

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: MacNeil v. Carroll, 2009 NSSC 189

Date: 20090327

Docket: 1201-059513

Registry: Halifax

Between:

John Peter MacNeil

Applicant

v.

Kathleen Alice Carroll

Respondent

Judge: The Honourable Justice Deborah Gass

Heard: March 9, 10, 23 & 24, 2009, in Halifax, Nova Scotia

Oral Decision: March 27, 2009

Written Decision: June 19, 2009

Counsel: Patrick Casey, counsel for the applicant
Daniel Jollimore, agent for the respondent

By the Court:

[1] This decision is the result of an application to vary, and I want to say at the outset that this has been a very difficult decision for the court, primarily because of the circumstances of the applicant and the respondent. I have the utmost sympathy for Ms. Carroll, who has been through some excruciatingly difficult times and has experienced unimaginable pain in the loss of a child she considers to be her daughter under horrific circumstances, and it is difficult to imagine how difficult that would be and I am very sympathetic to her circumstances. I am also very mindful of the considerable stresses that Dr. MacNeil is and has been under and the challenge of keeping going with so many responsibilities to uphold at great risk to his personal and professional well-being. This makes this a most difficult and complex situation to determine because there is no solution available to meet the needs of both parties and any remedy today will still be inadequate and everyone suffers. It is in this context that I have had to attempt to balance the best interests of the children and the needs and the abilities of the adults.

[2] This is an application to vary a Corollary Relief Judgment which is dated December the 8th, 2006. The Corollary Relief Judgment incorporated extensive Minutes of Settlement, which were entered into in March of 2006. John Peter MacNeil and Kathleen Alice Carroll MacNeil were married July 16th, 1988, having been together in an exclusive relationship prior to that. They were together for 21 years, married for 16. They have two sons: Ian, born January 3rd, 1991, now 18; and Michael, born July 4th, 1995, now 13 ½. They separated on May 31st, 2004. The respondent issued a Petition for Divorce on April the 15th, 2005 and the applicant filed an Answer and Counter-Petition. They subsequently negotiated and resolved an agreement in March of 2006. They were ultimately divorced; a Divorce and Corollary Relief Judgment were issued in December of 2006. Theirs would be described as a traditional marriage at the longer end of a medium length marriage or at the shorter end of a long-term marriage, but combining their years together and their ages when their relationship began, it would fall within the realm generally of a long-term traditional marriage.

[3] In their Minutes of Settlement they dealt with all matters of property, custody, child and spousal support. With respect to the order arising from their Minutes of Settlement, the agreement was that the applicant would pay the Guideline Table amount of support of \$4,531.78 a month for two children based on an approximate income of \$394,000.00 a year. In addition, he was to pay some

additional section 7 expenses. As well, he was to pay the sum of \$3,500.00 a month in spousal support, with an acknowledgement contained in the agreement of certain sums that had been paid in 2004, 2005 and 2006 prior to the formal agreement.

[4] The Corollary Relief Judgment also provided for an automatic review in the event of a number of occurrences, including the debt payment arising from the pre-separation debt going up or down, the sale of the house, or changes in employment status of the wife or husband, in addition to the general rights of review.

[5] There was also a provision for maintaining the wife and children as beneficiaries of the life insurance policies and on a medical plan for so long as he is legally able to do so.

[6] The matrimonial home was transferred to the wife for the benefit of her and the children. After the agreement was signed, the applicant began living with his present wife, Cheryl, in May of 2006 and the respondent began living with her current partner, Kevin, in January 2007. The maintenance was based on an estimated income based on prior years' income. In other words, the figure of \$394,000.00 per year was based on a previous year's income and an estimated income projection.

[7] The applicant filed a variation application on May 28, 2008 seeking a variation under s. 17 of the *Divorce Act* with respect to child support, spousal support and the life insurance obligations which secure the support. It is noted that he signed the application on March 19, 2008 but the application was not actually issued until May 28, 2008.

[8] The applicant relies on the following changes in circumstances:

[9] Although at the time of the parties' agreement he would appear to have at least been under investigation and possibly actually facing charges of fraud and tax evasion; I am not absolutely clear on that, but certainly they were out there prior to the separation and prior to the agreement and the outcome of those charges was not known when the agreement reached. It was not until May of 2007 that he was found not guilty of tax evasion and guilty of filing false tax returns. He was then ordered to pay a fine of \$88,638.00 together with victim surcharges and that fine was to be payable at the rate of \$1,000.00 a month. He appealed that conviction

and it was overturned. As a result of that, there has been a stay on the fine payment. The crown has appealed that decision and the appeal is pending in the Court of Appeal. As a result of these proceedings, he has incurred significant legal fees. While the fine payments are currently suspended, he has already paid into court approximately \$12,000.00.

[10] Another change on which he relies is that his income estimate was much higher than his actual income eventually turned out to be. He estimated an income of \$394,000.00 in March of 2006, based on an estimate of his earnings in 2004 from MSI billings, which is the lion's share of his billings, his on-call stipend, his job as ICU director and his estimated private clinic earnings, and projected an 8% increase for 2005. It is noted that he left the job as clinic director in 2005 prior to the parties' agreement.

[11] The income, as I have indicated, turned out to be in reality less than that, and his actual income fell far short of \$394,000.00. In 2006 it was \$332,349.00, which is about \$60,000.00 less; in 2007 his professional income was \$372,187.000, again \$22,000.00 less than the estimate that he had projected when he entered into the agreement. The earnings from the private clinic turned out to be less than he expected. He gave up the director's job before the agreement was signed, that is back in October of 2005, which is a fact that pre-dates the agreement and it was within the purview of the parties when they entered into this agreement. But, as it turned out, the income from the private clinic did not – he left the job as director in the hopes of making more money with the private clinic - materialize as he anticipated.

[12] The MSI earnings have as well, since he filed this application, gone down. And since the filing of the application a seventh anaesthetist was engaged, thereby reducing the number of available hours for work. There was a shut down of the operating room for 14 days without pay, but he managed to fill in at the ICU for two weeks for other doctors to supplement the lost pay as a result of that. He does his on-call work in the ICU once every six weeks also.

[13] The matrimonial home, which had been transferred to the respondent, sold in May of 2008 triggering one of the automatic grounds for review. As a result of the sale of that home and moving to an apartment, her shelter expenses and general expenses decreased. As well, in January of 2007, the respondent began living with her partner Kevin Horne, thereby being in a position to share household expenses

as between the adults and thus having some impact on her need because of the contribution by Kevin Horne, and I will turn to the difficulties that this family has experienced later.

[14] At any rate, it was a combination of two households, so to one extent the needs increased, but at the same time the contribution of Kevin Horne through his income to the household expenses is also a factor to be considered.

[15] The family did suffer a tragic loss in late 2007, which did significantly impact on their emotional circumstances and, consequently, on their financial circumstances because of the very devastating impact of this. So that did have a negative impact, certainly on Mr. Horne's ability to earn an income, at least for a period of time, and as well constituted a set-back for Ms. Carroll in terms of her ability to go out and work, in that she fulfilled a role of supporting the family through a very difficult time, which continues.

[16] Dr. MacNeil remarried and again joined financial forces with another adult person, which brings with it some financial benefits. However, at the same time, they are expecting a child and that has affected his wife's ability to contribute to the expenses to any great extent.

[17] The respondent, Ms. Carroll, has remained at home since the parties' separation in 2004. It is now 2009. The boys were young when the parties separated and the mother had been out of the work force for about 14 years. During the marriage, she fulfilled the traditional role of homemaker and caregiver and that is not disputed. It is not disputed either that she was entitled to spousal support on a compensatory basis and a non-compensatory basis, that is based on need. While there is an obligation to work towards self-sufficiency, it is acknowledged that she is not and, frankly, on the evidence before me it is unlikely that she will ever be totally self-sufficient in relation to the income earning capacity of the applicant, Dr. MacNeil. But there is an expectation on her to work towards self-sufficiency and to demonstrate an intention to move in that direction. It is clear from the evidence that there is no demonstrable evidence of any efforts to secure even part-time employment, or some training for employment, in the past five years. I say that recognizing that there have been considerable issues that Ms. Carroll has had to deal with. The stress and difficulty that surrounded the breakdown of the marriage and as well the subsequent tragedy in her family, have had an impact on that. But we are talking about a total period of five years and,

although the court does take into consideration those very difficult circumstances, there is still a period of time when there ought to have been some effort towards either re-training or working. Although the applicant does appear, for all intents and purposes, and certainly to the respondent Ms. Carroll, he appears to have gone on his merry way, he did so carrying \$800,000.00 in a tax debt that was accumulated during the marriage. He entered into a proposal in bankruptcy to pay the sum of \$5,000.00 a month for a period of five years, which resulted in a total of \$300,000.00 plus the administration fees. That was a circumstance that existed at the time of the parties' agreement. The respondent got the matrimonial home and she assumed \$30,000.00 of the debt, which did in all result in an unequal division in her favour. When she sold the house in May of 2008 she received about \$55,000.00.

[18] Since the parties' agreement, in meeting his financial obligations and particularly his obligations of spousal and child support as well as keeping up with his current living expenses, he fell behind again in his taxes, which again puts his bankruptcy proposal in jeopardy if he is not able to maintain his debt responsibilities. During this period of time, Ms. Carroll's income has been the spousal support of \$3,500.00 a month and she has received \$4,500.00 a month tax free in child support, which is all to be considered in terms of looking at income and expenses. Even though the child support payment is not taxable income, it is money coming into the household and a substantial portion of child support is intended to cover the basic expenses and needs of children which include a contribution towards the shelter, a contribution towards food, a contribution towards utilities and all of the other expenses that go with providing a roof over the head of children. So it is to be factored in to the overall picture of income and expenses.

[19] In total, she has received \$42,000.00 a year in spousal support, which is taxable, and as well the \$54,000.00 a year in child support, which is non-taxable. If one considers the income that the applicant has to earn in order to pay dollar for dollar the child support of \$54,000.00 a year, he has to earn in excess of \$100,000.00 a year to pay the child support alone.

[20] Even when one considers the adjustment period following the separation and the priority that Ms. Carroll rightfully gave to her children during that difficult time, and as well some adjustment for coping with the tragedy in the family, as I've indicated, that does not account for all of the time that has passed. The court

understands and appreciates that Ms. Carroll does suffer from depression and all of this has had an impact on her ability to work, but the court does have to take into consideration the obligation to work towards self-sufficiency and some demonstrable effort to do so.

[21] The burden is on the applicant to satisfy the court that there is a change in circumstances and that as a result of those changes it is necessary and appropriate to vary the obligations of child and spousal support. It is clear from the evidence that Dr. MacNeil is in a current state of financial crisis. It is also clear that he is still in very much a transition phase with respect to all of his financial obligations. If he wins his appeal, then the costs relating to the fine are gone but he still has his legal fees to pay. He still has to make his bankruptcy payments to 2010 and he has the back taxes and current taxes that he has to keep maintaining at the rate of \$10,000.00 a month, being a contribution towards current tax liability and a contribution towards arrears. He's been given some reprieve for the last couple of months by Canada Revenue, but on the other hand the debt is still there and the interest on that debt would continue to mount.

[22] On the other hand, if a new trial is ordered then Dr. MacNeil is going to have further legal fees and the outcome of that trial is unknown. The fine could be reinstated or he could be acquitted, but at any rate he would still incur further legal fees so the journey would not be over in terms of those obligations.

[23] There is no question, and I don't think it is disputed, that the mother made sacrifices in this situation for the benefit of their young family, that Dr. MacNeil and Ms. Carroll were involved in a partnership in which she was the parent who compromised her career potential for the benefits of being a stay at home mother to their children and in order for Dr. MacNeil to pursue his career to create income to support the family and it was a choice that both of them made.

[24] Ms. Carroll is entitled to spousal support and that entitlement continues. But, as I have indicated, the degree of entitlement is tempered by the changes in circumstances over the past five years and there is no evidence that she has done anything to move out of her total dependency on Dr. MacNeil.

[25] There are changes in her circumstances and it is incumbent upon her to look to her partner's income to some extent to assist and to reduce her income. It is of concern that even as of now there is still no plan in place before the court in terms

of any effort to at least alleviate or reduce to some extent her total dependency on Dr. MacNeil.

[26] She and Mr. Horne do have three growing boys living in the home and it has been indicated if one attributed income of \$35,000.00 to Mr. Horne that would result in a gross income of \$3,000.00 approximately a month. She is receiving currently \$3,500.00 a month gross and as well the child support, grossed up, that is close to somewhere in the vicinity of \$6,000.00 a month. The court is also mindful of the fact that the father does have the two boys in his care some of the time and there are expenses that go along with that.

[27] At the present time it would appear that Ms. Carroll's total net income alone is about \$87,256.00, which is about \$7,271.00 a month. If one added another \$1,800.00 a month net as a contribution from Mr. Horne that would mean they would have approximately \$9,071.00 a month net.

[28] It is clear from the evidence and it is clear from the demeanor of the parties throughout this proceeding, that this entire situation is overwhelmingly difficult for both parties. The applicant, Dr. MacNeil, is carrying an extremely heavy financial and workload burden and the stress must be close to intolerable. He is in bankruptcy, he is paying \$5,000.00 a month on that. He has been engaged in a lengthy legal battle to defend himself from very serious charges which can have an impact on his ability to earn a living. He has expended thousands of dollars to do so, much more than he ever expected, because of the protracted legal proceedings, and these charges all result from a time when the parties were living together as a family from 1998 to 2001. He has spent over \$80,000.00 in legal fees and it is not over yet. He has a fine of \$88,000.00 which may be erased, but the fine money that has already been paid will go to Canada Revenue or to Bankruptcy, but he will not see that money. In order to meet his obligations, he has fallen behind in his taxes, as I have indicated – and I ask you to pardon me for being repetitive during the course of this; there is so much evidence in this matter, both oral and documentary, that in putting together a decision I fall into being repetitive – in order to meet his obligations he has fallen behind in his taxes and he has to pay \$10,000.00 a month towards that, although I've already indicated that he has had some reprieve for a couple of months anyway. He has no personal credit and he relies on his wife's credit to get by. He has no control over his work schedule in the sense that work is assigned equally, but he works wherever and whenever he can. He is always available for work and never refuses. It is a dismal financial

picture that he faces and the end is still somewhere down the road. It will get better but the road there is a long and difficult one.

[29] Both parties have suffered severe emotional distress as a result of the separation and ongoing emotional and financial distress as a result of circumstances that have continued in both of their lives.

[30] The respondent, as I have indicated, has also suffered in that she was at home with the children when the police raided the house. Her husband left a couple of months later, leaving her in a traumatic state, caring for two young boys with no employment, having been out of the work force for many years and with no marketable skills. She had to endure the stress of the divorce proceedings. Then she finds a new relationship and they establish a home and family together, only to lose one of the children within a year to a horrendous death, and that has had an impact on her partner whose income was in the mid-\$40,000.00 and then he was unable to work for a period of time and the family has been assisted by donations from others.

[31] So what does the court do with all of this?

[32] There is a significant change in circumstances, the need continues but the court concludes that the ability to pay is not there. The applicant continues to work, but he needs to be able to get up in the morning and go to work facing all of the obligations that he has. I find on the evidence that he is working as much as he can and he needs to be careful even about his own health and his professional competence in the face of the amount that he is working and the financial stresses he is under. He has to get through this financial quagmire and requires some reprieve. His evidence is that he is even thinking about having to leave the province to improve his income situation, which would be a very difficult thing for him to do. He can't make that move with these outstanding matters still hanging over his head. Ms. Carroll continues to have a need and she spends every penny that she receives. So it is a no win situation in that I am satisfied Dr. MacNeil cannot keep the payments up at the rate that he has without inviting further financial crisis and yet Ms. Carroll needs the money.

[33] I am concerned that if Dr. MacNeil does not get some reprieve that he will suffer physically from exhaustion, both physical and emotional and that he could put himself at a risk of malpractice and that could jeopardize his income-earning

ability. If either of those things happen then he would be unable to pay anything for anyone at all and it seems to me that at this point in time steps have to be taken to try to give him some reprieve so that he can continue with his work and work towards clearing up the financial mess that occurred during the time that the parties lived together as a family.

[34] Despite the suggestion, there is no evidence before me that he is hiding income or that he is not doing everything possible to maximize his income. It is also clear that he is carrying an extraordinarily unusual high amount of debt.

[35] In terms of child support, I was asked to deviate from the table amount by virtue of the fact that the respondent earns an income in excess of \$150,000.00, which means that the table is not an automatic result, and that because of his extraordinarily high debt that was incurred to maintain the family when they were together, a substantial part of it, that that would persuade the court to deviate from the table amount. The court is not going to do that. It seems to me that those were circumstances that occurred and that were in existence at the time that the parties entered into the agreement for child support at the table amount, and it is my view that the circumstances are not sufficient to compel me to deviate from the table amount of child support. Certainly the amount of child support is required to be varied in the sense that his income is actually different from what was projected at the time and I will deal with that. I will also indicate at this stage that based on the table amount of child support, I am not satisfied that Dr. MacNeil can afford to pay spousal support at the current rate while he is paying child support and carrying these debts. Even though he is no longer paying the \$1,000.00 fine, as I have indicated, he still has ongoing legal expenses on top of what he still owes and he needs an immediate reprieve. He is court ordered to pay the support. There was a slip up in January because of the collection of his claimed income and he has a considerable amount of financial juggling to do. When I look at what he is required to pay just in terms of his bankruptcy proposal of \$5,000.00, the CRA of \$10,000.00, if one even attributes \$3,000.00 towards legal fees, \$4,500.00 towards child support, and a current gross amount of \$3,500.00 in spousal, that amounts to approximately \$25,000.00 a month, or \$300,000.00 net annually, there is very little left for him to live on.

[36] As I have indicated, this application was filed in May of 2008 and therefore with respect to child support I am varying the amount to \$4,208.00 a month effective June 1, 2008 based on his line 150 income in 2007 of \$354,888.00.

Effective June 1, 2009 child support will be varied to \$4,362.00 a month based on his 2008 income of \$368,702.00.

[37] I have determined that it is appropriate to vary the maintenance annually based on his previous year's income on June 1st of each year. Tax returns will be exchanged by May 31st of each year and the maintenance will be varied accordingly reflecting his line 150 income, unless there is an application to vary for other reasons.

[38] This does result in an overpayment of child support from June 1, 2008 to March 1, 2009 and that will be reflected in the child support payments for April and May.

[39] I am satisfied that with priority given to the child support and the amount generated that is necessary to pay that that he cannot afford to continue the \$3,500.00 a month spousal support payments at the present time. Also the court considers that five years after separation some income should be attributed to her and her partner as well as some reduction in her expenses by virtue of the sale of the home and the contribution of another adult to household expenses.

[40] I have previously addressed the issue of deviating from the table amount in terms of child support and that it is only in exceptional circumstances that one would do that, and while there are exceptional circumstances here, those circumstances for the most part did exist when the agreement was negotiated and signed because he was paying the bankruptcy proposal at that time, or it was actually foreseen in his statement of expenses; those facts existed. There are other changes in circumstances that have occurred but those circumstances bear on my determination with respect to spousal support.

[41] I am ordering a retroactive variation of spousal support to \$3,000.00 a month effective June 1, 2008 to account for the reduced costs of housing as a result of the sale of the property and the fact that the respondent's income turned out to be considerably less than what was projected when the agreement was reached. Effective June 1, 2009, and this will be a full five years post separation, the spousal support will be reduced to the sum of \$2,000.00 a month to account for a nominal contribution by her live-in partner that can be contributed to the household expenses. Commencing June 1, 2010 the spousal support will be reduced to \$1,500.00. That will be a full six years from the date of separation and it does give

the applicant some time to work towards being able to make some contribution to her own expenses by herself. I am not building in a review date here, it seems to me that this is not a situation where a fixed review date is appropriate because I do not want to invite further litigation. These parties have been through incredible stress as a result of their circumstances and court proceedings. A spousal support order in these circumstances would be indefinite by nature, but subject to an application to vary in any event as a result of any number of changes in circumstances, and by building in an actual review date I am inviting litigation. There are going to be a lot of changes in circumstances in the not too distant future in any event, when the bankruptcy debt is paid off. Further, we do not know the future of the tax charges and what the implications of that will be. There will be changes as well when the children start attending university, which is in the not too distant future. Any changes that would result in an application to vary will afford the parties an opportunity to sit down and create a support regime that maximizes the benefits to the families and reduces the costs, if possible, without resorting to litigation, which is costly both in financial and emotional terms.

[42] Whatever the overpayment is by way of child support, and I think it works out to be about \$3,230.00 but I'm not standing by that, as a result of the change to \$4,208.00, whatever that overpayment is should be divided between the two payments for the months of April and May.

[43] With regard to the spousal overpayment as a result of the retroactive variation of spousal support, that can be corrected by a credit of \$500.00 a month being afforded to Dr. MacNeil out of each monthly payment for the ongoing spousal support.

[44] As I have indicated, I have found this to be a very troubling and difficult case. I am mindful of the complexities of the evidence and the serious emotional issues that are tied to it. I have considered carefully all of the evidence and the arguments in this matter and it is necessary to remind ourselves that this is not a question of reward or punishment, it comes down to a matter of dollars and cents and need and ability to pay. And it is with those factors in mind that I have reached this conclusion, and I would ask you, Mr. Casey, to prepare the order.

ADDENDUM

[45] The applicant sought a variation of the provision for life insurance in the amount of \$2 million, naming the respondent and the two children as beneficiaries. The reduction in spousal support and the variation of child support, coupled with the current ages of the children are changes which warrant a variation of the life insurance responsibility. The obligation to maintain life insurance is therefore varied to \$1.5 million from \$2 million to reflect that change.

J.