

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Ferguson v. Gates, 2010 NSSC 88

Date: 20100305

Docket: 1207-002454 (026482)

Registry: Truro

Between:

Owen Ferguson

Applicant

v.

Heather Gates

Respondent

Judge: The Honourable Justice N.M. Scaravelli.

Heard: March 2, 2010, in Truro, Nova Scotia

Counsel: Alain J. Bégin, Esq., for the applicant
Sarah Lennerton, for the respondent

By the Court:

[1] This is an application to vary the provisions of a Corollary Relief Judgment, specifically, for an order:

- (1) Terminating spousal support;
- (2) Removing the respondent from the applicant's medical plan;
- (3) Removing the respondent's beneficiary of the applicant's life insurance policy currently held with the Teacher's Union.

[2] The respondent seeks dismissal of the application and an increase in spousal support.

BACKGROUND

[3] The parties were married on June 20th, 1981. They separated on February 1st, 2002 and were divorced on March 29th, 2004. There are three children of the marriage, namely: Nicole Joyce Wylie Ferguson (d.o.b. March 3, 1988), Julia Heather Ferguson (d.o.b. June 21, 1989) and William James Owen Ferguson (d.o.b. February 7th, 1995).

[4] The applicant obtained a Bachelor of Education degree from Acadia University in 1981 and began employment as a school teacher with Colchester-East Hants School

Board. In 1987, he completed a Master of Arts degree from St. Mary's University. In the Fall of 1990, he was granted sabbatical to pursue further education. The family moved to Mississippi in 1991 in order that the applicant could complete his Ph.D at the University of Southern Mississippi. The family returned to Nova Scotia in 1993.

[5] Early in the marriage, the respondent obtained her license as a real estate agent. She left that employment in 1987 as there was a joint decision that she would stay at home to start and raise a family. Although she worked sporadically, the respondent was essentially a homemaker until the date of separation in 2002.

VARIATION

[6] The relevant provisions of the Corollary Relief Judgment issued in May 2004 provides as follows:

4. Owen William Ferguson shall continue medical, dental and drug plan coverage for the children and Heather Ethel Mae Gates Ferguson available through his present employer.

...

6. (a) Owen William Ferguson shall pay spousal support to Heather Ethel Mae Gates Ferguson the amount of \$700.00 per month, payable on the 1st day of each month, and commencing April 1, 2004.

(b) Owen William Ferguson will maintain Heather Ethel Mae Gates as beneficiary of his life insurance through his employment as long as he is obligated to pay spousal support.

[7] In order for the Court to vary a spousal support order there must be evidence of a material change in circumstances since the granting of the original order for spousal support.

[8] Section 17(4.1) of the *Divorce Act* reads:

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.

[9] The objectives of any variation order varying a spousal support order are set out in Section 17(7) of the *Act*.

(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.

[10] Variation proceedings also require the Court to consider the factors for awarding spousal support as set out in Section 15.2(4) of the *Act*, namely; the condition, means, needs and other circumstances of each spouse including the length of time the spouses cohabited and the functions performed by each spouse during cohabitation. As reviewed by MacDonald, J. in *Kelloway v. Kelloway*, [2008] N.S.J.

No. 365:

6. The Supreme Court of Canada in *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.) and in *Bracklow v. Bracklow* [1999] 1 S.C.R. 420 confirmed that all four objectives set out in 15.2(6) and 17(7)(1) are to be considered in every case. No one objective has paramouncy. If any one objective is relevant upon the facts a spouse is entitled to receive support.
7. In *Bracklow v. Bracklow*, *supra*, the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support:
 1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.
 2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.
 3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligation to each other.

8. These rationales take into account both the factors set out in s. 15.2(4) and the objectives set out in 15.2(6) and s. 17(7)(1).

CHANGE IN CIRCUMSTANCES

[11] There has been a material change in circumstances since the granting of the Corollary Relief Judgment. The applicant's income has increased and both parties have re-married. The issue, therefore, is whether the changes are sufficient to warrant the variation sought by the parties.

[12] At the time of the divorce, the applicant earned an annual income of approximately \$70,000.00. He remains employed as a school teacher with a current income of \$85,000.00 per year. He is 50 years of age. The applicant re-married in August 2009 after a five-year common-law relationship. His spouse receives pension income in the amount of \$40,000.00 per year.

[13] Following the divorce, the respondent remained in the matrimonial home with the three children. She acquired ownership of the home by financing an equalization payment to the applicant. She still services this loan. The two older children currently

attend post-secondary education. Child support is paid directly to the two children by the applicant. The younger child remains at home with the respondent.

[14] The respondent is now 48 years of age. She resumed her career as a real estate agent following separation. Although she is affiliated with a local real estate company, she is considered self-employed. As a result, she does not have the benefit of paid sick leave, vacation, pension or a health plan. She acknowledges the real estate business is highly competitive in the Truro area given the large number of agents. According to the respondent's tax returns, her gross commissions revealed modest increases over the years following the divorce; 2005 - \$11,000.00; 2006 - \$15,000.00; 2007 - \$19,000.00. Her commissions dropped in 2008 and 2009. In 2009, she earned \$8,000.00. During that year she underwent surgery and suffered an injury as a result of a motor vehicle accident. Added to this was the effects of the downturn in the economy. The respondent is positive about future prospects. Her listings have increased as the economy rebounds. Although she has explored and applied for other job opportunities, the respondent enjoys her profession and values the flexible hours that enables her to be available for her son.

[15] The respondent has also re-married. She began a common-law relationship with her spouse in 2006. After a 10 month separation in 2008, they resumed co-habitation and married in October 2009. Her spouse is employed as a sprinkler-fitter. He earned \$24,600.00 in 2008 and \$35,000.00 in 2009 consisting of employment and EI income while on lay-off. He currently works for a company in Moncton requiring him to be away from home during the week returning on weekends. There are obvious expenses associated with this job. Future work is uncertain after the current construction project is completed. He contributes to monthly household expenses and has also contributed to some repairs to the home.

[16] The applicant submits a termination or reduction of spousal support is warranted on the basis of self-sufficiency. That the respondent is or ought to be self-sufficient.

[17] The respondent submits there has not been a change in circumstances sufficient to terminate or reduce spousal support. Further, that support should be increased due to increased cost of living as a result of inflation.

[18] I find the respondent has both a compensatory and non-compensatory claim to spousal support. The parties were married for 21 years. The respondent gave up a career in real estate and essentially withdrew from the workforce to raise a family. This enabled the applicant to pursue post-graduate studies which would qualify him for a higher teaching salary. The respondent continued her role as primary care-giver for the children following the separation. The respondent sustained a substantial economic disadvantage from the marriage breakdown. The marriage history created a pattern of dependency where the parties relied upon the applicant's income. At the time of the divorce there was a substantial disparity between their incomes.

[19] Upon reviewing the evidence, I find the respondent still maintains a compensatory claim. She has yet to overcome the financial disadvantages she suffered as a result of the marriage breakdown. I also find the respondent has a continued entitlement to non-compensatory spousal support. Since the granting of the divorce there has been no material increase in the respondent's income as a real estate agent despite working full-time. She has made reasonable efforts to improve her income from employment. While her re-marriage has enabled her to reduce living expenses, there has been no substantial change in her circumstances enabling her to attain self-sufficiency. Her spouse's income is not in any way comparable to the

income of the applicant and is somewhat unreliable. The present combined income of the respondent and her spouse is in the \$55,000.00 range. There has been a material change in the applicant's income. His spouse has a reliable income. I find the applicant has the ability to pay continued spousal support.

[20] Having determined the respondent is still entitled to spousal support, it would be inappropriate to remove her name as a beneficiary of the applicant's insurance policy. The Corollary Relief Judgment provides she is to remain a beneficiary as long as spousal support is payable.

[21] In terms of the health plan, the applicant states that his current spouse has been diagnosed with an illness and, although she has her own health plan, all of the costs are not covered. As indicated, the respondent does not have employment benefits including a health plan. She does not have the current means to purchase private health insurance coverage. As a result, the provision for coverage set out in the Corollary Relief Judgment shall remain.

[22] The respondent requests an increase in spousal support based on the increase in the cost of living following the divorce. Assuming inflation has occurred over a

six-year period, the question to be determined is whether it brought about the need for additional support. There is no evidence before me to support that finding. Although still not economically self-sufficient, the additional income the respondent receives from her current spouse would likely off-set any affects of inflation.

[23] As a result, the applications by both parties are dismissed and the terms of the Corollary Relief Judgment shall remain. Given the results each party shall bear their own costs.

J.