Verbal evidence was also received from the parties and the Petitioner's partner.

ISSUES

[19] The issues raised by this proceeding are:

1. What is the appropriate amount of spousal support to be paid by the Respondent to the Petitioner in 2014?
2. What is the appropriate amount of child support to be paid by the Respondent to the Petitioner on a prospective basis beginning in January 2015?
3. What is the appropriate amount of spousal support to be paid by the Respondent to the Petitioner on a prospective basis beginning in January 2015?

[20] There are also a number of sub-issues including:

(a) Should the "severance" payment paid to the Respondent by his former employer form part of his income in 2014 for the purpose of calculating child and/or spousal support?

(b) Is this an appropriate case to impute income to the Petitioner?

THE PETITIONER'S POSITION

[21] The Petitioner acknowledged that because of changes to the Respondent's income child support will need to be adjusted. However it was her position that in 2014, with the severance package received by the Respondent and the income that he earned in 2014 over and above his severance package, there is no reason to reduce her spousal support. Also, it was the Petitioner's position that there is no reason to reduce her spousal support prospectively. Any change should be to child support on a prospective basis beginning in January 2015. It was also her position that this is not an appropriate case to impute income to her.

THE RESPONDENT'S POSITION

[22] The Respondent's position was that what appears to have been a severance payment paid to him by his former employer in 2014 was really a reimbursement

of expenses owed to him by his former employer and that money should therefore not be included in his income for the purpose of calculating child or spousal support.

[23] It was also the Respondent's position that income should be imputed to the Petitioner. He submitted that she failed to comply with paragraph eight of the Consent Order.

[24] The Respondent therefore asked the Court to order a variation of the child and spousal support provisions of the Consent Order retroactive to January 2014 and base any new support figures on what he contended are lower income figures for him and higher imputed income figures attributed to the Petitioner. Further, on a prospective basis, it was his position that child support should be altered because of his reduced income and the Petitioner's higher imputed income. Similarly it was his position that spousal support should also be reduced significantly for the same reasons as well as the Petitioner's new living arrangements with her partner.

THE DIVORCE

[25] I will deal first with the Petitioner's request for a Divorce Order. Her request is not opposed by the Respondent.

[26] I am satisfied that all jurisdictional issues have been addressed. I'm satisfied too that there has been a breakdown of the parties' marriage. They have been living separate and apart since December 21, 2012. At no time did they resume cohabitation since that date. I am satisfied that there is no reasonable prospect of a reconciliation between the parties. A Divorce Order is therefore granted. I note in the Petition for Divorce the Petitioner requested an order changing her name - presumably back to her maiden name. If that is still her wish a provision to that effect may be included in the Divorce Order.

APPLICABLE LEGISLATION

[27] The ***Divorce Act*** R.S.C., 1985, c. 3 contains the applicable legislation, in particular sub-sections 15.1, 15.2 and 15.3 (1).

DISCUSSION

[28] In the ***Divorce Act*** a distinction is made between a child support order made pursuant to sub-section 15.1 (1) and an interim child support order made pursuant

to sub-section 15.1 (2). Similarly there is a distinction between a spousal support order made pursuant to sub-section 15.2 (1) and an interim spousal support order made pursuant to sub-section 15.2 (2). The Consent Order that was issued on September 5, 2013 has the heading "Consent Order". It is not identified as a Corollary Relief Order or as a support order or as an interim order. By the wording of paragraph one of the Consent Order it is clear that the parties intended for that order to become the terms of their Corollary Relief Order once the divorce was granted.

[29] When the Respondent made his application to vary the terms of the Consent Order earlier this year, in his pleadings he cited section 17 of the ***Divorce Act***. Section 17 allows for the variation of support orders or custody orders as defined by section 2. Section 2 defines a support order as meaning a child support order or a spousal support order and by definition those orders are orders made pursuant to sub-sections 15.1 (1) or 15.2 (1). Therefore, strictly speaking, section 17 does not have anything to do with the variation of interim orders. There does not appear to be any specific statutory authority for the variation of interim orders. There is, however, plenty of case law on that issue. That case law is sometimes conflicting but generally speaking it appears that interim child support orders and interim spousal support orders may be varied if a material change in circumstance can be demonstrated. Even if that were not the case there is nothing to prevent the Court from making a new interim spousal or interim child support order to replace an older order that is no longer appropriate.

[30] I have chosen to treat the support provisions of the Consent Order as an interim child support and an interim spousal support order but I am aware that it was the parties' intention to be bound by the support provisions of that order after their divorce unless material changes in their circumstances subsequently occurred.

[31] Of the two issues, child support and spousal support, child support is the easier to resolve. The *Child Support Guidelines* will provide the Court with the answer once the incomes of the parties have been determined. The parties share the care of their children equally. They and their counsel are aware of the Supreme Court's direction in *Contino v. Leonelli-Contino*, [2005] S.C.J. No. 65 but chose when the Consent Order was negotiated to use the "set-off" approach instead of the analysis required by section 9 of the *Child Support Guidelines*. The parties want to use the "set-off" approach now. Neither party claimed undue hardship.

[32] Spousal support is the more contentious issue. Sub-section 15.2 (4) requires the Court to take into consideration "the condition, means, needs and other circumstances" of both parties including:

> (a) the length of time the parties cohabited;
>
> (b) the functions performed by each of the parties during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

[33] 15.2 (6) provides that any spousal support order should:

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

[34] The factors listed in sub-section 4 are to be considered against the background of the objectives in sub-section 6. All of the objectives are to be given equal weight. (*Moge v. Moge*, [1992] 3 S.C.R. 813; S.C.J. No. 107, at paragraph 52).

[35] Generally, when making orders pursuant to 15.1 (1) and 15.2 (1) (i.e. "final" child and spousal support orders) the Court is not bound by the terms of an interim order. See for example *Mosher v. Mosher* (1995), 13 R.F.L. (4th) 385 (N.S.C.A.). Although not bound by the support provisions of the Consent Order I cannot ignore them. Among other factors, sub-section 15.2 (4) (c) requires the Court when making a spousal support order to take into consideration any order or agreement relating to the support of either spouse.

[36] Assuming that the agreement/consent order was negotiated under satisfactory conditions and took into account the factors and objectives of the ***Divorce Act*** (and neither party suggested that there was any fault with the order at

the time it was agreed upon) then the Court should strive to respect the parties' agreement. (*Miglin v. Miglin*, 2003 S.C.C. 24, paragraph 91).

[37] Having concluded that the Consent Order was appropriately negotiated and was a proper reflection of the factors and objectives of the ***Divorce Act***, the question is whether there have been intervening circumstances that would render that Consent Order no longer appropriate. I am satisfied that there have been material changes in the circumstances of the parties since the Consent Order was negotiated. Those changes include most notably the change to the Respondent's employment and income and also the change to the Petitioner's living arrangements. Having reached that conclusion the next step is to determine if or how those changes in circumstance impact on the support provisions of the Consent Order.

[38] Sub-section 15.2 (4) requires the Court to consider not just any agreement reached between the parties or any previously exiting order but also the length of time the parties cohabited and the functions performed by each during their cohabitation. The parties were married for 15 years. Their marriage was traditional in nature. While the Petitioner's primary role was as a homemaker and caregiver to the children she did, at different times, work outside of the home. It would be fair to say though, that her employment positions were secondary to the career of the Respondent.

[39] At the time of the parties' separation the Petitioner had little to no income and was dependent upon the Respondent for financial support.

[40] The Respondent has skills in the IT industry that enabled him to have a well-paying position with his former employer. Since his termination approximately a year ago he has developed his own business and is now projecting an annual income net of expenses in 2015 of approximately $96,000.00.

[41] The parties' agreement demonstrates that they recognized that the Petitioner was entitled to support – or at least she was at the time of their agreement. In addition to child support in the sum of $1,253.00 they agreed that the Respondent would pay to the Petitioner spousal support of $1,000.00 per month. The parties' agreement also focused on the Petitioner's need to try to become self-sufficient, thus the wording of paragraph eight of the Consent Order.

[42] The Respondent has conceded that the Petitioner is still entitled to some level of spousal support. The issue is quantum.

[43] The Respondent's job loss in January 2014 triggered significant changes in his life which also impacted on the Petitioner and the children. It is my intention to deal with 2014 separate from prospective support as did counsel during their summations.

2014

[44] Prior to the Respondent's termination he had commenced a legal proceeding against his former employer for the recovery of expenses that he had incurred in order to attain a certain professional certification. It was his evidence that it was always his expectation that the expenses that he incurred in order to obtain the certification were to be reimbursed to him by his former employer once the certification was attained. By April 2012 he attained that certification but by that time his immediate supervisor had been terminated by his former employer and there had also been changes in other mid-level management personnel. When he sought reimbursement from his employer his request was refused. It was then that he started his legal action. Ultimately his law suit was settled.

[45] According to the Respondent's evidence the settlement with his employer was in two parts. One involved a non-taxable payment of $82,322.27. The second was a taxable payment identified by his former employer as a severance package. It was submitted on behalf of the Respondent that although a portion of the settlement funds that he received was identified by his former employer as a severance package it was in fact a reimbursement to him of the expenses that he incurred in order to achieve his certification. As such, it was argued, it should not be considered as income for child or spousal support purposes.

[46] With respect, I disagree. I do not doubt that the Respondent viewed the monies paid to him as a reimbursement of his expenses but his former employer specifically negotiated to label a portion of the settlement as a severance package so as not to be "off-side of applicable labour legislation and to avoid the potential for future claims by Mr. Colter" (taken from paragraph 13 of the Respondent's previous counsel's affidavit). In a letter to the Respondent from his former employer dated January 16, 2014 it says in part:

> "To assist you in your career transition, we will provide you with a severance package on the terms set out below."

Below that the severance package was said to be a payment of $60,088.77 representing 33 weeks of base salary less statutory deductions and a further two

weeks of pay in lieu of notice. There were further taxable payments. One was identified as a STIP payment of $647.24 less "statutory deductions". There was also a statutory benefit payment of $114.62 representing statutory payments for a period of two weeks less "statutory deductions" and a further payment of $1,891.15 representing statutory benefits for a further 33 weeks less "statutory benefits". All of those payments are taxable in the hands of the Respondent. All of them were received in 2014. Most are referenced in his Record of Employment provided by his former employer. The severance package prevented him from claiming employment insurance benefits until at least July of 2014.

[47] Nobody testified on behalf of the Respondent's former employer. However, the Respondent provided other material including correspondence from his former employer addressed to him as well as an affidavit from his own lawyer (who represented him in the negotiations with his previous employer). It is apparent from that material that his former employer took issue with some of the expenses for which the Respondent sought reimbursement and also wanted to include in the settlement an agreed upon severance package so as to "avoid the potential for future claims" by the Respondent. I do not see how that portion of the settlement could be described as anything other than what it appears to be i.e. a severance package. It is taxable income received by the Respondent in the year 2014. It will form part of his "total income" on his T1 General Form that is to be given to Canada Revenue Agency. It is income for the purposes of both child and spousal support. With that background I calculate the Respondent's income for support purposes in 2014 as follows:

Severance pay	$55,769.75
Pay in lieu of notice	3,433.64
Vacation pay	6,420.91
Bonus incentive (For work done in 2013 but paid in 2014)	12,815.37
STIP payment	647.24
Statutory Benefit payment	114.62
Additional benefit payment	1,891.15
Net business income (figures provided by the Respondent)	50,532.54

TOTAL	$131,625.22

[48] There are statutory deductions that should come off the STIP payment, the statutory benefit payment and the additional benefit payment in amounts not in evidence. I therefore round the Respondent's 2014 income down to $131,500.00 for support purposes.

[49] The Petitioner is employed as the Assistant Manager in a food bank. She works in a permanent part-time position. She is paid $14.70 per hour most of the time. She works between 20 and 25 hours a week most of the time. She testified that she could expect to assume the manager's position during the manager's vacation for periods between six and eight weeks a year. For the purpose of my calculations I assumed that she will work in the manager's position seven weeks a year. In that position she would be paid $18.90 per hour and could expect to work five additional hours each of the weeks while in the acting manager's position. I therefore calculate her expected gross annual income to be as follows:

$14.70 per hour X 22.5 hours per week X 45 weeks per year =	$14,883.75
$18.90 per hour X 27.5 hours per week X 7 weeks =	3,638.25
TOTAL ANNUAL INCOME	$18,522.00

[50] The Respondent has requested that the Court impute additional income to the Petitioner and suggests imputing a total income figure of $30,000.00 to her. He relies on section 19 (1) (a) of the Child Support Guidelines which provides that the Court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the spouse is intentionally under-employed. The exact wording of sub-paragraph (a) is:

> "the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse."

[51] In the submissions of counsel for the Respondent he referred to paragraph eight of the Consent Order which requires the Respondent to "immediately and continuously pursue, in a diligent and dedicated manner, employment at full-time hours to secure her own self-sufficiency as soon as possible. Her failure to do so will require her detailed explanation at any subsequent review hearing."

[52] The Respondent points out that the agreement that led to the Consent Order issued in September 2013 was actually reached in May of 2013 and therefore the Petitioner has had ample time to seek out full-time employment.

[53] The Petitioner admitted that since obtaining her position at the food bank she has not sought full-time employment elsewhere.

[54] I have concluded that it would not be appropriate at this time to impute additional income to the Petitioner. I have come to that conclusion for the following reasons.

[55] Although the parties' agreement provides that the Petitioner is to pursue diligently employment on a full-time basis it does not say, specifically, that income will be imputed to her if she does not. Having said that, the *Guidelines* themselves allow the Court to impute income in appropriate circumstances.

[56] One of the reasons given by the Petitioner for not seeking full-time employment elsewhere is that because her place of work is only about seven kilometers from her home she is able to be at home shortly after the younger of the parties' two children returns home from school. She describes him as a young 13 year old who indicated to her that he was lonely being home alone after school. While I cannot conclude that her attendance is "required" by her son I can understand how her attendance at home in the afternoon might be beneficial to him. To be clear though, in the circumstances of this case this is not a sufficient reason by itself for her not to pursue more remunerative employment.

[57] Because of where the Petitioner lives it is not unreasonable to assume that finding full-time employment may be difficult for her unless she is prepared to drive into Halifax or Dartmouth. If she should do that her transportation costs (including the cost of parking) will increase.

[58] The Petitioner is in her mid-forties. She has a high school education. Beyond that she completed just two university courses. She has some work experience but much of that is dated. She worked as a volunteer at the food bank and after the parties separated she was able to secure a paid position. While the job does not give her full-time hours it does pay her more than minimum wage. I have calculated her gross annual income to come to $18,522.00. If she was to obtain full-time employment elsewhere it may very well be at minimum wage because of her limited formal education and work qualifications. If that was the case she might be able to earn as much as $21,000.00 per year, a difference of only

$2,478.00 before taxes. A significant portion of the net after-tax difference may be off-set by her additional travel costs.

[59] It was the Petitioner's evidence that her position was secure and she also testified that when the food bank manager retires, which could be as early as a year from now, she is likely going to be offered the manager's position. If she is then she will be making at least $18.90 per hour and therefore grossing in the vicinity of $27,000.00 per year.

[60] Furthermore, it is not insignificant to the Court that the parties have been separated for only two years after a marriage of 15 years. During that short period of time the Petitioner has obtained employment albeit not full-time. However, that is not the only means by which she has been trying to reduce her dependency on the Respondent. She is cohabiting with her partner and sharing expenses with him. As a result she no longer has a rent expense. I am satisfied that in her own way the Petitioner is trying to achieve self-sufficiency within a reasonable period of time.

[61] Using the 2014 income figures to which I referred earlier and applying the set-off approach requested by the parties, the Respondent will be required to pay to the Petitioner for each month in the year 2014 child support in the sum of $1,461.00. He has thus far paid for each month in 2014 child support in the sum of $1,253.00 pursuant to the terms of the Consent Order, resulting in a monthly shortfall of $208.00 and a shortfall for the year of $2,496.00.

[62] Cromwell J.A. (as he then was) wrote in *Fisher v. Fisher*, [2001] N.S.J. No. 32 (N.S.C.A.) at paragraph 82:

> "The fundamental principles in spousal support cases are balance and fairness. All of the statutory objectives and factors must be considered. The goal is an order that is equitable having regard to all of the relevant circumstances. As was stated in *Bracklow*, supra, at [paragraph] 36:
>
> > …There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown."

[63] The ***Divorce Act*** requires among other things that the Court consider the condition, means and other circumstances of both parties. I have reviewed the Respondent's income in 2014 as well as his Statement of Expenses. I have calculated his total income for 2014 to be considerably more than the income figure that was used when the parties agreed on the terms of the Consent Order. I

am cognisant of the fact that he applied a significant portion of the money that he received from his former employer to his line of credit. That decision made it more difficult for him to honour the support provisions of the Consent Order, but honour them he did. He testified that to do so he had to add some debt back onto his line of credit. Notwithstanding those circumstances I am satisfied that he had the means to meet the terms of the Consent Order. The determination of the quantum of spousal support to be paid in this case is more a function of the Petitioner's need than the Respondent's ability to pay.

[64] The Petitioner provided a Statement of Expenses sworn April 3, 2014. She then provided an updated Statement of Expenses sworn July 11, 2014. There are a number of differences between the first statement and the second. Most notably in April she showed a rent expense of $1,000.00 per month and in July, because she was by then sharing accommodation with her partner, she showed no rent expense at all. One might expect that as a result of the elimination of this expense that her total expenses would have declined by a similar amount. However, her total expense figure (before income tax) in April 2014 was $3,229.43. In July, 2014 (after her cohabitation with her partner began) her total expense figure before income tax actually increased to $4,117.71. A closer examination of her Statement of Expenses shows that her fire insurance and heat expenses have gone up slightly and she now shares a property tax expense with her partner. Some other expenses have gone up slightly such as telephone and internet and toiletries. In her more recent statement she included the cost of replacing her motor vehicle. She also included a holiday expense of $180.00 per month compared to $40.00 per month in the spring. Her entertainment expense has gone from $20.00 per month in April, 2014 to $231.00 per month in July.

[65] Perhaps the biggest reason her total expense figure has increased is that she is now including a savings figure of $717.00 per month (as compared to nil in April). The Petitioner's evidence was somewhat vague when she was asked where the money for her savings was coming from. She seemed uncertain as to whether that money was coming from savings that she already had (such as from the money paid to her by the Respondent for her share of the matrimonial assets) or if it came from her monthly income, inclusive of support.

[66] I can understand the reasons for the increase to some of her expenses. Experience may have taught her that she underestimated some of those costs. Other expenses have changed because her living arrangements have changed. However, it is difficult to ignore that her rent expense of $1,000.00 no longer exists and she

now reports savings of over $700.00 per month. Is it coincidental that at her marginal tax bracket the value to her of the $1,000.00 per month spousal support payment is approximately $750.00 per month?

[67] The *Spousal Support Advisory Guidelines* would suggest a monthly spousal support figure in excess of what the Petitioner is receiving now. In the circumstances of this case I did not find the *Spousal Support Advisory Guidelines* to be particularly helpful. The reason for that is primarily because of the Petitioner's re-partnering. In the *Spousal Support Advisory Guidelines* the authors acknowledged the difficulty in constructing a formula that could be applied to all of the situations where a recipient spouse has entered into a new relationship and is sharing living expenses. Each case has to be decided on its own facts.

[68] Considering the Petitioner's current income and the child support that she will be receiving from the Respondent and the fact that she has no rent or mortgage expense, I find it difficult to justify the continuation of spousal support at the level of $1,000.00 per month. The figures she has shown for shelter expenses such as heat, electricity and the like on the surface seem reasonable. However when added to the expenses budgeted by her partner they appear excessive. For example she shows a heat expense of $150.00 per month. Her partner shows a heat expense of $235.00 a month. Between the two of them their heat expense would therefore be $385.00 per month. Similarly she shows electricity of $125.00 a month. Her partner reports electricity of $125.00 per month. Between the two of them they say they are spending $250.00 a month on electricity. The Petitioner reports a food expense of $720.00 per month. Her partner reports a food expense of $500.00 per month. Their combined food budget seems excessive particularly given that the two children are with her only half of the time.

[69] There are numerous expense figures which I found concerning. However if I only adjust her food expense from $720.00 to $500.00, her holiday expense from $180.00 a month to $50.00 a month, her entertainment from $231.00 a month to $200.00 a month, her savings from $717.00 a month to $200.00 a month and eliminate her alcohol and tobacco expenses of $194.00 per month I arrive at total expenses (including $200.00 for legal fees) of $3,025.71 per month. After deducting her employment income, her child support, her Child Tax Benefit and G.S.T. Benefit she has a surplus before receiving any spousal support from the Respondent of over $300.00 per month. If I were to make further adjustments – and I think further adjustments to her expenses could possibly be made – that surplus would only grow.

[70] The calculation of spousal support is not and should not be based on the recipient's barebones needs. The factors and objectives listed in the ***Divorce Act*** must be taken into account. The lifestyles of the parties at the time of their separation and subsequently must be taken into account. Sometimes support should be paid for compensatory reasons. In this case it was not suggested that support should be paid on compensatory grounds. There was however some evidence that would suggest that a compensatory component would not be unreasonable but no evidence or submissions on how any compensatory component could be quantified was offered.

[71] The Petitioner asked that in 2014 her spousal support level be maintained at $1,000.00 per month. The Respondent urged the Court to reduce her spousal support as of February 1, 2014 to nil which would result in an overpayment of spousal support in that year in the sum of $11,000.00.

[72] Taking all of the factors and objectives in the ***Divorce Act*** into account as well as the financial circumstances of the parties I have concluded that it would be appropriate for the spousal support at the level of $1,000.00 per month to be maintained for the months of January to May, 2014 inclusive, but that from June, 2014 (when the Petitioner and her partner began cohabitating) to December, 2014 spousal support shall be reduced to $0 resulting in an overpayment by the Respondent to the Petitioner of $7,000.00 for the year 2014.

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[73] There is no reason to believe that the Petitioner's income in 2015 will be any different than what I have calculated it to be in 2014 (i.e. $18,522.00). There is agreement that the Respondent's expected income in 2015 will be $96,000.00 net of his operating expenses but before taking into account income tax. While the Respondent continues to have the ability to pay spousal support at that level of income his ability to pay is not as high as it was in 2014 and it is slightly less than it would have been had he not been terminated from his former employment position. His personal expenses, for the most part, are reasonable although he has included an allowance for legal fees of $700.00 per month which, although likely legitimate, compares to the Petitioner's allowance of only $200.00 per month.

[74] The parties intend to continue sharing the care of the children and it appears that their personal living expenses are likely to remain more or less the same.

[75] Using the set-off approach that the parties have agreed upon, the child support to be paid by the Respondent to the Petitioner will be $1,030.00 per month. That is a reduction of $431.00. That sum impacts directly on the Petitioner's bottom line. In addition, the Respondent's lower income figure reduces the Petitioner's share of the Child Tax Benefit by about $40.00 per month. I had previously calculated that she had a monthly surplus of over $300.00 (excluding spousal support). The reduction in child support and the Child Tax Benefit would result in her having a modest monthly deficit. If spousal support is to be paid to cover that deficit then that deficit figure would have to be grossed-up to take into account the tax payable on the spousal support.

[76] The Respondent has proposed paying $400.00 per month spousal support. I believe that to be a reasonable resolution.

[77] I therefore order that beginning on January 15, 2015 and continuing on the 15th day of each month thereafter until otherwise ordered, the Respondent will pay to the Petitioner spousal support in the sum of $400.00 per month.

SUMMARY

[78] In summary, the provisions of the Consent Order issued September 5, 2013 will be incorporated into the Corollary Relief Order subject to the following changes:

- For the period January 1, 2014 to and including December 1, 2014 the Respondent will pay to the Petitioner child support in the sum of $1,461.00 per month. As of January, 2015 the Respondent will pay to the Petitioner child support in the sum of $1,030.00 per month until varied in the future. Those payments will be paid on the 1st of each month.

- The 1st sentence in paragraph eight which provides for spousal support in the sum of $1,000.00 will reflect that as of June 15, 2014 to and including December 15, 2014 spousal support will be nil dollars per month and effective January 15, 2015 and continuing on the 15th day of each month thereafter spousal support shall be $400.00 per month.

- Assuming that by now the Respondent has paid to the Petitioner the January 1, 2015 child support payment of $1,253.00 the child support short-fall figure of $2,496.00 to which I referred earlier would have to be adjusted (and reduced) by the overpayment of $223.00 resulting from the January 1

> payment of $1,253.00 ($1,253.00 - $1,030.00 = $223.00) leaving a child support short-fall of $2,273.00. Taking into account the Respondent's overpayment of spousal support in the sum of $7,000.00 the Petitioner is to repay to the Respondent a net overpayment of support in the sum of $4,727.00 ($7,000.00 - $2,273.00). I will give the parties and their counsel an opportunity to try to negotiate how and by when that sum will be paid by the Petitioner. Failing an agreement on that point the parties may reappear before me and I would be prepared to give them my direction.

[79] In coming to the conclusions that I have regarding spousal and child support I have taken into consideration all of the evidence presented by the parties including their affidavits, their statements of income and expenses and other financial documentation. I have taken into account the income and expense figures of the Petitioner's partner and how the Petitioner and her partner share those expenses. I have taken into account the provisions of the ***Divorce Act***. I have also considered the tax consequences to both parties as well as the *Child Support Guidelines* and the *Spousal Support Advisory Guidelines*.

[80] I ask that Ms. Schofield, as counsel for the Petitioner, prepare the Divorce Order and the Corollary Relief Order. The Corollary Relief Order will include among other things a provision requiring the exchange of their most recent income tax returns and Notices of Assessments no later than June 1st of each year beginning on June 1st, 2015. Also, there will be the usual provision for the payment of support through the office of the Director of Maintenance Enforcement.

[81] If either counsel wishes to be heard on the issue of costs they are to write to my assistant, with a copy of the letter forwarded to the opposing party. The Court will then arrange a time for verbal submissions.

Dellapinna, J.