

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *M.G.H. v. J.L.H.*, 2015 NSSC 259

Date: 2015/11/13

Docket: *Halifax* No. 1201-062474

Registry: Halifax

Between:

M. G. H.

Applicant

v.

J. L. H.

Respondent

Editorial Notice: Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Moira Legere Sers

Heard: September 14th, 2015, in Halifax, Nova Scotia

Written Release: November 13th, 2015

Counsel: Gregory Englehutt for the Applicant
J. L. H., Self-Represented

By the Court:

[1] On February 26th, 2015, Mr. H. made an application to vary the July 17th, 2009, Corollary Relief Judgement between himself and his former wife, J. H..

[2] The Applicant is represented by counsel; the Respondent is self-represented.

Basis for Variation

[3] The Applicant argues:

1. He has experienced a material change in his financial circumstances; and,
2. The Respondent has not diligently worked toward self-sufficiency.

[4] The Applicant seeks to terminate his obligation to pay spousal support. If not terminated, he seeks to have his obligation significantly reduced based on his reduced income.

[5] He also wishes to be relieved of his obligations to keep the Respondent as a beneficiary on his life insurance policy.

Arrears

[6] The Applicant suggests his arrears are approximately \$7600; the Respondent suggests the arrears are in the approximate amount of \$8000.

[7] The Court was not privy to a record of payments from Maintenance Enforcement to verify the exact arrears.

The Corollary Relief Judgement July 17th, 2009

[8] The Judgement states as follows:

Spousal Support

1. The Respondent shall pay spousal support to the Petitioner in the amount of \$1,000.00 per month, commencing the 1st day of June, 2009, and continuing on the 1st day of each and every month thereafter until further Order of the Court. **The quantum of support takes into account the debts assumed by the Respondent as set out herein.**
2. Payments are to be made payable to J. L. H. and forwarded to the Director of Maintenance Enforcement.

3. **The parties shall exchange no later than June 1st of each year**, copies of their Income Tax Returns with all supporting schedules and information slips and any Notices of Assessment or Reassessment received from Canada Customs and Revenue Agency.
4. The Respondent shall pay all premiums on his existing SISIP life insurance policy, in the current amount of \$300,000.00, insuring the life of the Respondent as they become due and will name and maintain the Petitioner as beneficiary **of 50% of said SISIP life insurance policy for so long as spousal maintenance is payable by the Respondent** to the Petitioner. The Petitioner shall be entitled to contact and receive information about said life insurance coverage directly from the insurance provider.
5. The Respondent shall maintain his existing medical and dental plan through his former employment with Canadian Armed Forces (or any other plan that may be available through new employment as the case may be) for the benefit of the Petitioner for so long as he is legally able to do so under terms of the plan.

Brief history

[9] The parties married on June [...], 1980, and separated in December 2007, after **27 years of marriage**. They were divorced August 8th, 2009.

[10] There were no adult children at the time of the divorce.

[11] This was a traditional marriage. The Applicant was the principle income earner employed with the military. He retired in April 2007, months before the separation.

Orders

[12] There is a Consent Interim Order dated March 12th, 2009, a Pension Division Order dated July 17th, 2009, and a Consent Corollary Relief Judgement dated July 17th, 2009.

[13] Both parties were represented by counsel at the Divorce. The Respondent is self-represented in this proceeding.

Income

[14] At the time of the Divorce the husband was earning \$64,347. The parties agreed to impute income to the Respondent of \$12,000.

Changes in income subsequent to the agreement

<u>Year</u>	<u>Applicant</u>	<u>Respondent</u>
2011	93,046 (incl. RIF 15,236) *	11,237.12 + 12,000 plus RIF 15,391 = \$38,628.32
2012	79,371 (incl. RIF 15,236)	8,449.46 + 12,000 + 13,741.44 = \$34,190
2013	79,375 (incl. RIF 15,236)	11,259.67 + 12,000 + 13,299 = \$36,559
2014	63,884 (48,648 net of pension)	7,266.73 + reduced spousal** + RIF
2015	45,712.92 (net of pension)	12,385 (pro- rated) + reduced spousal + RIF

* Plus other RRSP income of \$12,045

** In 2014 her support was arbitrarily reduced by \$478.66 to \$521.34 per month

Pension income

[15] The division of matrimonial property resulted in a division of the Applicant's pension earned during the marriage. This is a pension in pay as reflected in the 2011 RIF income slip and is adjusted annually.

[16] The pension payable is adjusted annually and makes up a part of the total taxable income in each party's hands.

Reduced spousal

[17] Starting either in May (her affidavit) or November 2014 (her income statement) the spousal support was arbitrarily reduced either by the Applicant or by Maintenance Enforcement without court order. The Respondent now receives \$521.34 monthly.

The Applicant's circumstances

[18] The Applicant provided an expert report (accepted without challenge) from his therapist indicating he is suffering from PTSD as a result of his work related duties.

[19] The Respondent accepts the validity of the report. However, she also testified that the Applicant was a heavy user of alcohol well prior to the diagnosis, indeed well prior to his entry into the military.

[20] She believes this misuse of alcohol and the trauma suffered from his involvement in the military and [...] was traumatic to her former husband's health.

[21] The report from his specialist does not give any certainty as to when the Applicant will be able to return to work. The Applicant is hopeful of obtaining employment after completing the intensive one year course in which he is enrolled.

History

[22] The Applicant was a member of the Armed Forces from 1983 to 2007.

[23] In 1993 the Applicant was in a serious car accident. He was required by the military to enter a detox program. He remained abstinent for ten years. The Respondent believes he resumed drinking sometime in 2003.

[24] The Applicant was diagnosed in 1998 with PTSD by a military psychiatrist following exposure to:

“a number of traumatic events that occurred from 1984 to 2002 inclusive of the violent death of several military colleagues in two separate aircraft accidents, a deployment to the Persian Gulf in 1990 and his participation in the recovery efforts for [...]. His subsequent deployment to Iraq further exposed him to violent incidents and exacerbated his PTSD symptoms.”

[25] His ability to function was severely impaired. He ended his employment shy of his intended 25 years.

[26] Unable to manage his symptoms. He retired from the military in 2007. He was then employed with a company that [...] He was advised to end this employment in January 2014, because he was unable to function.

[27] According to his therapist, he was medicating with “copious” amounts of alcohol.

[28] He was referred by the Department of Veteran Affairs to his current therapist in August 2013, and he commenced treatment.

- [29] In February 2014, with assistance, he ceased using alcohol.
- [30] He received employment insurance for an unspecified period of time.
- [31] He is currently enrolled in a vocational rehabilitation program which began sometime in August – September 2014, and is scheduled for 57 weeks with an end date in September 2016.
- [32] Veteran's Affairs supplied the necessary financial assistance for this course including full tuition of approximately \$14,000, a books allowance and a bus pass.
- [33] The effects of living with the untreated misuse of alcohol and PTSD was the final trigger in the Respondent's decision to divorce the Applicant after so many years of marriage.
- [34] Certainly the effects of the Applicant's drinking and his PTSD had a significant deleterious effect on both parties' lives.

Financial Consequences

- [35] The party's financial situation at the time of divorce was difficult. Once the house sold there was a deficiency of \$2000.
- [36] Paragraph 11 and 12 of the Consent Agreement requires the Applicant to pay the joint debts of the parties (a CIBC joint checking account in the amount of \$1,900; a joint line of credit in the amount of \$16,600 and a joint loan in the amount of \$11,600).
- [37] The Applicant did not maintain these debts nor did he pay the Respondent's tax debt as promised. Instead, he filed for bankruptcy in 2010.
- [38] The creditors then approached the Respondent and she was forced into bankruptcy.
- [39] The Applicant suggested there was a hidden RRSP in favour of the Respondent. The Respondent explained more accurately the details surrounding the result of the divorce negotiations.

[40] There is no evidence to support the Applicants statement. If anything, the Applicant admits to a foggy memory of the financial events surrounding separation.

The Applicant's historical income

[41] **In 2014** the Applicant declared income from all sources of \$63,885.

[42] \$11,461.55 came from his employment until he left in February 2014. In 2014 his disability benefits were \$34,772.02. He received employment insurance of \$2,415 and \$15,236.88 from his half of the Armed Forces pension.

[43] The Applicant was unable to receive employment insurance or severance pay since his employer deemed he left his employment voluntarily.

[44] However, his therapist spoke to his deteriorating state of health and alcohol use at the time of his decision to leave his employment. He was, in her words, essentially unable to perform the functions of his employment.

[45] Prior to his approval for receipt of funding from Veterans Affairs in April 2015, the Respondent received what she describes as distraught phone calls from the Applicant as well as calls from his lawyer. Feeling sorry for the Applicant, she refunded the Applicant four cheques from July to October 2014 and some of the garnished money she received from Maintenance Enforcement.

[46] At one point she wrote a letter to the Court waiving her entitlement. She retracted this letter. I find she was under duress and without legal advice at the time.

Applicant's current income

[47] On the Court's direction the Applicant filed a monthly financial benefits entitlement details.

[48] **In 2015** the Applicant's current monthly income from disability is \$3,809.41, net of his superannuation cheque of \$1,299.72. This is an annual income of \$45,712.92.

[49] His gross, inclusive of his share of the divided pension, is \$61,309.56. (His April 14th, 2015, statement of income incorrectly included net figures.)

Applicant's family

[50] The Applicant has re-partnered. While his partner has worked as a chef in the past she has not worked for any meaningful period of time in the last five years of their cohabitation. His partner stays home to take care of the house.

[51] Their individual statements confirm she does not financially contribute to the household.

[52] There is no reason proffered why his partner is not contributing to the joint monthly expenses.

[53] There is no evidence of any children in this relationship.

[54] Part of the Applicant's financial stress might be relieved if his partner were to contribute towards their joint expenses.

Statement of Expenses

[55] The Applicant's monthly expenses include an entertainment expense of \$243.87, savings of \$200, his partner's personal expenses of \$200 as well as veterinarian expenses of \$37.75 for a total of \$681.62.

[56] While savings are included in his budget he advises he is not actually saving money.

[57] He has now less than \$500 left to pay on a 2010 bankruptcy debt which currently requires an outlay of \$100 a month and \$1,500 in outstanding court fines.

[58] He has accumulated tax debt of approximately \$33,500 with no explanation why he has not paid his taxes.

[59] His pre-existing obligation to his former wife of 27 years needs to be given a higher priority in his financial planning.

The Respondent's history

[60] The parties were 18 and 19 at the time of their marriage. They were 46 at divorce and they are 54 years of age at the date of this hearing.

[61] This was a traditional marriage.

[62] At the time of their marriage in 1980, when the Respondent was 18 years of age she was three months from completing her course at beauty school. She was unable to complete it without the Applicant's financial support. He wanted her to work part-time and take care of the home and children.

[63] She wanted to return to school during the marriage and after his promotion but was unable to obtain his financial backing to do so.

[64] The Respondent relocated with the Applicant as required . She worked to supplement the household income but was expected to maintain the home and care for the children.

[65] In 2005 her income was \$11,395 and in 2006 it was \$15,025 and in 2007 her income was \$14,008.

[66] At separation the Respondent's income was imputed to be \$12,000.

Self-sufficiency

[67] The Respondent worked part time (20 hours per week as a cashier) in proximity to their home in Dartmouth in 2000-2002.

[68] She left this job in March 7th, 2009, when she was without spousal support and unable to relocate without sufficient funds for a deposit.

[69] Following the sale of their home she temporarily lived with her son, found a job with a grocery chain in 2010 and stayed for two years. She was transferred to another store within the same chain on [...] in 2012 and remained there for one year with similar work hours (20-25).

[70] She left that job due to the location, her hours of work and concern about her safety and route home.

[71] She obtained another job, with benefits, working 25 hours a week. Subsequently, her hours were reduced such that she had to look for another job.

[72] She obtained her current job in 2013, and is content to continue until something better arises.

[73] For a period of time she was working at two different locations with two different employers.

[74] She applies for jobs online at least twice a month or more depending on the availability of postings. She visits the library to review job postings although her experience tells her that online postings and word of mouth are the best sources for her job hunting.

[75] The Respondent has minimal education and is essentially working as she did during the marriage.

[76] The Applicant's allegation that she is not diligently searching for work are unproven. He admits he simply did not know of her efforts to find employment.

[77] There is no evidence she is accepting less hours than available to her and no evidence that she is not pursuing leads when they become available.

Quantum of Spousal support

[78] From January to December 2008, the Applicant paid the Respondent \$2,000 per month for a total of \$24,000.

[79] Beginning February 1st, 2009, until further order, the Interim Order dated March 12th, 2009, required the Applicant to pay \$2,853.81 per month by the way of third party payments to keep the matrimonial home expenses paid.

[80] The Corollary Relief Judgement orders spousal support in the monthly amount of \$1000. Commencing June 1st, 2009, and continuing for 2010, 2011 and 2012.

[81] The final spousal support award was approximately 18.7% of the Applicant's annual salary.

[82] The parties did not start out at separation in a good financial footing. By Interim Order the Respondent agreed to cash in her spousal RRSP to cover matrimonial debts pending final agreement.

[83] The Corollary Relief Judgement specifically notes that the spousal support award was made considering the fact that the Applicant agreed to absorb matrimonial debts as noted above in the approximate amount of \$30,000.

[84] The Applicant did not pay these debts. They were absorbed in the bankruptcy ultimately resulting in the Respondent's bankruptcy as well.

- [85] Given the length of the marriage and his then current income, the spousal support was not a significant award which would adequately represent her entitlement. Rather it was made in consideration of the division of debts.
- [86] Given the Respondent's educational level, her employment prior to and during marriage of 27 years and all relevant considerations, one has to ask what an appropriate award would have been but for the consideration of the debts he did not pay.
- [87] One should also ask to what extent or at what level of income will the Respondent be able to achieve some level of self-sufficiency.
- [88] In addition, one has to consider the impact the Applicant's health, life style issues and financial management, or lack thereof, had on the Respondent's ability to obtain self-sufficiency.
- [89] In May 2014, the Applicant and Maintenance Enforcement decreased her payments without benefit of court order. The Respondent is currently receiving \$521.53 per month.
- [90] Unlike the Applicant, the Respondent had and has no financial ability herself or support from another source to enter a training course.
- [91] The Respondent has testified she is restricted in what she can receive from the pension in pay.
- [92] Accessing a lump sum for retraining purposes from this pension in pay is not an option. The Respondent cannot withdraw a lump sum other than what is calculated by the pension administrator.
- [93] If the costs of the Applicant's one year course is \$14,000, one could reasonable suspect on the Respondent's income, without a subsidy, retraining is not probable.
- [94] The only other source of money is her income from employment without which she could not pay her monthly bills.
- [95] What she does receive is dedicated to maintaining a residence and addressing basic necessities of life..

- [96] In the ordinary negotiations in a divorce proceeding a party in the Respondent's position might negotiate a retraining allowance in the form of lump sum support thereby putting the stay-at-home partner in a better position to seek enhanced income from employment.
- [97] In this case, the effects of the PTSD, the history of alcohol abuse and the party's financial situation at divorce made the payment of a lump sum for retraining purposes unlikely.
- [98] The Applicants argument concerning the Respondent's failure to retrain would be more credible had they not been in such a difficult financial situation at the end of their marriage or had he contributed to a retraining program early on.
- [99] Given the Respondent's financial and employment reality, the real question is whether the Respondent can achieve self-sufficiency at all and if not, whether she can find more hours in a similar position to further supplement her income to put her in a position that which will likely be her maximum potential earnings.

Security for Payment/Life Insurance

- [100] The Applicant is only required to secure ½ of his insurance policy for the Respondent and only while he has an obligation to pay spousal support.

Conclusion

- [101] In 2014 the Applicant left his employment due to his deteriorating health concerns.
- [102] In spite of that, when his annual income is reviewed there is not a significant difference between his annual income from employment insurance and disability benefits in the 2009 year (\$64,347) and the 2014 year. (\$63,884 (incl. RIF))

[103] In the intervening years he experienced an increase in pay which when added to his RIF payments yielded the following income:

2011	\$93,046
2012	\$79,371 (incl. RIF)
2013	\$79,375

[104] His change in fortune was not shared by the Respondent despite the fact her spousal support award was diminished to account for his obligation to pay the debt, which he did not pay.

[105] Thus, while he has certainly suffered a change in circumstance in his professional and personal life, his economic situation did not significantly deteriorate.

[106] In total, his income of \$63,884 is very close to the income on which the original support was based with heavy emphasis on his promise to pay the matrimonial debts.

[107] Once he declared bankruptcy he was no longer obliged to pay the matrimonial debts. His remaining debt included the trustee fees which he must pay and his outstanding fines.

[108] Currently his income for 2015 is projected to be \$61,309.56. Of that, his pension income would be \$15,597, leaving him Veteran's Affairs income of \$45,712.92 for a 57 week period ending September 2016.

Double Dipping

[109] The Applicant argues that if the Court includes his pension income, his income for the purposes of determining spousal support would be equivalent to double dipping.

[110] *In Boston v. Boston*, [2001] 2SCR 413 the Court speaks to the "double dipping" issue raised by the Applicant herein.

[111] There are a number of factors in this case that speak to the need to carefully balance the Respondent's entitlement and ongoing need with the temporary interruption in the Applicant's employment history:

1. In hindsight, the spousal support award and the division of property could not be said to have addressed the compensatory aspect of the Respondent's entitlement. The lower assessment of spousal support in exchange for the Applicant assuming approximately \$30,000 in matrimonial debt and the Applicant's subsequent failure to pay the debts compromised their financial integrity;
2. The Respondent was required, by agreement, to cash in her spousal RRSP to pay matrimonial debts subject to her right to seek equalization and credit at a later date;
3. There does not appear an available sum of money to assist the Respondent to retrain;
4. The Respondent's ability to use the lump sum is restricted to an amount of income flow dictated by the plan and by law. She is of the belief she cannot draw down on a larger sum. There is no evidence to the contrary. A careful review of her income from all sources reveals that this is insufficient to generate enough income to sustain her and provide a retraining allowance;
5. I have no evidence to suggest that the Respondent has been wasteful or that she has used the asset in any other than a reasonable manner. She uses her stream of income to support herself;
6. The support being paid cannot be said to relieve her economic hardship suffered through the marriage and as a result of the marriage breakdown.

[112] I have reviewed the agreed upon spousal support award at divorce and the evidence available to me.

[113] The Pension Order is dated July 2009. It was anticipated the Respondent would be receiving her share of his pension in pay.

[114] In a long term marriage with a dependant spouse responsible for maintaining the household and child, minimal education and out of the market essentially for 27 years except for her cashier jobs, one would expect an indefinite award for **significantly** more than 18% of the payer's gross income. One might even consider equalizing the parties standard of living.

[115] I have not been provided spousal support guidelines.

- [116] I find the Respondent's need and entitlement to support continues.
- [117] Her entitlement has been interrupted by the Applicant's poor health and employment circumstances brought on by PTSD and his use of alcohol.
- [118] From a lifestyle perspective the Applicant has a total household income of \$61,309.56. The payment of \$1000 per month reflects only 19.5 % of his total income.
- [119] In addition, he has an educational allowance exceeding \$14,000 covering the cost of his education and a partner to assist him contribute to his household expenses.
- [120] During the 2014 year the Applicant's net of pension income was \$48,648.57. This was the year he reduced his spousal support to \$521.53, which was just 12.8% of his income net of pension or 9.79% of his total income.
- [121] The existing payment of \$1,000 per month would have been 24.6% of the net income. This was not an onerous payment With good management that would have been achievable and payable.
- [122] The Applicant has other options to reduce his financial stress which must be pursued before arriving at a situation where he can successfully plead an inability to pay.
- [123] There is no evidence that his partner is unable to contribute to the household monthly expenses.
- [124] The burden of proof that there has been a material change in circumstances that affects the entitlement or the ability of the Applicant to pay is on the Applicant.
- [125] The Respondent has not been without sympathy for the Applicant's position and has, to her financial detriment, assisted him at times. She is willing to concede that there might need to be some **reduction while he is unemployed and attending this course.**
- [126] In assessing all factors including the Respondent's willingness to support the Applicant's current efforts to retrain, I have evaluated the Applicant's ability to pay on the income earned aside from the pension in pay.

[127] By excluding his pension in pay I do not adopt the *Boston v. Boston*, [2001] 2 S.C.R. 413, 2001 SCC 43, as a set of circumstances analogous to the facts in this case.

[128] The assumptions made originally, which resulted in a significantly reduced spousal support award, did not occur. The Applicant was advantaged, the Respondent disadvantaged.

[129] The Respondent did not share in the increases in the Applicants income and circumstances in the years between the divorce and the termination of the Applicant's employment given he did not absorb the matrimonial debt.

[130] The Respondent had no control over the Applicant's actions and his decision to withdraw from employment. Nor did she have control over the Applicant's lifestyle decisions to accept responsibility to support another adult.

[131] Both parties have suffered financial hardship resulting from the consequences of the Applicant's illness during and after the marriage.

[132] The current changes put the Applicant at a slightly reduced income level as existed at divorce.

[133] I reduce the spousal support order of July 2009 by \$200 a month to an award of \$800 to lift the current burden while the Applicant retrains. This will lighten his financial responsibility while he is focused on retraining and maintaining his sobriety. This is effective commencing the month in 2014 in which her spousal support was reduced without court order.

[134] The Applicant shall pay to the Respondent, \$800 per month based on his net of pension income of \$45,712.92. In a marriage of this duration this is still only 21% of his income, net of his pension.

[135] These spousal support payments may be reassessed by either party when the Applicant's course ends or when the basis of his disability entitlement is altered.

[136] On a review or variation the Applicant will be expected to show what efforts he has made towards reemployment and managing more effectively his finances.

[137] He may be in a better financial position in future at which point her then current needs can be more adequately addressed.

[138] He shall advise the Respondent in writing immediately of any change in his income and employment.

[139] The Respondent continues to be obliged to seek employment according to her skills and education and provide proof of her efforts towards earning as much as she can in her circumstances.

[140] She ought to enquire into the availability of government retraining programs to determine if there are any subsidized courses that could improve her market skills.

[141] However, given her age at marriage and her current age, her current skill set absence from educational and or industry programs, the question remains; what course will she take at this age will improve her ability to support herself?

[142] One month in advance of the end of his course (September 16th, 2016) or 24 hours after receiving notice of other income from employment or elsewhere, the Applicant shall notify the Respondent in writing and communicate details of his employment status, income benefits or other benefits resulting from his continuing receipt of Veteran's income.

Arrears

[143] I have not been provided a statement from Maintenance Enforcement.

[144] Maintenance Enforcement will recalculate the arrears based on the changed award.

Moratorium on collection

[145] Until the Applicant is finished his course, I place a moratorium on any collection of past arrears to facilitate the Applicant's rehabilitative training pending further order of the Court or agreement of the parties.

[146] Any monies arising from his income tax refund shall be paid into and held in trust with the Maintenance Enforcement program to address the arrears that accumulated due to the reduction in the collection pending a reassessment of the Applicant's circumstances

[147] This is reviewable once the Applicant's course is complete.

[148] The Applicant's obligation to continue the Respondent as beneficiary of 1/2 his insurance policy, as stated in the amount required in the Corollary Relief Judgement, continues as long as he is obliged to pay spousal support.

[149] He shall provide proof of this policy designation within 30 days of the date of this decision.

[150] The Applicant must respond within 30 days of the date of the Respondent's enquiries regarding the status of this policy.

[151] The Respondent retains the right to communicate and receive information directly from his insurer as per the Order.

[152] Counsel for the Applicant shall draft the order.

Legere Sers, J.