

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Whalen v. Whalen, 2008 NSSC 244

Date: 20080414

Docket: Docket Number 1201-57536

Registry: Halifax

Between:

Wayne Kirk Whalen

Applicant/Petitioner

v.

Linda Jean Whalen

Respondent

Judge: The Honourable Justice Patrick J. Duncan

Heard: April 2, 2008, in Digby, Nova Scotia

Written Decision: April 14, 2008

Counsel: Wayne Kirk Whalen, self represented
Linda Jean Whalen, self represented

By the Court:

[1] This is the application of Wayne Kirk Whalen for an order varying spousal maintenance. The parties have filed Affidavits and Statements of Financial Information. Mr. Whalen appeared in person, self represented, at the application. He testified and provided documents particularizing the income as set out in his Statement of Financial Information. Ms. Whalen did not appear and did not have representation in the hearing.

Background

[2] Wayne and Linda Whalen began cohabitating in 1989 and were married on October 19, 1990. It was a third marriage for both. There are no children of the marriage. The parties separated on November 14, 2002.

[3] Mr. Whalen was retired when the parties first began living together. Ms. Whalen, prior to cohabitation, worked for a day care service, was a part time house sitter and a nanny. Her employment was not of such a nature that she could be considered self sufficient. She depended on support from her previous husband, her father and then Mr. Whalen.

[4] After the parties married, Mr. Whalen returned to work, retiring again in April,

2000. Ms. Whalen did not work outside of the home during the marriage.

[5] By decision of the Honourable Justice Leslie J. Dellapinna dated March 11, 2004, Ms. Whalen was allowed spousal support in the amount of \$300 per month commencing April 1, 2004.

[6] Justice Dellapinna commented that both parties were advantaged by the marriage relationship and similarly disadvantaged by its breakdown. Mr. Whalen was having difficulty after the breakdown with caring for himself without his wife's contribution and Ms. Whalen was unable to financially support herself. As a result, he awarded support on a non-compensatory basis.

[7] Justice Dellapinna found that Ms. Whalen has an obligation to attempt to support herself and ordered that the spousal support order be reviewed upon application by either party after September 20, 2007. Justice Dellapinna commented:

This will give her four years to train and hopefully enter the work force. When she turns age 60, she will apply for a division of the Canada Pension Plan credits earned by Mr. Whalen during their marriage and hopefully prior to any review application the parties will know the effect of that division. Hopefully too, Mr. Whalen will have a better idea of how his military pension will be affected when he attains the age of 65 the following February. (at para. 32)

[8] In so concluding, Justice Dellapinna rejected Mr. Whalen's submission that spousal support be for a fixed period of time. The court was of the view that there was no way of knowing when Ms. Whalen might become self sufficient.

Financial circumstances of Linda Jean Whalen

[9] At the time of Justice Dellapinna's decision in 2004, Ms. Whalen was unemployed and in receipt of approximately \$350 per month, received in the form of social assistance benefits. There was evidence of a plan for her to retrain and to enter the workforce.

[10] Prior to the hearing before Justice Dellapinna, there was a division of matrimonial assets, but there was an as yet to be determined distribution arising from the sale of real property and the liquidation of an investment account. Mr. Whalen testified that subsequent to the granting of the Corollary Relief Judgment there was an amount of between \$140,000 and \$150,000 generated by the sale and liquidation and that the funds were divided approximately equally. There is no indication in the material before me as to how Ms. Whalen used her share of the funds.

[11] The following chart sets out Ms. Whalen's income information (it is

incomplete in some aspects and includes only those amounts put in evidence, by Ms. Whalen):

Type of Income	2005	2006	2007	2008 (projected)
Bowater Mersey Pension		\$2,180.04	\$2,178.96	\$2,180.00
Canada Pension Plan (Wayne Whalen)			\$ 199.59	\$1,337.00
Canada Pension Plan (Linda Whalen)				\$ 798.00
Investment Income		\$ 37.42		
Spousal Support	\$3,600.00	\$3,600.00	\$3,600.00	\$3,600.00
Total - Income Tax Line 150	\$5,858.00	\$5,817.46	\$5,978.55	\$7,915.00

[12] Ms. Whalen has not declared employment income on her tax returns since the divorce.

[13] I have reviewed Ms. Whalen's Statement of Expenses and they reflect her very modest income. There is an apparent continuing need for financial assistance. She indicates in her Affidavit that she is living in an apartment at her sister's. It is not apparent on the information before the court how Ms. Whalen meets the deficit in her budget, nor how she has managed the monies received in consequence of the marriage breakdown.

Financial Circumstances of Wayne Whalen

[14] Mr. Whalen's financial circumstances have changed as a result of adjustments in the various pensions he receives. The following summarizes his position today as against the circumstances at the time of Justice Dellapinna's decision:

Type of Income (Monthly)	2004	2008
Bowater Mersey Pension	\$ 359.38	\$ 182.58
Canada Pension	\$ 537.10	\$ 487.37
Canadian Armed Forces Pension	\$1,195.67	\$ 982.96
Totals	\$2, 092.15	\$1,652.91

[15] Mr. Whalen's annual income has reduced from \$25,104 in 2004 to an expected income in 2008 of \$19,835, which represents an annual reduction of \$5,269 or \$439 per month.

[16] There was no evidence presented to the court that Mr. Whalen, having turned 65 years of age, has applied for benefits that he may be entitled to pursuant to Old Age Security Act R.S. 1985, c.O-9.

[17] Mr. Whalen testified that he has about \$4,000 remaining of the approximately \$70,000 he received from the post divorce distribution. He says that he applied the balance toward ongoing living expenses.

[18] I have reviewed Mr. Whalen's expenses and find them to be generally reasonable. He includes a budget for holidays, entertainment, gifts, charitable donations and miscellaneous items totalling \$530 per month which Ms. Whalen cannot match on her income. He lives in a rural community, some distance from town, and so he needs a car. He testified that he needs a newer vehicle since the one he currently is using has approximately 300,000 km on it. As a result he needs to free up income for that purchase.

[19] He resides in an upper flat of a house and shares expenses with the female owner, who occupies the lower flat. He acknowledges a relationship with this woman but testified that they live independently of each other and maintain separate finances. He says that he does not prepare his own meals and eats out regularly.

Applicable Law

[20] The power of a court to vary a spousal support order is found in section 17(1)(a) of the **Divorce Act**. The factors a court must consider in deciding such an application are set out in 17(4.1) which reads:

Before the court makes a variation order in respect to 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.

The objectives are set out in s. 17(7) of the act, the relevant portions of which are:

- (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;
 - ⋮
 - c) relieve any economic hardship of the former spouses arising from the breakdown of the marriages; and
 - d) insofar as practicable, promote the economic self sufficiency of each former spouse within a reasonable period of time.

Analysis

[21] I am satisfied that there has been a change in both the means and needs of both parties. Not including spousal support, Ms. Whalen's annual income has increased nominally from \$4,200 (from Social assistance benefits) at the time of the granting of

the Corollary Relief Judgment to \$4,314 (from pension income), projected for 2008. She has been benefiting from \$3,600 per year in support payments.

[22] There is no evidence as to what efforts, if any, Ms. Whalen made to become economically self sufficient since 2004. In reviewing her tax information for the years 2005 through 2007, as well as her Statement of current financial information, there is no indication of any earnings to supplement the pension income previously set out.

[23] At 60 years of age, there is still an opportunity for her to seek out employment should she choose to. It appears that to this point she is content to survive on the pension income she receives.

[24] Under current legislation, Ms. Whalen will be eligible to receive Old Age Security benefits when she turns 65 in September, 2012.

[25] Mr. Whalen is now 65 years of age and says that as a result of the pension division he is not able to enjoy the retirement years in a way that he had hoped for. For his part, Mr. Whalen has seen an overall reduction in his annual income of approximately \$5,269 or \$439 per month.

[26] Justice Dellapinna concluded that both parties were disadvantaged by the breakdown of the marriage. The evidence before this court suggests that those disadvantages continue for both parties.

Conclusion

[27] It is still true, as noted in the earlier decision, that Ms. Whalen's "financial need far exceeds the amount that he [Mr. Whalen] can reasonably afford to contribute".

[28] Mr. Whalen has 21% less gross income today than he had at the time of the granting of the Corollary Relief Judgment. It was contemplated that Ms. Whalen would have made some strides toward self sufficiency which would have reduced her need, but that has not happened. The question then is for how much longer and to what extent should Mr. Whalen be required to provide support?

[29] I have concluded that, having regard to the present circumstances of the parties, Ms. Whalen will be required to live on slightly less overall. In order to address the possibility of the parties increasing their respective incomes through employment or additional pension benefits, I direct that there be an annual exchange

of financial information so that either of the parties will know whether a further variation application may be appropriate at some future date.

[30] Ms. Whalen should make reasonable efforts to increase her self sufficiency. In particular, it is reasonable to expect that when she becomes eligible to receive pension benefits at age 65 that she will do so. At that point, and barring any intervening changes, Mr. Whalen will have paid spousal support for nine years after a 13 year relationship. He will be 70 years old. It may be that that will be an appropriate time to consider termination of support, but that decision should be made at that time and based on then current information.

[31] In the result, I am satisfied that there are sufficient grounds on which to grant this application and I therefore direct that Wayne Kirk Whalen shall pay Linda Jean Whalen spousal support in the amount of \$100 per month, commencing May 1, 2008 and continuing on the first of each month until further order of the court. All support payments shall be payable to Linda Jean Whalen. Payments shall be forwarded to the Officer of the Director of Maintenance Enforcement, P. O. Box 803, Halifax, Nova Scotia, B3J 2V2, while the Order is filed for enforcement with the Director. The

current mailing address of Linda Jean Whalen is 90 Camelot Lane, Halifax, N.S., B3M 4H9.

[32] The parties shall provide each other with a copy of his or her income tax return, completed and with all attachments, even if the return is not filed, along with all notices of assessment received from Revenue Canada, on an annual basis on or before June 1st, commencing June 1st, 2009.

[33] There shall be no costs payable to either party. Order accordingly.

Duncan J.