SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Piasecki v. Piasecki*, 2015 NSSC 210

Date: 2015-07-21
Docket: *Halifax* No. 1201-064095
Registry: Halifax

Between:

Jacek Piasecki

Applicant

v.

Krystyna Piasecki

Respondent

Judge:	The Honourable Justice Beryl A. MacDonald
Heard:	June 4 and 5, 2015, in Halifax, Nova Scotia
Counsel:	Pavel Boubnov, Counsel for the Applicant Damian Penny, Counsel for the Respondent

By the Court:

[1] The Husband and Wife married on December 25, 1982. They separated in November 2008. They had been married for 25 years. When they separated they had one dependent child. They did not have a happy relationship during their marriage. Their separation only enhanced the conflict. The repercussions of the misery they inflicted upon one another continue. There is no respect, compassion or understanding between them. Repeated resort to this court has not improved their lives or their relationship. This decision will likely do nothing to change that dynamic. Nevertheless, the parties, once again, could not resolve their differences requiring this court to decide their future parental and economic responsibilities.

[2] On April 29, 2013 the Husband filed a Notice of Variation Application. To be successful he must first convince me there is a change of circumstances justifying the change he requests. He requested the following relief:

- Primary care of the child
- If he did not receive primary care a reduction in child support
- Termination of spousal support
- Recalculation of child support
- Forgiveness of arrears for child and spousal support

PRIMARY CARE

[3] The Husband's affidavit, filed with his Notice of Variation Application, made several allegations about the Wife's care of the child that resulted in an order for a "Wishes of the Children Report". That report was prepared by Martin Whitzman on October 8, 2013.

[4] Mr. Whitzman's report was discussed at a settlement conference held on October 14, 2014. The parties agreed the child was to remain in the Wife's primary care without specific access to the Father who was to have such access as he could arrange in discussion with the child. The parties were to request Martin Whitzman to provide therapeutic intervention to regularize contact between the child and the Husband. The parties cannot agree on the wording that should be used in an order resulting from that settlement conference. To save time and expense I suggested the parties take some time, during this proceeding, to speak with one another to determine whether this matter could be resolved. They returned and both parties

acknowledged the child was reluctant to have specified contact with the Husband. The previous arrangements in the Corollary Relief Judgment for specific access could not continue. Their agreement suggests the choice of the child will determine the outcome. I doubt any contact will result if the decision remains with the child. Mr. Whitzman may not agree to provide his assistance if both parents are not prepared to implement his suggestions, and particularly if the Wife refuses to impose consequences upon the child if she does not comply with requests and recommendations made. This matter may be resolved as a result of parental discussion with Mr. Whitzman. If he agrees to provide this service I am informed the parties agree to equally share the associated cost. If he does not matters will remain as they are unless the Father choses to make a Motion for a Review. If he does so it will be for the specific purpose of determining what, if any, contact he will have with the child. That review is to be held before me.

[5] The Husband requested telephone access with the child. He alleges the Wife interferes with his opportunity to speak with the child. If this child has a cell phone, the Husband is to be given her cell phone number. If she does not speak to him or return his calls that will be as a result of her action and choice. I have no means by which to require her, or force her to talk with the Husband. If her willingness to have a relationship with him improves this issue may resolve itself.

[6] In the settlement conference, according to the running file note, the parties also agreed that:

> " ..the Wife could take the child to travel within or outside Canada for vacation purposes, without requiring the prior written consent of the Husband. The Wife shall, prior to any proposed trip, provide the Husband with the travel itinerary, dates and location of travel and contact information. The Husband was allowed to travel with the child for vacation, if the child was in agreement, and the Wife shall not unreasonably withhold her consent. Similar provisions for notice of itinerary etc. If the Wife needs consent from the Husband to obtain/renew a passport for the child, that consent shall not be unreasonably withheld."

[7] The parties have argued about whether the file note accurately reflects the agreement reached. The parties suggest they will listen to the recording of the conference in order to finalize the order, and if they continue to disagree about the wording of the order the matter will be placed before the settlement conference justice for completion. This will only result in more expense for these parents. Whether they intend to follow the suggested process and engage in further legal proceedings will be their choice but I am struck by the fact that the Wife may

travel with the child without any consent from the Husband but he will need her consent. Given the relationship between the parties I would want to be confident that the Wife understands what it means to "not unreasonably withhold her consent". Because of this child's age it would be impossible to force her to travel with the Husband without her consent. Why the Wife should be permitted to have any objection to the child's travelling with the Husband, should the child wish to do so, is concerning and may only lead to further interference about which the Husband has so bitterly complained. Nevertheless, if this is what the recording of the parties agreement reflects then it must be contained in an order and I would expect this to appear in the order following my decision without further references to the settlement conference justice. Of course the parties may now agree that the Wife may travel with the child without the Husband's consent and he can travel with the child without the Wife's consent if the child agrees to travel with him. If this is the case that provision is to appear in the order forwarded to me.

CHILD SUPPORT REDUCTION and RECALCULATION

[8] The Corollary Relief Judgment issued April 15, 2011 required the Husband to pay, commencing May 1, 2011, $592.00 per month for child support based upon his 2010 total annual income which was $68,259.00. The child support table amount at that time was based on the May 2006 table. He was to pay $1,000.00 for spousal support. Spousal support was to increase to $1,200.00 when the matrimonial home was sold.

[9] Due to the Wife's lack of co-operation, the Husband, in February 2012, filed a Notice of Motion seeking instructions to permit the sale of the matrimonial home. The Motion was heard on April 12, 2012. Directions were given that eventually did result in the sale of the home. The Husband also filed a Notice of Variation Application on April 27, 2012 requesting a child support reduction, termination of spousal support and forgiveness of arrears for spousal and child support. This was not heard until September 7, 2012. The Variation Order issued December 12, 2012 contained little effective change. The December 31, 2011 table was used to calculate child support. The written decision of the presiding justice did suggest a variation request could be considered because the previous order contemplated the timely sale of the matrimonial home which had not occurred requiring the Husband to accumulate unexpected debt. However, his income had not changed nor had the circumstances of the child or the Wife. The Variation Order required the Husband to pay, commencing May 1, 2012, $588.00

per month for child support based upon his 2011 annual income which was $68,538.00. He was to continue to pay, commencing November 1, 2012, $1,000.00 for spousal support. The Variation Order also provided:

> 2. There shall be a suspension of collection of arrears of child support and spousal support which accumulated under the Corollary Relief Order of September 15, 2011 from February 1, 2012 to the date of the decision October 19, 2012.
>
> 3. The Court reserves jurisdiction to deal with the issue of the fixing and forgiveness of arrears of child and spousal support and the collection of same and the level of spousal support pending the anticipated sale of the matrimonial home.

[10] Notwithstanding the implications of paragraph 3 of the Variation Order that the matter would next come forward as a review, the Husband filed the Notice of Variation Application that is the subject of this proceeding. Because the child does not have regular contact with the Husband, and because his income has decreased there are changes in circumstances justifying consideration of his application to vary. Paragraph 3 of the Variation Order requires a decision about the arrears. The Husband has accumulated further arrears on his account with the Maintenance Enforcement Program. His income is being garnished for those arrears.

[11] Both parties have agreed the Husband's 2015 total annual income is $51,192.00. At the settlement conference previously referred to, they agreed, commencing May 1, 2014, the Husband would pay $430.00 per month for child support. The file note suggests the parties also agreed to retroactively recalculate child support based on the Husband's actual total annual income for 2012, 2013 and for the period from January to April 2014. Given the Husband's request for forgiveness of arrears it is unclear whether he was agreeing to pay those retroactive amounts or whether once calculated he was requesting some or all of that amount to be forgiven. The recalculation will result in his owing more child support not less. This is another circumstance that convinces me the parties may not have been clear about their intent at the settlement conference.

[12] I am asked to determine what the retroactive calculations are to be. If there was an agreement the Husband was to pay the recalculated child support with no forgiveness that is to be reflected in the order to be prepared following my decision. If there is any question about the payment of the retroactive recalculation, the parties may need to return this matter to the presiding settlement conference justice if their listening to the recording of the parties agreement does

resolve this issue. However, that justice will make reference to the words that were read into the record. If they do not clearly indicate, or by implication indicate, a commitment by the Husband to pay the recalculated amounts, I will retain jurisdiction to resolve any issue about forgiveness of any child support owing as a result of the recalculation.

[13] While the parties appear to have been content to use the 2015 total annual income to calculate child support commencing May 1, 2014, they have not provided me any calculation about the appropriate total annual income for the Husband from January 2014 until April 30, 2014. The Husband has not provided his T-4 or a completed income tax return for 2014, although he has been requested to do so by the Wife. I do have his Notice of Assessment for 2014 disclosing a line 150 total annual income of $94,614.00. Line 150 is what courts are directed to use when calculating total annual income. The Husband has not referred to any of the circumstances provided in the Federal Child Support Guidelines that would support a different calculation of total annual income.

[14] According to the explanation attached to the Notice of Assessment it appears the 2014 total income includes:

> " a lump sum payment to compensate you for CPP or QPP benefits you did not receive earlier. Since you received the payment for this reason, it is eligible for a special tax calculation. We do this calculation to see if it is better for you to include the payment in your income for 2014 or for the year to which the payment applies. In your case, it is to your advantage to include the full amount of the payment in your 2014 income." (Exhibit 2)

[15] I have no evidence about "the year to which" the lump sum payment applies. I do not know the quantum of the lump sum payment because the Husband has not provided his 2014 income tax return which would have provided information about his earned income and other income separate from this lump sum payment. However the fact is he received this lump sum amount in 2014. As a result I will base child support for January 1, 2014 until April 30, 2014 upon a total annual income of $94,614.00. The Husband, commencing January 1, 2014 until April 30, 2014, is to pay the sum of $795.00 per month for child support. The Husband had the responsibility to provide proof of his income. The only proof of his income for the period in question is the 2014 Notice of Assessment. By using a lower income amount from May 2014 than the 2014 Line 150 amount the Wife has provided some relief to the Husband from the financial hardship this child support payment

would allegedly have caused him had it continued for the remaining months of the year based upon his 2014 Line 150 income.

[16] The Husband's line 150 total annual income from his 2013 Notice of Assessment is $77,801.00. The required table guideline child support on this income is $659.00 per month. He should have paid this amount from January 1, 2013 until December 31, 2013.

[17] The Husband's line 150 total annual income from his 2012 Notice of Assessment is $73,203.00. The required table guideline child support on this income is $620.00 per month. He should have paid this amount from January 1, 2012 until December 31, 2012.

[18] I leave it to the parties to calculate how my calculation of the retroactive child support effects the Husband's record of payment with the Maintenance Enforcement Program and, in particular, his arrears. However, the parties may agree on its effect and reflect the necessary changes in the order to be prepared following this decision.

[19] I will comment later in this decision about collection of the arrears.

Spousal Support

[20] The Husband requests termination of spousal support suggesting the Wife no longer has entitlement to receive that support and in the alternative that he has no ability to pay spousal support.

Entitlement

[21] Previous decisions in this matter suggest the Wife's entitlement was compensatory and non-compensatory but the analysis was not detailed. The *Spousal Support Guidelines* were not used to establish quantum.

[22] I must re-examine the issue of entitlement taking into account the findings made in previous proceedings and those I must make about present circumstances.

[23] How to determine entitlement was examined in *Moge v. Moge*, [1992] 3 S.C.R. 813. It appeared to suggest a feminist analysis was to prevail with an

assumption that in all cases when a person (usually the wife) stayed home to raise a child or children, that person had a compensatory claim. Such a claim presumes a loss and compensation to remedy that loss. The loss is generally the loss of an ability to earn sufficient income. Evidence can be provided to prove there has been no loss. Evidence must be provided to establish the strength or weakness of the compensatory claim. This was important because the nature and extent of the compensatory claim was to be a primary factor in deciding the quantum and duration of the claim. For example, weaker compensatory claims may result in a lower spousal support payment or a shorter duration or both. The decision in *Moge* did raise questions about whether a wife in a lengthy childless marriage would have a compensable claim because she looked after the household and her husband. Many courts recognized that a wife in this situation would also be economically disadvantaged, or the husband advantaged, upon the breakdown of the marriage and as a result entitlement would be compensatory.

[24] L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra,* at p. 39:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin (1991), supra*, and *Linton v. Linton, supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. *As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)*", supra, at pp. 174-75). (emphasis added)

[25] This comment raised the suggestion that the entitlement arising from a "pattern of dependence" is compensatory. A pattern of dependence may create a continuing compensatory claim even though a spouse has sufficient income to cover reasonable expenses and might be considered to be self-supporting. This often is described as the "lifestyle argument" - that the spouse should have a lifestyle upon separation somewhat similar to that enjoyed during marriage. (*Linton v. Linton*, 1990 CarswellOnt 316 (Ont. C.A.). A lengthy marriage generally leads to a pooling of resources and an interdependency even when both parties are working. Usually the recipient spouse will never be able to earn sufficient income to independently provide the previous lifestyle. This would form the basis of a significant compensatory claim but does not necessarily entitle a

spouse to lifetime spousal support. It was thought the essence of a compensatory claim is that eventually it may be paid out. However, the trend in Ontario case law may suggest lifetime support for elderly spouses who have had lengthy marriages.

[26] This compensatory analysis was not unreservedly accepted across the country. The Nova Scotia experience suggests many judges considered the needs and means analysis the more appropriate mechanism by which to determine entitlement and quantum. Perhaps this is why the non-compensatory entitlement suggested by *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 became the foundation for most Nova Scotia support awards. Quantum, for the most part, continued to be calculated on a needs and means basis usually without reference to the *Spousal Support Advisory Guidelines*.

[27] The seeds for *Bracklow* were planted in *Moge* but the framework for analysis was not clarified by *Bracklow*. An interesting exploration of the various effects of *Moge* and *Bracklow* is contained in the article written by Carol Rogerson, Professor, Faculty of Law, University of Toronto, 2001, 19 Can. Fam. L.Q. 185, entitled "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" In this article she quotes with apparent agreement the comment of Quinn J. in *Keller v. Black*, 2000 CarswellOnt 74 (Ont. S.C.J.):

> [22] It seems that *Bracklow* has taken us to the point where any significant reduction in the standard of living of a spouse resulting from the marriage breakdown will warrant a support order – with the quantum and/or duration for the support being used to tweak the order so as to achieve justice in each case.

[28] In her article Professor Rogerson comments further at page 224:

> As Quinn J. recognizes, most of the action in spousal support cases is now with quantum and duration. And on that issue, *Bracklow* provides little guidance except to say that it is all discretionary. However, it may be slightly misleading to think that what goes on at the entitlement stage of analysis is not significant, given that the basis for entitlement will likely influence the subsequent analysis and the assessment of the appropriate award in terms of quantum and duration. It may still, therefore, be important to distinguish whether entitlement is based on compensatory or non-compensatory grounds. The way in which a court categorizes the marriage and the applicable models of spousal support may exert a significant influence on the actual outcome.

[29] Given that entitlement for a spouse may generally be considered to be compensatory when there are children, or when there has been a lengthy marriage

with a stay at home spouse when there are no children, non-compensatory entitlement may more appropriately be applied to cases where there is a short to mid length marriage, without children. However, even in these cases the entitlement may be compensatory because the recipient spouse may have given up a career, or taken a less remunerative job to move with a spouse or may have assisted a spouse to obtain training leading to better employment from which the recipient spouse will not benefit because of the separation.

[30] Determining the basis of entitlement is a required first step to ensure proper utilization of the Spousal Support Advisory Guidelines. Significant compensatory claims may suggest spousal support at the higher level of the range. Lesser compensatory claims and non-compensatory claims may suggest support at a lower level of the range. Duration will also be determined based upon the strength of the claim.

[31] The guidelines are referenced by litigants in Nova Scotia but they are often used to generate numbers without an explanation about why one number is preferred instead of another. Quantum and duration are not linked to entitlement. This likely has resulted because judges in Nova Scotia have had a less than enthusiastic acceptance of the *Spousal Support Advisory Guidelines* preferring to resort to the budgetary means and needs analysis from days of old. I too have resorted to this method of calculation because, without assistance from counsel and the evidence necessary to determine the existence and strength of the compensatory or non-compensatory claim, it may be difficult to apply the *Guidelines*.

[32] In this case there is ample evidence before me to determine the nature and extent of the Wife's entitlement. The guidelines were referenced by the Wife. In this case they can provide a preferable means by which to determine the appropriate quantum and duration for spousal support even though this is a variation. However, caution must be exercised. (*Beninger v. Beninger*, 2007 BCCA 619, "The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version" - March 2010 prepared by Professor Carol Rogerson and Professor Rollie Thompson.)

[33] I recognize the *Guidelines* are advisory and provide a guide not a mandated outcome. However, they do provide a focused consideration of the requirements

mandated by section 15.2 (6) and 17 (7) of the *Divorce Act* and a theoretical construct from which to justify the quantum and duration of an award.

Previous Circumstances

[34] The parties emigrated from Poland in 1992. In 1995 the Husband joined the Canadian Armed Forces. Three children were born of the parties' relationship. There remains one dependent child. The parties were married on December 25, 1982 and separated on November 14, 2008. The Wife was principally a stay-at-home mother although she did work occasionally.

[35] When the divorce was granted the trial justice determined there was "no medical evidence" to suggest either party was unable to work. However, it was noted the Husband was being treated for insomnia, depression, nosebleeds, eczema and a heart condition. He was on multiple medications and was treated in April 29, 2010 for stroke symptoms. He was placed in a "temporary medical category" within the military that would prevent his advancement and his deployment. The justice noted that the Wife was "educated as a textile worker, sold food, souvenirs and products, was a talented cook and was good at all things domestic". However, the Wife had not been formally employed for 20 years although she had occasional part-time jobs. While residing in Ottawa she had a home-based business preparing and delivering Polish food to Polish delis and private customers. She had managed a department store fruits and flower section in 1982 but the decision does not indicate where this had occurred. She worked as a "nanny" including the provision of meals and cleaning services from September 1996 to June 1997, from May 11, 1998 to July 1999 and from November 1, 1998 to February 2000. In 2000 she also acted as a part-time caregiver for two people but the duration is not mentioned in the justice's decision. Neither party were proficient English speakers although their comprehension may have been greater than their spoken word indicated.

[36] When the divorce was granted the Wife believed her inability to speak English fluently prohibited her from obtaining employment and she had not sought employment opportunities. She had made no effort to improve her English proficiency nor to seek retraining in respect to child care, cooking and cleaning. The justice commented that there was an expectation she would "make diligent efforts to obtain some degree of self-sufficiency in order to assist her supplement her income as may be possible."

[37] During the variation hearing held September 2012 the Husband testified his health had deteriorated significantly and he was to be released from the military as a result. The justice presiding acknowledged the likelihood that he would be released from the military and be required to live on pension income. However that had not yet occurred.

[38] The Wife had made some efforts to find work and to improve her English proficiency. She testified her search for work was complicated by her lack of experience, her age, her language and her health. The justice continued to consider the Wife's effort as less than diligent but did comment "in this traditional marriage where the respondent has been out of the workplace for 20 years, the probability of her finding employment that will place her in a position of self-sufficiency is minimal". The justice did advise the Wife that if she wanted to maintain her standard of living she may need at some point, if not immediately, to supplement her income by finding employment.

Present Circumstances

[39] In May 2014 the Husband was released from the military and as a result his income has declined. Presently his income is derived from his long term disability claim. This is income available for child and spousal support. (*Darlington v. Moore*, 2013 NSSC 103)

[40] According to his treating physician the Husband has "…multiple medical issues, which have caused him considerable limitations and pain. This has impacted his ability to function and work as he is limited in his ability to sit or stand for prolonged periods or do physical activities. Despite our aggressive attempts at pain management, his pain continues to impede his ability to concentrate and conduct mental work." (Exhibit (E) attached to Exhibit 13)

[41] Because of the Husband's multiple medical conditions he is required to take a significant number of medications many of which are not completely covered by his medical health insurance. He has testified that he is unable to perform basic household chores such as cleaning, yard work and snow removal and must hire people to do this work for him.

[42] The Wife is now 59 years of age. She has made efforts to find employment including as a homecare worker. She is not been offered any employment. She

suffered from carpal tunnel syndrome and a surgical intervention has not been completely successful. She has degenerative disc disease causing her lower back pain and she has hearing loss.

[43] The Husband considers the Wife to be "wilfully unemployed" and argued that she has a "duty to become self-sufficient". He suggests she can and should find a minimum wage job in the service industry. He argues that if she applied the significant assets she received as a result of the division of their property she could be self-sufficient. In any event, the Husband submits he has no ability to pay spousal support and can just barely pay his own expenses which require significant payments for a home and personal care attendant as well as for medications.

[44] I agree with the comments of the previous justice that "in this traditional marriage where the respondent has been out of the workplace for 20 years, the probability of her finding employment that will place her in a position of self-sufficiency is minimal". The challenges faced by middle aged divorced women was also highlighted by Justice Proudfoot in *Story v. Story*, (1989), 65 D.L.R. (4th) 549 (B.C.C.A.) at 566:

> It is often, in my opinion, totally unrealistic to expect that a 45- or- 50 year old spouse who has not been in the job market for many, many years to be retrained and to compete for employment in a job market where younger women have difficulty becoming employed. Employment and self-sufficiency are simply not achievable.

[45] In addition there is no "duty" to achieve self-sufficiency. The Supreme Court of Canada rejected this suggestion in *Leskun v. Leskun*, 2006 SCC 25. Failure to achieve self-sufficiency is merely a factor to be taken into account in assessing a spousal support request.

[46] The Wife has significant compensatory entitlement because:

- this was a lengthy marriage
- the Wife was primarily a stay at home spouse raising the parties' children
- the Wife moved with the Husband leaving behind whatever job opportunities she may have pursued in Poland, and later in Ottawa
- the Wife was completely financially dependent upon the Husband

[47] Little has changed in respect to the Wife's compensatory claim. She remains disadvantaged. She is not seeking a retroactive recalculation of spousal support but seeks to have it remain at $1,000.00 per month. She does not want the court to forgive any child or spousal support arrears.

[48] The range suggested by the *Spousal Support Guidelines* is from $986.00 to $1,253.00 with his income at $51,192.00 and hers at $0.00. The Wife's strong compensatory claim would suggest support at the higher end of the range but the Husband's medical needs, which I accept do require that he have assistance in daily living, may suggest support at the lower end of the range taking into consideration his ability to pay. The Wife requests spousal support to continue at $1,000.00 per month for an indefinite duration. This is appropriate. After paying child and spousal support the Husband will have slightly more net disposable income than the Wife. He will have a net disposable income of $2,232.00 to meet his individual needs. The Wife will have a net disposable income of $1,938.00 from which to support herself and her daughter.

[49] I make no decision at this time about the arrears accumulating on the Husband's account with the Maintenance Enforcement Program or about their enforcement efforts. I retain jurisdiction to resolve this issue if the parties cannot once the child support recalculation is made. The scheduling office will be contacting counsel to set a date for a 15 minute conference before me on or before September 18, 2015 to inform me whether an agreement about the payment of the arrears has been reached or to set date set for my consideration of that issue.

[50] If either party is seeking costs counsel are to arrange for a 15 minute appearance before me to provide their oral submissions.

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Beryl A. MacDonald, J.