

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation: Waterman v. Waterman, 2016 NSSC 1**

**Date: 2016 - 01 - 11**

**Docket: SFH-DOCR 091225**

**Registry: Halifax**

**Between:**

**Paulette Rena Waterman**

Applicant

v.

**Wayne Gordon Waterman**

Respondent

**Judge:**

The Honourable Justice Elizabeth Jollimore

**Heard:**

December 14, 2015

**Counsel:**

Alex F. Embree for Paulette Waterman  
Wayne Waterman not appearing

**By the Court:**

**Introduction**

[1] Paulette Waterman has applied for a division of property pursuant to the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275 and for spousal support pursuant to the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3. She has also claimed costs.

**Litigation history**

[2] Paulette and Wayne Waterman separated in March 2010 after almost twenty years of marriage. On October 19, 2010, Justice Zuker granted a final order for spousal support which provided that Mr. Waterman would pay monthly spousal support of \$2,050.00 to Ms. Waterman. These payments were ordered to begin on May 1, 2010. As well, Mr. Waterman was ordered to continue medical, dental, vision and prescription drug coverage for Ms. Waterman through his insurance carrier and to pay costs of \$1,000.00 to her. His Lordship ordered that interest be payable on amounts owing under his order at the rate of two percent per year. According to the order, Mr. Waterman did not appear, though he was properly served. Following the separation, Ms. Waterman left Ontario and returned to Nova Scotia where the couple had lived until 2008.

[3] On June 20, 2013, Mr. Waterman applied to vary Justice Zuker's order, seeking to terminate spousal support pursuant to the *Interjurisdictional Support Orders Act, 2002*, S.O. 2002, c. 13 and the *Interjurisdictional Support Orders Act*, S.N.S. 2002, c. 9. His application was initially heard in Nova Scotia and decided on October 1, 2013.

[4] On November 21, 2013, Mr. Waterman filed a petition for divorce in Ontario. He sought a divorce and claimed no other relief. Ms. Waterman was not served with the petition.

[5] Unaware of her husband's petition, on December 13, 2013 Ms. Waterman petitioned for divorce in Nova Scotia, claiming a spousal support, a division of assets under the *Matrimonial Property Act*, a division of pension benefits, and a change of name.

[6] Ms. Waterman learned of her husband's petition in January 2014 when the Central Divorce Registry declined to provide a clearance certificate for her proceeding in Nova Scotia because of the earlier outstanding divorce proceeding in Ontario.

[7] Mr. Waterman's divorce was heard by Justice Kruzick on January 22, 2014 and the divorce was granted on February 4, 2014.

[8] On May 15, 2014, Ms. Waterman discontinued her petition. A few days later on May 20, 2014, she filed the application which is before me. She has resided in Nova Scotia since 2010. To use the language of Part I of the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2<sup>nd</sup> Sess.), c. 2, I have "territorial competence" over Ms. Waterman's application.

[9] Mr. Waterman successfully appealed the decision dismissing his application to terminate spousal support: the Nova Scotia Court of Appeal rendered its decision on December 11, 2014, remitting his application for determination upon proper notice to both parties. This decision is reported at *Waterman*, 2014 NSCA 110.

[10] Mr. Waterman was substitutionally served by email and by registered mail with the originating documents for the application before me. While he did not file a response to Ms. Waterman's application, he has subsequently participated in pre-trial conferences, made written submissions with regard to pre-trial motions and a request for an adjournment. He also made submissions, last summer, asking that I dismiss Ms. Waterman's application. I am satisfied that he has attorned to this jurisdiction.

[11] On October 2, 2015 there was a conference before the Honourable Justice Lynch. Mr. Waterman participated by telephone and the hearing date was discussed at this conference. He was unsure whether he'd be able to attend Nova Scotia for the trial. He was referred to the possibility of participating by video conference. Filing deadlines were set for both parties. Because the Watermans are divorced, Justice Lynch determined that Mr. Waterman's variation application pursuant to the *Interjurisdictional Support Orders Act* was longer before the court, and his request to terminate spousal support and rescind arrears would be considered in the context of Ms. Waterman's spousal support claim. A conference memorandum was prepared and mailed to Mr. Waterman's designated address which he confirmed on the record during the conference. Though sent to this address, the conference memorandum was returned by Canada Post. While Mr. Waterman did not receive the conference memorandum, I am satisfied that he was aware of the hearing date and filing deadlines because both were discussed during the conference.

[12] There was an additional conference on November 23, 2015. Mr. Waterman didn't attend this conference. An attempt was made to contact him by telephone and a message was left on an answering machine or voicemail service for him. The memorandum from this conference (which inadvertently referred to Mr. Waterman as having participated in the conference) was returned by Canada Post on December 28, 2015.

[13] Mr. Waterman has failed to maintain a designated address despite the requirement of Civil Procedure Rule 31.16(1). It appears that in October 2015 he provided an address which was not effective or he failed to arrange to forward deliveries to that address, if he has moved.

[14] The hearing proceeded on December 14, 2015. Mr. Waterman was not present. He was paged in the courthouse. Mr. Waterman did not make contact with the court to request an adjournment or to participate by video conference. He was aware of the date of court proceedings and chose not to participate. The hearing was conducted in Mr. Waterman's absence. There has been no communication from Mr. Waterman to the court since the date of the hearing.

[15] Pursuant to Civil Procedure Rule, 31.16(3), I am prepared to grant judgment against Mr. Waterman. He is disentitled to further notice.

## The evidence

[16] Ms. Waterman testified and offered an affidavit, a current Statement of Income, a current Statement of Expenses and two historic Statements of Property.

[17] Mr. Waterman filed no materials, either on his own behalf or from Dawn Stranger, with whom I am told he resides, in the context of Ms. Waterman's application.

[18] Mr. Waterman did file various documents in the context of his *Interjurisdictional Support Orders Act* application. Had he taken part in the hearing, I would have been able to consider whether those documents could be used in this proceeding. However, I am cognizant of the then-Appeal Division's decision in *Magionas*, (1988), 83 NSR (2d) 80 (AD) where, at paragraph 3, Justice Hart said, "Counsel must always have the right to test affidavit evidence". Justices Macdonald and Pace concurred. In Mr. Waterman's absence there is no opportunity for Ms. Waterman to test Mr. Waterman's affidavit evidence, so I have not considered these materials. As a result, there is no evidence on which to assess his claim to rescind arrears, so I dismiss this claim.

## Legal issues

[19] Ms. Waterman raises issues of property division and support. Pursuant to *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414 (A.D.) (affirming *Harwood v. Thomas* (1980), 43 N.S.R. (2d) 292 (T.D.)), I will begin with the division of property and then address the spousal support claim. In her brief, Ms. Waterman asked that I order the Canada Revenue Agency to produce materials from Mr. Waterman. She also asked that I tailor the language of any order for spousal support to maximize the amount which could be taken from Mr. Waterman's income by way of garnishee though she offered no information on how this might be done or my authority to do so.

## Property division claim

[20] Ms. Waterman's claim for a division of property includes a claim to Mr. Waterman's pension. I am told that his pension is the only asset available for division.

[21] Ms. Waterman advances her property division claim under the *Matrimonial Property Act*: claims for pension division are governed by the *Matrimonial Property Act*, while the legislation governing individual pensions provides the mechanism for the division of pension credits at source, according to Justice Bateman in *Morash*, 2004 NSCA 20 at paragraphs 28 and 29.

[22] Subsection 12(1) of the *Matrimonial Property Act* says that "either spouse" is entitled to apply for a division of property where certain triggering circumstances exist. A "spouse" is defined in clause 2(g)(i) of the *Act* as one of persons who are "married" to each other. Paulette and Wayne Waterman are not married to each other. They have not been spouses since early in 2014.

[23] Ms. Waterman argues that her application is saved by subsection 22(1) of the *Matrimonial Property Act* which provides that the division of matrimonial assets is "governed by

the law of the place where both spouses had their last common habitual residence” or, where there’s no such residence, by the law of Nova Scotia. The Watermans’ last common habitual residence was Ontario.

[24] Ms. Waterman argues that subsection 22(1) requires me to bring the entirety of Ontario’s *Family Law Act*, R.S.O 1990, c F.3 into the *Matrimonial Property Act*. Clause 7(3)(a) of the *Family Law Act* allows that an application to equalize net family properties shall not be brought after the earliest of “two years after the day the marriage is terminated by divorce”. The Watermans’ divorce was granted in 2014. While time is running out, Ms. Waterman still has some time to seek a property division under the Ontario legislation.

[25] On its face, subsection 22(1) of the *Matrimonial Property Act* refers to the choice of law applicable to the division of assets and the ownership of moveable property as between spouses.

[26] Ms. Waterman may only avail herself of section 22 of the *Matrimonial Property Act* if she is a person to whom the *Act* applies. She is divorced, so the *Act* does not apply to her. I dismiss her claim for a division of matrimonial property.

[27] In the alternative, in closing submissions Ms. Waterman asked that I assume jurisdiction under Ontario’s *Family Law Act*. This is not possible. Subsection 4(1) of the *Family Law Act* limits the courts with jurisdiction to decide family property applications under the *Family Law Act* to the Family Court of the Superior Court of Justice and the Superior Court of Justice.

[28] Further, I am unwilling to address this claim because it was not earlier identified to Mr. Waterman in the pleadings. Mr. Waterman did not take part in the hearing. To the extent this was a choice, it was made in the context of Ms. Waterman’s pleadings. If Mr. Waterman had known that Ms. Waterman intended to advance some other claim, he may have chosen to take part. I am mindful of the Court of Appeal’s decision in *Slawter v. Bellefontaine*, 2012 NSCA 48 at paragraph 5 where the Court discusses the duty of procedural fairness owed to a party where there has been no indication of the order that is contemplated. While *Slawter v. Bellefontaine*, 2012 NSCA 48 was decided in the context of a parenting dispute, I believe the same concerns about procedural fairness arise, particularly where a party is self-represented and depends on pleadings to clearly disclose the case to be met.

### **Spousal support**

[29] The Watermans married in December 1990. She was forty-three, and he was thirty-one. She worked as a hairdresser, and he worked for the Department of National Defence. Mr. Waterman retired from the Department of National Defence in 1994. Thereafter, he received pensions from the Department of National Defence and the Department of Veterans’ Affairs. He began to work as a long haul driver.

[30] Health problems (chronic back pain, neck injuries) meant Ms. Waterman stopped work in 1998. From that point on, she was dependent on Mr. Waterman’s income. They separated in March 2010, almost twenty years after they married. Ms. Waterman is now sixty-eight. Mr. Waterman is fifty-six.

[31] Ms. Waterman has been diagnosed with fibromyalgia. She says she also has nerve damage in both hands. She receives \$206.46 from the Canada Pension Plan and other government-funded payments to alleviate her low income status.

[32] Ms. Waterman's monthly expenses are \$2,675.00. This excludes her repayment of a \$2,300.00 debt she owes to the Canada Revenue Agency. She seeks monthly spousal support of \$1,592.09. Her application in the absence of a concurrent divorce proceeding is a corollary relief proceeding envisioned by subsection 2(1) of the *Divorce Act*.

[33] Pursuant to Justice Lynch's direction, Mr. Waterman application to terminate spousal support is now considered in the context of Ms. Waterman's application under the *Divorce Act*. I am satisfied that Ms. Waterman is entitled to receive spousal support. The parties adopted traditional roles during the marriage: she was at home while he worked and supported her financially. Their marriage was lengthy, and Ms. Waterman was sixty-three years old and unable to work when it ended. She was entirely supported by Mr. Waterman during the latter years of the marriage.

[34] The evidence on which I am to determine Mr. Waterman's income is far from perfect. I have a copy of the July 2015 decision of Justice C.J. Jones. Her Ladyship's decision addressed Mr. Waterman's motion with regard to a garnishment notice sent to the law firm which held funds from a class action lawsuit in trust for Mr. Waterman. In her decision, Justice Jones noted that Mr. Waterman's Department of National Defence pension was \$18,264.60 and that he had, as well, a Department of Veterans' Affairs pension which was in the range of \$12,672.49 (tax-free) per year. This is the best, and only, information I have about Mr. Waterman's income.

[35] Recognizing that some of Mr. Waterman's income is received on a tax-free basis, his after-tax income is approximately \$29,503.00. His marginal tax rate is approximately twenty percent, so he must finance eighty percent of a spousal support award from his post-tax income.

[36] Ms. Waterman's request for spousal support of \$1,592.09 (\$19,104.00 annually) would leave Mr. Waterman with roughly \$14,220.00 from his pensions. I do not know whether he has other income available to him. I do not know his expenses. I do not know whether he currently shares expenses. With the limited information available to me, it is difficult to consider Mr. Waterman's needs and his ability to pay.

[37] To recognize the length of the marriage, the relationship of financial dependency which existed during the marriage, Ms. Waterman's age and her inability to support herself, I order Mr. Waterman to pay monthly spousal support of \$1,350.00. Payments will begin on January 15, 2016 and continue on the fifteenth day of each subsequent month.

### **Production order for the Canada Revenue Agency**

[38] In her brief, Ms. Waterman sought a "third party notice to disclose" to be forwarded to the Canada Revenue Agency so Mr. Waterman's tax returns would be forwarded to her annually.

[39] Subsection 241(1) of the *Income Tax Act*, R.S.C. 1985 (5<sup>th</sup> Supp.), prohibits the provision of any taxpayer information to any person except in limited circumstances. None of the circumstances enumerated in section 241 are applicable. I dismiss this claim.

### **Costs**

[40] Ms. Waterman sought costs of \$7,000.00, calculated pursuant to Tariff A. She argued that I should determine the amount involved to be \$20,000.00 and award her costs on Scale 3 to reflect Mr. Waterman's "complete lack of participation", his "fooling around", his failure to provide items he's been ordered to disclose and "playing fast and loose" with receiving documents. Ms. Waterman said that her former husband took part in the proceeding when it served him and that he knows and is resigned to the fact that there is a limit on the garnishee the Family Responsibility Office will impose on him. She said he "just wanted to put her through the process".

[41] Civil Procedure Rule 77.02(2) makes clear that I have a general discretion to award costs. When using the Tariffs, Rule 77.07(2) states that I may increase or decrease the amount having regard to various circumstances which include a party's conduct which affects the speed or expense of the proceeding (Rule 77.07(2)(e)).

[42] During these proceedings, Ms. Waterman changed her counsel in the spring of 2015. Her current counsel appeared unaware of Mr. Waterman's October 2014 correspondence to the court, which was explicitly copied to her previous counsel (at the same firm). In this letter, Mr. Waterman wrote, "Property division will be based on 50% of last Four years of Canadian Forces Service." He also said, "Marriage was for only last 4 years of CF Service 22 December 1990 – February 27 1995. Therefore entitlement is 50% of last 4 years."

[43] The equal division of Mr. Waterman's pension contributions during the last four years of Mr. Waterman's employment by the Department of National Defence is exactly the relief Ms. Waterman said she wanted in her *Matrimonial Property Act* claim. It appears there was no need to pursue the property division claim: this could have been resolved by a consent order. It may yet be possible to do so.

[44] Ms. Waterman was unsuccessful in her request for a notice to produce for the Canada Revenue Agency. She was successful in obtaining an order for spousal support, though in an amount less than she requested.

[45] Ms. Waterman's application was frustrated by Mr. Waterman's actions, particularly his failure to disclose information he was ordered to provide.

[46] I order Mr. Waterman to pay costs of \$3,000.00 forthwith.

### **Conclusion**

[47] I dismiss Ms. Waterman's application pursuant to the *Matrimonial Property Act* and her request for a notice to produce for the Canada Revenue Agency. I grant her application for

spousal support pursuant to the *Divorce Act* and order Mr. Waterman to pay monthly spousal support of \$1,350.00 beginning on January 15, 2016 and continuing on the fifteenth of every month thereafter. I award Ms. Waterman costs of \$3,000.00 to be paid forthwith.

[48] Mr. Embree shall prepare the order.

---

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia