

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Gildart v. Gildart, 2009 NSSC 134

Date: 20090429

Docket: 1201-058154

SFHD-028448

Registry: Halifax

Between:

Marjorie Dawn Gildart

Applicant

v.

Kevin Douglas Gildart

Respondent

Judge: The Honourable Associate Chief Justice Robert Ferguson

Heard: April 2, 2009, in Halifax, Nova Scotia

Written Decision: April 29, 2009

Counsel: Sandra Barss, counsel for the Applicant
Kenzie MacKinnon, counsel for the Respondent

By the Court:

[1] Kevin and Margaret Gildart were divorced in January of 2006. They separated in June of 2001 and entered into a Separation Agreement in March of 2002. This Agreement was incorporated into the Corollary Relief Judgment and provided for Mr. Gildart to pay spousal support to Ms. Gildart beginning March of 2002.

[2] In January of 2008, Ms. Gildart made what was termed as an Application to Vary, specifically, the relief requested was stated as follows:

Spousal Support or Spousal Maintenance

The Applicant seeks an Order requiring the Respondent continue to pay spousal support to the Applicant after March 31, 2008, pursuant to clause 9(a) of the parties Separation Agreement dated March 21, 2002; and, that the Respondent maintain a life insurance policy in the sum of \$450,000.00 with the Applicant named as a beneficiary, pursuant to clause 14 of the said separation agreement.

With the changes being sought to take effect on (specify): March 1, 2008, as per the Separation Agreement.

[3] In September of 2008, Mr. Gildart filed a Response to Variation Application which stated, in part:

TAKE NOTICE that Kevin Douglas Gildart, the Petitioner, replies to the application of Marjorie Dawn Gildart, the Respondent, under: section 17 of the *Divorce Act*; and requests changes to the following order: Subsection 9(a) of the Separation Agreement of March 21, 2002 annexed to the Corollary Relief Judgment of January 12, 2006;

regarding the following relief: spousal support: (a) implementation of the third sentence of subparagraph 9(a) of the Separation Agreement of March 21, 2002, by which the Petitioner's obligation to pay spousal support to the Respondent terminated on February 29, 2008; or

(b) the reduction in the quantum of spousal support payable to the Respondent, to reflect the income or imputed income of the Respondent to be subtracted from the spousal support payments of the Petitioner,

with the changes being sought to take effect on February 29, 2008.

HISTORY

April 9, 2008: A Pre-Trial Conference was held which resulted in a Memorandum which stated, in part:

2. Ms. Gildart, in her filings, identified the issues of ongoing spousal support and ongoing life insurance (naming her as the beneficiary). After discussions with Mr. Gildart who is self represented and Ms. Barss, who represents Ms. Gildart, there was consensus that Mr. Gildart is agreeable to continuing spousal support, provided the clause 9a conditions are met. Clause 9a provided for spousal support to be paid to Ms. Gildart for a six year period, ending in March 2008. Certain conditions had to be met for that spousal support to continue beyond that period. Ms. Gildart says that in fact, she is not in remission and has not been over the past year.

3. Mr. Gildart is asking for documentary confirmation by way of letters or reports from Ms. Gildart's medical doctors that confirm that she has not been in remission over the past year, and that she has in fact been receiving ongoing treatment for cancer that has spread (it was originally breast cancer). In her affidavit, Ms. Gildart states that her cancer returned in December of 2006 and that she discontinued work in July of 2007 because of the spread of the cancer.

...

5. Mr. Gildart agrees to continue the life insurance policy that names his former wife as the beneficiary, as provided for in clause 9 of the separation agreement. The obligation to continue to name Ms. Gildart as the beneficiary of the life insurance policy, is also contingent upon the provision of medical information.

6. Mr. Gildart will be seeking to have the quantum of spousal support reduced if in fact it is to continue. His application to reduce this amount is based on changed financial circumstances.

April 29, 2008: A Settlement Conference was held wherein there was an agreement not to proceed and an acknowledgement that the matter was to proceed

to a one-day hearing. A Pre-Trial Conference Memorandum issued which stated, in part:

3. Mr. Gildart is to advise Ms. Barss in writing no later (sic) two weeks from today's date as to whether or not he will accept the letter and opinion of Dr. Racine dated April 11, 2008 without the necessity of Ms. Barss subpoenaing him to come to court to testify.

September 15, 2008: A Pre-Trial Conference was held resulting in a Memorandum which stated, in part:

3. The matter is scheduled for trial on **October 27, 2008, from 10:00 a.m. to 4:30 p.m.;**
4. Counsel are bound by the disclosure requirements ordered by Justice R. J. Williams in his Pre-Trial Conference Memorandum of April 29, 2008;

October 27, 2008: A Hearing took place wherein both parties sought further disclosure pertaining to outstanding issues. An adjournment was granted and an Interim Order was issued which stated, in part:

AND UPON HEARING from the parties as to relevant information not being available;

NOW UPON MOTION:

IT IS HEREBY ORDERED THAT:

1. The hearing of this application shall be adjourned to **March 16, 2009, from 10:00 a.m. to 4:30 p.m.** or to an earlier date on which Associate Chief Justice Ferguson is available to hear the application;
2. On the last day of October, 2008, and on the last day of each month thereafter until the hearing of this application, the Respondent shall pay to the Applicant \$3,000.00 in spousal support;
3. Enforcement of any arrears of spousal support that the Respondent may owe to the Applicant is suspended until the hearing of this application.

March 5, 2009: Appearance for Trial. Counsel for Ms. Gildart informed the court that Ms. Gildart was in palliative care and unable to appear. There was a request for an adjournment. Counsel further indicated there was uncertainty as to when she could be available in the future.

Mr. Gildart informed the court his request, at this stage, was to vary his current spousal support obligation; that such request was based solely on his ability to pay the existing amount. Mr. Gildart indicated that he would not be contesting Ms. Gildart's eligibility to receive support as stipulated in the Corollary Relief Judgment.

An adjournment was granted to April 2, 2009, noting that the hearing would proceed in the absence of Ms. Gildart, if she was unable to attend, and that any variation as to Mr. Gildart's support obligation would be effective as of April 1, 2009.

April 2, 2009: A trial was held. Mr. Gildart was the only witness and Ms. Gildart was not in attendance.

EVIDENCE

[4] Mr. Gildart was, at the time the parties separated, and continues to this day, to be a self-employed as an investment counsellor.

Mr. Gildart's Income

[5] The Separation Agreement indicates Mr. Gildart's income for 2001 was approximately \$100,000.00. It is this amount that attributed to the spousal support payment of \$3,333.00 per month.

[6] As to child support, the agreement noted the parents would have "shared joint custody" and no child support would be paid by either parent. However, to the end of 2005 Mr. Gildart was totally responsible for "expenses referred to in s. 7 of the *Child Support Guidelines*." From that point on, such expenses were to be shared between the parents.

[7] Mr. Gildart's Income Tax and Benefit Returns (T1 General) for the years 2004 to and including 2007 provided the following information:

| | Gross Business Income [162] | Net Business Income [135] | Total Income [150] | Total Business Expenses [9368] |
|-------------|--|--------------------------------------|-------------------------------|---|
| 2004 | \$191,734.00 | \$113,769.00 | \$114,438.00 | \$67,719.00 |
| 2005 | \$147,357.00 | \$101,627.00 | \$104,206.00 | \$36,604.00 |
| 2006 | \$119,990.00 | \$79,587.00 | \$79,931.00 | \$33,082.00 |
| 2007 | \$190,383.00 | \$122,766.00 | \$120,090.00 | \$63,076.00 |

[8] As for 2008, Mr. Gildart provided his T4 which indicates his gross business income is \$131,586.00 being the amount he will insert in line 162 of his 2008 Income Tax Return. This amount indicates a decrease in his gross business income from the previous year of \$60,148.00. He has also provided a list of his business expenses for 2008 in the amount of \$58,384.00.

[9] In his Statement of Income filed September 15, 2008, Mr. Gildart indicates his yearly income for that year would be \$77,520.00. Mr. Gildart has not yet filed his Income Tax returns for that year. He has, however, seen the completed return prepared by his accountant. He indicates his total income will be several thousand dollars less than portrayed in his most recent income statement.

[10] Mr. Gildart attributes his loss in income to the general turndown in the economy. He further indicates that, given the first few months of this year, he does not believe either the economy or his income will rebound in the year 2009.

Mr. Gildart's Property and Related Debt

[11] Mr. Gildart filed a Statement of Property as of September 15, 2008. The total value of property was in excess of one million dollars comprised mainly of the following:

| | |
|-----------------|--------------|
| Four Properties | \$846,100.00 |
| Furniture | \$2,000.00 |
| Vehicle | \$13,500.00 |

| | |
|--------------|-------------|
| RRSPs | \$53,786.00 |
| Mutual Funds | \$84,305.00 |
| Shares | \$14,000.00 |

[12] His numerous debts amount to approximately \$966,000.00.

Mr. Gildart's Expenses

[13] Mr. Gildart filed a Statement of Personal Expenses as of September 15, 2008, indicating an income of \$6,560.00 per month (\$78,720.00 per year) and expenses of \$12,777.00 creating an after tax deficit of \$8,470.00 per month. The current monthly spousal support obligation was not included as an expense.

[14] The Gildarts have two children: Clark, age 24, and Kayleigh, age 22, both who expect to graduate from university this spring. In his Statement of Expenses, Mr. Gildart attributes about \$2,600.00 per month to the support of these children.

[15] Mr. Gildart has a common-law partner. She filed a Statement of Income indicating income of \$2,915.00 per month (\$34,986.00 per year). Mr. Gildart testified his partner provides the food and household items for the home which he estimates to amount to about \$800.00 per month.

RELEVANT LEGISLATION

[16] The relevant sections of the *Divorce Act* are:

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

...

Terms and conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just

Factors

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- a) the length of time the spouses cohabited;
- b) the functions performed by each spouse during cohabitation; and
- c) any order, agreement or arrangement relating to support of either spouse

...

Order for variation, rescission or suspension

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

...

Factors for spousal support order

(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.

CONCLUSION

[17] When Mr. Gildart made his initial application in the form of a reply, he was seeking the possibility of relief on two grounds. First, that the appropriate

interpretation and implementation of the terms of the Separation Agreement would terminate his spousal support obligation. Second, his dramatic loss of income would decrease his ongoing support obligation.

[18] As noted previously, Mr. Gildart has withdrawn his request to have his support obligation terminated. He further acknowledges, for the purpose of this hearing, Ms. Gildart's entitlement to support in the amount currently required.

[19] I find that Mr. Gildart's dramatic lessening of his income constitutes an appropriate change of circumstances to allow him to proceed with his application to lessen his ongoing spousal support obligations.

[20] Ms. Gildart emphasizes, although Mr. Gildart's loss of income is not contested, that he continues to have the ability to comply with his current spousal support obligation. In support of this submission, she submits: (1) Mr. Gildart, given his type of employment, has the ability to avoid many of the expenses of salaried employees earning a similar income; (2) Mr. Gildart has acquired property that should be considered when determined his ability to provide spousal support; (3) his obligation to provide child support will shortly end; and (4) his common-law spouse should be providing more to lessen the amount of what Mr. Gildart indicates are his ongoing personal household expenses.

[21] As previously noted, Mr. Gildart's current Statement of Expenses indicates a deficit in excess of \$8,000.00 per month. A continuance of his spousal support obligation would increase that deficit by approximately \$1,800.00.

[22] At separation, as noted in the Corollary Relief Judgment/Separation Agreement, the parties divided their matrimonial property. Since then, Mr. Gildart has acquired additional property. This property, particularly the real estate, did not require a significant financial input by Mr. Gildart. At this time, there is no income available to Mr. Gildart from these investments. Further, given the current economic conditions, a liquidation of this property would not increase Mr. Gildart's ability to provide spousal support.

[23] Mr. Gildart, due to Ms. Gildart's illness, has assumed the child support obligations which the Corollary Relief Judgment/Separation Agreement stipulated would be shared. These expenses, at this time, continue in the amount previously noted.

[24] Mr. Gildart's common-law partner's contribution to his ongoing household expenses has been questioned. I find it would be appropriate for her to contribute at least an additional \$400.00 a month in this regard.

[25] Mr. Gildart has referred to the *Spousal Support Advisory Guidelines* and indicated that, given the parties current incomes and Mr. Gildart's child support obligations, he should be required to provide between \$1,266.00 and \$1,692.00 a month spousal support.

[26] I agree with Ms. Gildart's submissions that, given Mr. Gildart's occupation, he may legitimately lessen normal personal expenses. Further, as previously noted, his common-law partner should contribute more fully to his listed expenses. However, even with this acknowledgment, Mr. Gildart's dramatic decrease in income places him in a position where he is unable to provide spousal support at the current level.

[27] I conclude Mr. Gildart's spousal support obligation should be varied and reduced to \$1,800.00 a month beginning April 1, 2009. I further find that the Interim Order reducing his obligation from \$3,333.00 to \$3,000.00 should not create arrears in his past spousal support obligation.

[28] I would ask counsel for Mr. Gildart to prepare the order.

J.