

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nelson v. Weber, 2008 NSSC 116

Date: 20080418

Docket: ST 1207-001817

Registry: Truro

Between:

Audrey Muriel Nelson

Applicant

and

Johann Joseph Weber

Respondent

Judge: Justice Glen G. McDougall

Heard: March 18, 2008, in Truro, Nova Scotia

Counsel: Barbara Darby, on behalf of the applicant
Karen Killawee, on behalf of the respondent

By the Court:

[1] By virtue of an Interlocutory Notice (Application Inter Partes), which was filed on the 30th day of August, 2007, Audrey Muriel Nelson (the “applicant”) applied to:

- (1) Vary the provisions of a Corollary Relief Judgment to increase spousal support;
- (2) Confirm the maintenance of life insurance to secure the payment of support by Johann Joseph Weber (the “respondent”); and
- (3) Have costs awarded for this application.

[2] The applicant filed an affidavit in support of the application along with a current Financial Statement and Property Statement.

[3] The respondent also filed an affidavit and Statement of Financial Information and Statement of Property on March 14, 2008. The respondent seeks to have his spousal support obligations quantified so that he can pre-pay them, if possible, in order to prepare for future retirement at a reasonable age. He is presently 56 years of age.

BACKGROUND FACTS

[4] The applicant and the respondent were married on the 22nd day of June, 1974. They have two children both of whom are now living on their own and who are financially independent of their parents.

[5] During the course of their traditional marriage, the respondent worked as an auto-mechanic. The applicant also worked outside the home until the children were born. She worked part-time after the birth of their first child but after their second child was born she became a stay-at-home mother and home-maker.

[6] The parties separated sometime in May, 1999 and were divorced on February 9, 2000. At that time the applicant was earning about \$14,560.00 per annum whereas the respondent had annual income of approximately \$43,680.00. As part of the Corollary Relief Judgment (the "CRJ"), the respondent was ordered to pay child support for their one remaining dependent child in the amount of \$374.00 per month. The amount was determined in accordance with the **Federal Child Support Guidelines** for British Columbia. He remains a resident of that Province.

[7] The respondent was also ordered to contribute towards the cost of his daughter's dental braces at the rate of \$96.00 per month, for sixteen months, as well as 75% of the consultation fee and the cost to remove her wisdom teeth.

[8] In addition to the foregoing, the respondent was also ordered to pay spousal support of \$400.00 per month. These payments were to continue indefinitely unless the parties reached some other agreement or the Court otherwise ordered.

[9] Paragraph 9 of the CRJ stated:

9. The Respondent currently has a life insurance policy with Transamerica in the amount of \$200,000.00. As long as this policy remains in place and while the Respondent is obligated to pay child or spousal support to the Petitioner, the Respondent shall insure that the named beneficiary on said life insurance policy is the Petitioner.

[10] The parties were also obligated under the CRJ to provide each other with a copy of their respective income tax return on or before June 1st each year beginning with the taxation year 2000. Neither party has ever fulfilled this obligation.

POST-DIVORCE EVENTS

[11] The respondent paid child and spousal support as ordered. In order to fulfil his financial obligations towards his daughter and former spouse and to meet his other financial commitments, the respondent took various courses to upgrade his auto-mechanic license. By doing so he was able to obtain better employment which not only paid more but also enabled him to increase his hours of work. He and his new common law spouse were able to purchase a Townhouse together. He was also able to pay off the matrimonial debts that he was ordered to pay as part of the CRJ.

[12] Given the respondent's age he does not think he can continue, indefinitely, to work 50 to 55 hours per week as he has been doing over the past several years. He is resisting any increase in his spousal support payments and would like to make a lump sum prepayment provided it is an amount that he can reasonably finance. He does not feel he should have to share his improved financial situation with his former spouse.

[13] The applicant's income has now doubled to approximately \$28,000.00 per year. She continues to reside in the matrimonial home which had previously been listed for sale at \$89,000.00 in the year just prior to the divorce. At the time of divorce there was a mortgage of approximately \$63,000.00 against this property. The applicant assumed sole responsibility for the mortgage as part of the property division under the CRJ. The matrimonial home had an extra, adjoining lot which the applicant later sold. She was not required to share the proceeds of sale.

[14] The applicant estimates that the existing mortgage on her home stands at about \$56,500.00. She has not had the property appraised nor could she recall its most recent assessed value. According to her testimony the house is in need of repairs. Based on her present income and due to debts she has incurred since the time of the divorce the applicant claims that she is unable to get by financially without an increase in spousal support. She bases her application for a variation of spousal support on the respondent's increased income as well as the termination of his child support obligations now that their daughter is financially independent and living elsewhere. Her daughter does visit on occasion but she is not expected to make any financial contributions towards household expenses. Additionally, the respondent's common law spouse works and is therefore able to contribute towards common living expenses. According to the respondent's testimony, he pays more than 50% of such expenses. His 2007 income was reported at \$71,641.20 whereas his common law spouse had earnings of only \$17,323.51 during the same period. The respondent's income prior to 2007 was:

\$80,292.00 (2006)

\$78,000.00 (2005)

[15] Based on these figures, the amount of child support paid by the respondent should have been considerably more than what he actually paid. This Court is not being asked to re-visit the matter of child support. The respondent's initiative and hard work has enabled him to improve his financial situation considerably. Perhaps it would have been better if he had only demonstrated a willingness to share his improved financial situation with his daughter and the mother of his children.

[16] The respondent testified that he interpreted paragraph 9 of the CRJ as an obligation to name the applicant as beneficiary under the insurance policy only so long as it was in place but that there was no obligation to maintain it. Because of his limited financial resources at the time of the divorce he decided to cancel the policy in order to cut expenses. The wording of this particular clause might not be as precise as it could have been but I believe its intent and purpose is clear. The requirement to keep the insurance policy in place was for the benefit of the respondent's dependent child and former spouse. If something had happened to the respondent and he had died there would have been no insurance fund available to provide for those who were financially dependent upon him. Fortunately the respondent is still alive and still able to contribute towards the support of his former spouse.

LAW

[17] An application to vary spousal support is governed by Section 17 of the *Divorce Act*, R.S.C. 1985, c. 3, as amended. The relevant provisions are as follows:

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; ...

...

(3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

...

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

...

(6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

...

(7) A variation order varying a spousal support order should

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(b) apportion between the former 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 former spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[18] There have been a number of cases out of the Supreme Court of Canada dealing with spousal support variation. It is clear from these cases that before ordering a variation in spousal support, the Court, pursuant to s. 17(4.1) of the *Divorce Act*, must first determine whether there has been a change in the condition, means, needs or other circumstances of either former spouse since the making of the support order or the last variation order. The change must be material and not trivial or insignificant.

[19] If the Court makes such a determination, the Court must consider all four of the objectives of spousal support described in s. 17(7) of the *Divorce Act*. No one objective has priority over any other although some might have more relevance than others depending on the facts of the case. (See **Hickey v. Hickey** (1999), 46 R.E.L. (4th) 1 (S.C.C.).

[20] In the case of **Boston v. Boston**, [2001] 2 S.C.R. 413 (S.C.C.), Major, J., had this to say at paragraphs 105 - 107:

105 In the case at bar, any order of support must address both the consequences of the marriage and of its breakdown. It must rest on an assessment of the needs and means of the parties and it should acknowledge the need to compensate the spouse who stayed home, worked there and gave up any idea of a career and the economic independence it allows.

106 The first objective of any order is to make sure that the dependent spouse, after the breakdown of the marriage, has enough to live on. In assessing the adequacy of support, the courts must consider the past income and living standards of the parties. (See *Payne and Payne*, supra, at p. 205; *Moge*, supra, at pp. 866 and 870.) The creditor spouse remains entitled to an income proportionate to her former living standards, although some economic disadvantages and costs often arise out of the splitting up of the family unit. It is also fair and consistent with the objectives of the Family Law Act to include an element of compensation for the consequences of the breakdown of a marriage where a spouse has given up any possibility of a career outside the home.

107 Then, in assessing the needs of a spouse, a judge must factor in the need of both spouses for security....

DISCUSSION

[21] In the case before me there have been a number of changes that have occurred since the time of the divorce in the year 2000. First and foremost is the fact that there is no longer a dependent child. In addition, both the applicant and the respondent enjoy a higher annual income. The applicant's income, now that she is working on a full-time basis, has approximately doubled from the pre-divorce level of \$14,560.00 to the current level of \$28,000.00. Based on her education (High School, plus 2 years of clerical) her income will not likely improve appreciably in the years she has left in the workforce.

[22] The respondent's annual income has also improved considerably since the divorce due in large measure to the additional training he has taken and the extra overtime hours he has worked. Although he might not wish to continue working these extra hours as he approaches retirement age and, indeed, he might find it physically impossible to maintain the same level of exertion due to some health concerns that he raised with the Court he, nonetheless, is in a much better financial situation now than when the divorce occurred. He also has a new common law spouse who can contribute to at least a portion of the couple's household and other living expenses. They have incurred debts of their own but they are quite manageable.

[23] Spousal support was appropriately decided at the time of divorce taking into consideration the respective income of each of the parties at that time. The respondent's obligation to pay child support took priority over any spousal support he had to pay. The factors and objectives for the Court to consider in determining this original order were the same as those the Court must now consider in determining the appropriate variation, if any, to order.

[24] In the present case the Court is satisfied that there has been a material change in circumstances warranting a variation. By remaining home to raise her children on a full-time basis, the parties made a joint decision that they must have felt was in the best interest of their children. The applicant must not bear all the financial and economic consequences resulting from that decision. She is entitled to enjoy a modest standard of living taking into consideration the condition, means, needs and other circumstances of each former spouse.

[25] Counsel for the applicant has supplied the Court with several different calculations made in accordance with the spousal support advisory guidelines. The guidelines can be a useful check against the amount the Court ultimately determines to be the appropriate amount to order. They are not, however, legislated and therefore the Court is not obligated to follow them. Counsel for the applicant has recommended the Court increase spousal support to \$1,600.00 per month from the current \$400.00. This amount resulted from the range suggested by the spousal support advisory guidelines and takes into consideration the relatively higher income enjoyed by the respondent over the past several years. As indicated previously, the respondent's resourcefulness and industriousness enabled him to improve his auto mechanic's license and also provided him with the opportunity to work extra overtime. In light of his age and health the respondent cannot be expected to continue to work these extra hours.

[26] Conversely, the applicant by virtue of her own work ethic, has found full-time work that is commensurate with her education, training and rather limited work experience. She is not sitting idly at home waiting for someone else to provide for all her needs. Unfortunately, she is not able to become financially independent. Her needs, in order to provide her with a modest standard of living, have to be supplemented by the respondent. He has the present ability to pay increased support.

[27] Taking into consideration all of these factors, I order the respondent to pay spousal support of \$1,000.00 per month retroactive to January 1, 2008. I am not prepared to go back to the date of the filing of the application. The delays in having this matter proceed to hearing cannot be attributed to just one party. They must both share the consequences resulting from these delays. The arrears which have accumulated since January 1, which I calculate to be \$2,400.00 $[(\$1,000.00 - \$400.00) \times 4 \text{ months} = \$2,400.00]$, can be paid by way of an additional monthly payment of \$300.00 for the remaining eight months of 2008. Beginning on May 1, 2008 and continuing on the first day of each month up to and including December 1, 2008 the respondent shall pay \$1,300.00. Thereafter spousal support shall be \$1,000.00 beginning on January 1, 2009 and remain at that monthly amount until changed either by mutual agreement or further Court order.

[28] I am not prepared to order a lump sum prepayment amount in lieu of periodic payments. If the parties wish to negotiate such an arrangement they are at liberty to do so but the Court is not prepared to order it.

[29] I have previously commented on the respondent's decision to cancel the life insurance policy based on his interpretation of paragraph 9 of the CRJ. I have not been requested to order reinstatement of this policy now that child support has ended. If the applicant seeks to have this paragraph interpreted in a formal sense and if she wishes to have a new policy put into place to secure future payments of spousal support then a new application will have to be filed to enable the court to more fully assess the need and the efficacy of doing so.

[30] I have also not heard from the parties with respect to costs. If an agreement on costs cannot be reached, I invite counsel to file further written submissions with the court within 60 days of the date of this decision.

McDougall, J.