

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Haynes v. Strickland, 2009 NSSC 392

Date: 20091217

Docket: 1201-057271

Registry: Halifax

Between:

James Haynes

Petitioner

v.

Mary Jacqueline Strickland

Respondent

Judge:

The Honourable Justice R. James Williams

Heard:

November 16, 2009, in Halifax, Nova Scotia

Counsel:

Elizabeth Wozniak, for the Petitioner
Barbara Darby, for the Respondent

By the Court:

[1] This is a variation application dealing with retroactive and current spousal support.

[2] James Haynes (born November 14, 1961, now 48) and Jacqueline Strickland (born December 22, 1963, almost 46) were married August 27, 1982. They had two children - both now adults. They separated October 20, 2001. They were married 19 years.

[3] In October 2002 a Separation Agreement was signed - it was incorporated into the Corollary Relief Judgment when they divorced in January 2003. At the time of the Separation Agreement Mr. Haynes earned approximately \$61,000.00, Ms. Strickland \$15,000.00. Mr. Haynes paid spousal support of \$1,350.00 per month pursuant to the agreement / Corollary Relief Judgment.

[4] Mr. Haynes applied to terminate the spousal support in April 2003 - the application was later withdrawn.

[5] Mr. Haynes paid the support until the end of May 2004. He asserted that the parties agreed to terminate spousal support at that time in a note purportedly signed by the parties. Ms. Strickland denied this - implying he had "doctored" the note. No original document was produced. No legal advice was sought at the time. I conclude Mr. Haynes failed to prove on the balance of probabilities that such an agreement was entered.

[6] Mr. Haynes retired in June 2004 and moved to the United Kingdom from June 2004 to September 2007. He stopped paying the support. A portion of his pension was garnished by Maintenance Enforcement starting in February 2005. He asserted he didn't know he had maintenance payable, arrears accruing. It is difficult to believe this evidence.

[7] The order was not changed. Despite the garnishee he took no steps to address the spousal support issue until 2007, in 2008 he obtained an order from the Newfoundland Supreme Court and obtained a provisional order stopping the garnishee.

[8] He then applied to this Court - seeking a retroactive variation and termination of ongoing spousal support.

[9] Ms. Strickland opposes the termination, and seeks payment of arrears.

[10] Both parties acknowledge some adjustment in the order retroactively, and now is appropriate.

The Law

[11] This application is made pursuant to section 17 of the *Divorce Act* which provides in part:

1. s. 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; or...
2. s. 17 (3) The court may include 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.
3. s. 17 (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.
4. s. 17(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) insofar as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

I have considered these provisions, factors.

[12] Counsel agreed that the parties' incomes and spousal support paid and after support incomes (gross numbers) for the years in question approximate the following:

Year	James Haynes Income	Support Paid	James Haynes after Spousal Support	Jacqueline Strickland	Jacqueline Strickland after support
2004	\$45,763	\$8,100	\$37,663	\$18,978	\$27,078
2005	\$28,894	\$6,782	\$22,113	\$19,799	\$26,581
2006	\$58,366	\$6,288	\$52,078	\$16,757	\$23,045
2007	\$46,838	\$6,480	\$40,358	\$26,478	\$32,958
2008	\$112,353	\$4,956	\$107,397	\$34,377	\$39,333
2009	\$59,143 (est)	\$643	\$58,500	\$37,500 (est)	\$38,143

[13] There are a number of changes in the parties circumstances since their divorce. They include:

- changes in their incomes in the years 2004-2009;
- Mr. Haynes retirement from the Canadian Armed Forces;
- The stress he experienced from that employment and since;
- Mr. Haynes remarriage, then second divorce (in 2007);
- Mr. Haynes cohabitation with his girlfriend, Christine Gull;
- Mr. Haynes surplus (if his disability pension included);
- Ms. Strickland's securing full-time work (as a Porter for the Halifax Health) earning approximately \$31,000.00 per year

[14] The parties are 48 (him) and 46 (her). They separated in October 2001 - 8 years ago. He was 40, she 38.

[15] I have considered and reviewed the evidence available to me, and the relevant portions of the *Divorce Act*. I have considered their incomes and circumstances (includes her needs, his ability to pay), and discretionary or potential monies or income as argued by counsel.

[16] I conclude that the appropriate spousal support on a yearly basis should be as follows:

- a. 2004
His income was \$45,763.00
He paid support of \$8,100.00 or \$675.00 per month
His income after paying support was \$37,663.00
Her income was \$18,978.00
Her income after receiving support was \$27,078.00

I conclude a support payment of \$800.00 per month is appropriate.

\$800.00 X 12 = \$9,600.00
\$8,100.00 was paid
\$1,500.00 arrears

- b. 2005
His income was \$28,894.00
He paid support of \$6,782.00 or \$565.17 per month
His income after paying support was \$22,113.00
Her income was \$19,799.00
Her income after receiving support was \$26,581.00

Mr. Haynes had moved to England and ignored the support order, or assumed it was “ok” even after the garnishee started in February 2005.

I would vary the spousal support payable for 2005 to \$565.17 per month. There are no arrears owing for 2005.

I would not vary the order below what he paid in 2005 noting his neglect of the obligation, failure to initiate a variation in a timely fashion.

- c. 2006
His income was \$58,366.00
He paid support of \$6,288.00 or \$524.00 per month
His income after paying support was \$52,078.00
Her income was \$16,757.00
Her income after receiving support was \$23,045.00

I conclude a support payment of \$1,200.00 per month is appropriate.

\$1,200.00 X 12 = \$14,400.00
\$6,288.00 was paid
\$8,112.00 arrears

I note that the “numbers” in 2006 approximate the incomes, support in the parties Divorce Order.

- d. 2007
His income was \$46,838.00
He paid support of \$6,480.00 or \$540.00 per month
His income after paying support was \$40,358.00
Her income was \$26,478.00
Her income after receiving support was \$32,958.00

I conclude a support payment of \$700.00 per month is appropriate.

\$700.00 X 12 = \$8,400.00
\$6,480.00 was paid
\$1,920.00 arrears

- e. 2008
His income was \$112,353.00
He paid support of \$4,956.00 or \$413.00 per month
His income after paying support was \$107,397.00
Her income was \$34,377.00
Her income after receiving support was \$39,333.00

I conclude a support payment of \$1,350.00 per month is appropriate.

\$1,350.00 X 12 = \$16,200.00
\$4,956.00 was paid
\$9,912.00 arrears

- f. 2009
 His income was \$59,143.00 (est)
 He paid support of \$643.00 or \$53.83 per month
 His income after paying support was \$58,500.00 (est)
 Her income was \$37,500.00 (est)
 Her income after receiving support was \$38,143.00 (est)

I conclude a support payment should be \$400.00 per month for 2009 and forward into 2010 payable on the first day of each month.

\$400.00 X 12 = \$4,800.00
\$643.00 was paid
 \$4,157.00 arrears to December 31, 2009

Total arrears to December 31, 2009 are:

2004 :	\$1,500.00
2005 :	nil
2006 :	\$8,112.00
2007 :	\$1,920.00
2008 :	\$9,912.00
2009 :	<u>\$4,157.00</u>
	\$25,601.00

These arrears shall be paid by February 28, 2010. They are payable as a lump sum - with no tax adjustment, it is not clamable as periodic support.

There are a number of reasons for this, including:

1. Mr. Haynes had the use of the money for these years, Ms. Strickland did not.
2. A "balloon" payment of this amount would create an unreasonable tax burden for Ms. Strickland.
3. I have considered this in setting the quantum of retroactive support for each retroactive year.
4. I lack the evidence to re-calculate the parties' tax retroactively.
5. As much as possible, this matter should be brought to a fixed certain conclusion (on this retroactive issue).

Termination

[17] Mr. Haynes seeks a termination of the obligation to pay spousal support. While the marriage was relatively long (19 years) the parties were relatively young at separation (40 and 38). Mr. Haynes has paid, or effectively paid, support for 8 years - since October 2001.

[18] Ms. Strickland has made strides towards self sufficiency. Based on the income information available to me, the parties age and circumstances, the history of the marriage and relationship, and the provisions and objectives of the *Divorce Act* before me I conclude that Mr. Haynes' support obligation should terminate after (just over) 10 years - on December 31, 2011 provided:

- a. the arrears to December 31, 2009 are paid in full on or before February 28, 2010.
- b. his periodic payments are maintained.
- c. he maintains a life insurance policy - payable to Ms. Strickland - in the amount of \$50,000.00 so long as he has a support obligation. He has and is ordered to maintain this policy.

[19] In the event these conditions or (any one of them) are not met the termination clause will be vacated and the question of a termination date subject of application by one of the parties, and the periodic support treated as indefinite, ongoing until terminated.

[20] I acknowledge that a change in circumstances may result in a variation application prior to December 31, 2011. This order does not preport to oust that jurisdiction, if circumstances occur beyond the control of the parties.

[21] All payments will be made by Mr. Haynes to Ms. Strickland through the Maintenance Enforcement office of the Province of Nova Scotia.

[22] I will hear the parties on the issue of costs.

J.S.C. (F.D.)

Halifax, Nova Scotia