

SUPREME COURT OF NOVA SCOTIA

Citation: Jardine-Vissers v. Vissers, 2011 NSSC 195

Date: 20110518

Docket: 1207-003527

Registry: Halifax

Between:

Jo-Ann Elizabeth Jardine-Vissers

Petitioner/Applicant

and

Peter Henry Vissers

Respondent

Judge: Justice Carole A. Beaton

Date of Hearing: April 27, 2011

Date of Decision: May 18, 2011

Counsel: Jane Lenehan, Counsel for Jo-Ann Jardine-Vissers
Julia Cornish, Q.C., Counsel for Peter Vissers

By the Court:

Introduction

[1] The parties came before the Court following a Petition for Divorce filed by the Applicant in November 2010. A Motion for Interim Relief filed by Ms. Jardine-Vissers, the Petitioner/Applicant (hereinafter “the Applicant”), dated November 22, 2010 resulted in a January 2011 Interim Consent Order (hereinafter “interim order”) regarding the following matters:

- (a) Exclusive possession of the matrimonial home by the Applicant;
- (b) Exclusive possession of the cottage by the Respondent;

- (c) specific directions regarding the listing for sale of certain matrimonial assets comprised of three lots of land;
- (d) a prohibition on encumbrance or disposition of any business or matrimonial assets by either party;
- (e) direction to the Respondent to forthwith instruct the issuing of certain dividend cheques to the Applicant from the business, Woods Realty for the period January - April, 2011; and
- (f) a requirement that the Respondent maintain existing health insurance coverage to the benefit of the Applicant.

[2] That same order also provided for the matter to return to the Court for a hearing on the Motion for Interim Relief on April 27, 2011 which hearing is the subject of this decision.

Relief Sought

[3] The Applicant seeks the following relief:

- (a) interim spousal support of \$3,894.00 per month, commencing May 1, 2011;
- (b) a requirement that the Respondent change the designated beneficiary on his life insurance policy to the Applicant;
- (c) that paragraphs 1 and 2 of the Interim Order relating to exclusive possession of the matrimonial home by the Applicant, and exclusive possession of the cottage by the Respondent remain in effect;
- (d) that paragraph 3 of the Interim Order requiring listing for sale of certain assets (3 lots of land) remain in effect;
- (e) that paragraph 4 of the Interim Order prohibiting the disposition or encumbrance of business or matrimonial assets remain in effect;
- (f) that paragraph 7 of the Interim Order requiring the Respondent to maintain coverage for the Applicant on his current health insurance policy, including appropriate reimbursement to the Applicant thereunder, remain in effect;
- (g) that the Respondent be required to reimburse the Applicant in cash equivalent to the difference between the amount of funds payable to her pursuant to paragraphs 5 and 6 of the Interim Order and the cash she

directly received, and further that the Respondent return to Woods Realty a dividend payment of \$10,000 made to him in early 2011; and

- (h) that the Respondent provide to the Applicant keys to permit her to access the sheds and various outbuildings located on the site of the matrimonial home.

[4] Mr. Vissers, the Respondent (hereinafter “the Respondent”), both in his evidence and through the submissions of his counsel, advised he is in agreement with the following:

- (a) he will continue the health insurance coverage for the Applicant as per item (f) above (and paragraph 7 of the Interim Order);
- (b) he will provide the Applicant with the keys necessary to afford her access to the sheds and outbuildings located at the site of the matrimonial home as per item (h) above;
- (c) he will not dispose of or encumber any business or matrimonial asset without the prior written consent of the Applicant as per item (e) above (and paragraph 4 of the Interim Order);
- (d) he will immediately list for sale with Woods Realty, the so-called “Brookfield Lots” as per item (d) above (and paragraph 3 of the Interim Order); and
- (e) the parties shall continue their respective exclusive possession of the matrimonial home and the cottage as per item (c) above (and paragraphs 1 and 2 of the Interim Order).

Issues

[5] The following three issues remain outstanding:

- (1) The Respondent having conceded that the Applicant meets the evidentiary hurdle to establish a claim for interim spousal support, what is the appropriate quantum of support?
- (2) Should the Respondent be required to change the designated beneficiary on his life insurance policy to protect the Applicant’s spousal support entitlement, and if so, what should be the amount of the coverage?
- (3) Should the Respondent be required to reimburse the Applicant in cash equal to the difference between the amount of funds payable to her pursuant to paragraphs 5 and 6 of the Interim Order and the cash she directly received, and further, should the Respondent be required to return

to Woods Realty a dividend payment of \$10,000 made to him in early 2011?

Background

[6] The parties were in a 29.5 year marriage and their children are now grown. The Applicant is a 49 year old part-time electrologist who has operated a home-based business since the mid 1990's. The Respondent has been employed as a real estate agent since the mid 1990's. The Respondent was the primary income-earner during the marriage, and the Applicant also worked outside the home, although primarily on a part-time basis, particularly in recent years. In 2007, the parties purchased Woods Realty (held 51% by him and 49% by her), the Truro-based business which employs 14 real estate agents in addition to the Respondent. This purchase was intended to help secure for the couple a future retirement income.

[7] Each party filed a series of Affidavits and also Statements of Income, Statements of Expenses and Statements of Property, all of which were before the Court as exhibits. Both the Applicant and the Respondent gave evidence.

[8] Overall, both parties presented as credible witnesses, although they were at odds as to their respective interpretations of various events that have occurred since their separation, and more particularly, since the Interim Order was reached, the majority of which relate to their respective financial circumstances since separation.

[9] Merely by way of example, the Applicant never shied away from acknowledging in her viva voce evidence that she did not report all of her income to Canada Revenue Agency on her 2010 Income Tax Return, or in relation to her Statement of Income previously file with the Court. I did not form the impression the witness was being evasive, avoiding answers or in any way trying to mislead; to the contrary, she seemed quite willing to discuss these omissions when put to her on cross examination.

[10] Likewise, the Respondent agreed on cross examination that he had not followed the Interim Order to the letter in relation to making payments to the Applicant (which were drawn as dividends from the parties' business assets) by failing to deliver the entire payments directly to her. For example, he unilaterally decided to apply a dividend payment intended for the Applicant to an insurance bill

for the matrimonial home occupied by the Applicant. In the same way, the Court did not sense that he was at any time being evasive or misleading in his evidence.

[11] It is very clear that both parties continue to struggle with the financial ramifications of separation. More recently, both have engaged in certain “power plays” which suggest attempts to control the other party through financial means. This was illustrated by events such as the Applicant’s acknowledged failure to transfer the listing of the so called “Brookfield Lots” from the realtor carrying those properties to Woods Realty in a timely manner (contrary to the Interim Order) and also in the Respondent’s unilateral decision to pay himself a dividend from Woods Realty in the amount of \$10,000 (contrary to the Interim Order).

[12] If nothing else, the whole of the evidence before the Court demonstrated, not surprisingly, that the parties need to move toward the disposition of some assets and a consequent retiring of some matrimonial debt as quickly as possible, in order to allow them to proceed on a more stable financial footing.

Spousal Support

[13] The Applicant seeks interim monthly spousal support going forward. Section 15.2 of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) provides for spousal support orders, including interim orders, and guides the Court as to the factors and objectives to be considered:

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.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim 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, pending the determination of the application under subsection (1).

...

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.

...

Objectives of spousal support order

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

(b) apportion between the 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 spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[14] The burden rests with the Applicant to establish a case for spousal support. The Respondent concedes the Applicant can meet that threshold, but argues that there are several factors this Court should take into account, in either declining to make an award, or in the alternative, making an award significantly below the amount sought by the Applicant. The Respondent cites those factors as:

- (i) the lack of appropriate effort by the Applicant to take any, or appropriate, steps to enhance her current earning capacity, and correspondingly, the ability of the Court to impute a greater income to the Applicant than that shown on her Statement of Income - her needs.
- (ii) the Respondent's current income level, the financial circumstances of the parties' business, and the fact he has been making payments on

matrimonial debt to the benefit of the Applicant in an amount that equates or exceeds any spousal support quantum that might be assessed against him - his ability to pay.

(i) The Applicant's Needs

[15] The Applicant described steps she has taken since separation to increase her client bookings in relation to her part-time, home-based employment as an electrologist, in which she has been engaged since 1996. She also described having unsuccessfully applied for two jobs since separation, both with salaries in the range of \$40,000. The Respondent argues the efforts of the Applicant have been insufficient, and she has not looked in a meaningful way for realistic employment opportunities such as minimum wage jobs. The Respondent urges the Court to impute to the Applicant annual earnings of \$18,000.00 per year (assuming a full-time job at minimum wage).

[16] The Applicant's assertion was that she should be employed in the parties' real estate business where there exists the opportunity for her to earn greater than minimum wage, thereby increasing her financial independence.

[17] The evidence established that given the history of the parties' breakdown in communication (following separation) and the level of mutual mistrust which has grown, even in the face of the Interim Order, that while having the Applicant employed in the business might be an attractive solution to her immediate income needs, it is nevertheless an entirely unworkable and unrealistic suggestion. One struggles to envision a functional arrangement whereby the parties could work together in an office setting.

[18] It is not necessary, in an application for interim support, for the Court to scrutinize the Applicant's efforts at self sufficiency to the same degree as might otherwise be appropriate and relevant in a final hearing. For the purposes of this interim hearing, I am satisfied that the Applicant has made reasonable and appropriate efforts to raise income, and obviously her efforts should continue.

[19] There is no evidence that persuades me the Applicant is intentionally underemployed. The discrepancy in income between her 2009 Income Tax Return (\$19,710) and her current Statement of Income (\$7,200.00), was explained in her evidence of the income-splitting between her and the Respondent as reflected on

her 2009 Income Tax Return on the advice of the parties' accountant. I am not persuaded the Applicant is intentionally under-employed such that it might negatively influence any interim support award, much less permit the Court to impute income to her in the manner the Respondent suggests.

[20] The evidence of the Applicant clearly establishes additional income (unreported for tax purposes) of \$1,500.00. The Applicant also acknowledges she has collected \$1,000 in profits from the parties' rental properties and the Respondent has, in his evidence, agreed she should continue to do so (although the precise amount of future income that might be generated from that venture remains somewhat vague from the evidence). Those two sources of income, added to her \$7,200.00 in current annual employment income, permit me to conclude the income of the Applicant, for purposes of the interim spousal support calculation, is \$10,000.00 per year.

[21] Exhibit 4 contained the Statement of Expenses of the Applicant. It included "projected-only" monthly expenses for a new vehicle (\$500.00) and a new roof for the matrimonial home (\$1,500.00) (both of which may be needed, but are not currently incurred). Although the Applicant was not challenged on other aspects of her budget, it is clear that items such as \$400 per month for trips to visit her grandchildren, \$300 per month for entertainment and \$500 per month for savings (RRSP) cannot be sustained under her current circumstances. The Applicant is operating in a significant deficit position each month. Her average monthly income of \$833.00, less reasonable expenses of approximately \$3,200.00 per month leaves a \$2,367.00 monthly shortfall.

(ii) The Respondent's Ability to Pay

[22] The Respondent's 2010 Income Tax Return documents a total income at line 150 of \$94,111.33 realized from \$78,072 in T4 income from real estate sales commissions, \$2,518 in additional employment income, and dividends from a taxable Canadian corporation of \$13,519. From this must be subtracted, as the evidence of the Respondent established, employment expenses of just under \$20,000, giving him annual income of \$74,000. The evidence of the Respondent indicated that dividends recently taken from the business Woods Realty in the early winter of 2011 were attributed to his 2010 Income Tax Return on the advice of his accountant. Accordingly, another \$13,500 can be deducted on the basis that further dividend payments are unlikely in the near future. I accept the Respondent's

evidence regarding the remoteness of that occurrence, given Woods Realty's pending 2012 mortgage obligation and the uncertainty of any final disposition of matrimonial and business assets and debts as between the parties.

[23] The Applicant submitted that the income earning potential of the Respondent is much greater than shown on his 2010 income tax return, based on his returns from 2008 and 2009. This assertion is not borne out in the evidence.

[24] The Applicant also submitted that any employment expenses claimed by the Respondent must be tempered to reflect that he realizes a personal benefit from certain of those expenses, such as for example, vehicle mileage or his cell phone. Again, the Court takes a broad view for the purposes of this hearing and further, there was no detailed evidence available as to the particularities of those expenses, given the Respondent's evidence that all of the details of his employment expenses were in the possession of his accountant at the date of hearing and that his 2010 Income Tax Return was still in draft form.

[25] In view of the fact that the quantum of employment expenses has been consistent over the last several Income Tax Returns filed by the Respondent, it is not unrealistic for the Court to accept, for the purposes of this matter, the number contained in the Respondent's 2010 return in relation to those expenses. The Court is not prepared, in this interim proceeding, and in light of limited evidence on the point, to scrutinize to any greater extent any benefit the Respondent might realize in relation to business expenses such as his personal use of his cell phone or mileage claims for his vehicle.

[26] The Applicant also argued the Court should consider the relative health of the parties' business, Woods Realty, in which the Respondent is employed, and the recent history of payment of dividends as evidencing the Respondent is in a better financial position than his 2010 Income Tax Return would suggest, and that there are funds available to permit him to realize a greater income from the company.

[27] Both parties discussed the pending 2012 mortgage due by the business Woods Realty, in the amount of \$190,000. In their evidence both parties recognized the role this considerable obligation plays in terms of the question of the relative financial health of the company. It is for this reason the Respondent does not agree that there is at present capacity in the company to allow him to realize additional income from it or in the alternative, to pay dividends to the parties.

[28] Clearly the health of the business will likely factor into any future property division, however for the purposes of a determination of quantum of interim spousal support it would seem unnecessary to do anything more than recognize that this obligation looms.

[29] The Respondent vigorously promoted in his evidence that the ongoing monthly obligations of the company have left it barely solvent. Through cross examination it was revealed that all of the looming debt obligations the Respondent specifically identified, save and except the 2012 mortgage due, are annual or monthly anticipated expenses in the usual course of business, all of which have been met by the business to the date of hearing. As a result, the Court is not prepared to recognize that any of the debts enumerated in paragraph 21 of the Respondent's affidavit of April 26, 2011 (Exhibit 7) place him in a situation where he cannot realize an income from the business commensurate with his 2010 T4 amount.

[30] Given the whole of the Respondent's documentation and his evidence, the Court is satisfied that for the purposes of calculating interim spousal support the Respondent's income can be identified as employment income of \$78,000 plus additional employment income of \$2,500, less employment expenses of \$19,650, for a total income of \$60,850 per year.

[31] As was the case with the Applicant, the Respondent's Statement of Expenses records payment for expenditures not made but only contemplated, and expenditures for items such as holidays which cannot be sustained given his current circumstances. Clearly, both parties have "needs" but also "wants". As noted by MacLaughlin, C.J. in *Bracklow v. Bracklow* [1999] 1 S.C.R. 420, at paragraph 54:

“. . . It does not follow from the fact that need serves as the predicate for support that the quantum of the support must always equal the amount of the need . . .
Need is but one factor to be considered . . .”

[32] While each party shows a deficit monthly budget, the Applicant earns significantly less than the Respondent, and while both have contributed in their respective ways and with their respective financial abilities to trying to keep their creditors at bay, in the final analysis the Applicant needs assistance and the Respondent is in a position to provide it.

[33] It is to be remembered this is an interim application for spousal support and therefore it is not intended that the Court should conduct an analysis of the financial histories of and future prospects of the parties to the same extent a final hearing would demand. Rather, the Court should concern itself more with what is happening at present and less with the long-term consequences to either party of the termination of their marriage.

[34] Based upon all of the evidence before me, I am persuaded that the relative financial position of each party should properly result in an interim monthly spousal support payment by the Respondent in favour of the Applicant in the amount of \$1,800.00. Payments shall be due on the first day of each month, effective May 1, 2011. The spousal support award is made subject to the provisions of Section 17(1) of the *Divorce Act, 1985*, as to possible future variation.

[35] The Respondent has been paying on certain matrimonial debts on a monthly basis, specifically concerning two lines of credit, a Scotia Bank loan and a CIBC Visa bill. The Respondent argued that his total monthly payments in relation to servicing those debts (\$2,500 per month), which are obligations of both parties, equate to or exceed any amount of monthly spousal support he might otherwise be required to pay.

[36] Nevertheless, it is clear from the whole of the evidence and the history of the parties' treatment of one another, in particular since the Interim Order, that the level of mistrust between them, combined with the unilateral steps taken by each party to handle financial obligations in a certain fashion, should leave the Court unwilling to rely on the parties to conduct themselves outside the parameters of an Order setting out interim spousal support.

[37] The reality is that the matrimonial debts need to be serviced, apart from the impact of this decision, which will cause monies intended to be for the benefit of the Applicant to go directly to her as opposed to having the Respondent control the application of certain payments to certain debts. Conversely, the reality of requiring the Respondent to provide a monthly spousal support payment means the problem the Applicant has experienced with regard to realizing income by way of cash from the Respondent will now shift to the challenge to her of participating more fully in servicing monthly debts.

[38] The Respondent claimed in his affidavit and in *viva voce* evidence that he was desirous of putting forward a comprehensive settlement proposal to the Applicant however such a proposal has not been forthcoming. It would seem that as long as the Respondent might be permitted to continue servicing matrimonial debt in lieu of a spousal support payment, that arrangement would not be an impetus to crafting a resolution and might serve only to protract the final division of debts and assets. The Court is not prepared to leave the status quo arrangement in place and simply endorse the Respondent's continued payment of debt in lieu of spousal support, for the reasons set out herein.

[39] The Respondent alternatively urged the Court to direct each party regarding debt servicing if an interim support order was made. While it may seem at first blush seem facile, the most the Court should do at this point is acknowledge that it would be reasonable to expect the parties to share in the monthly debt payments proportionate to their respective adjusted monthly incomes. It would be unwise to require anything more specific at this time, insofar as the Court might have jurisdiction to do so, in light of:

- (a) the interim nature of this order;
- (b) the uncertainty as to how the parties may choose to amend their monthly spending in light of this decision; and
- (c) the lack of clarity in the evidence as to whether the payments which the Respondent has been making to four specific debts as enumerated in his financial statement (Exhibit 10) are the minimum payments required, or whether a lesser or other payment on each or any of the debts is possible.

[40] Furthermore, the Applicant is always free to instruct the Respondent to apply a portion of the spousal support payment to a third party creditor

Insurance Coverage

[41] The Respondent enjoys health insurance through his employment with Woods Realty, which policy provides coverage for both parties. The Court heard evidence as to efforts by the Applicant to obtain reimbursement under that policy. Without reviewing here the specifics of challenges she has faced in realizing reimbursement, it is sufficient to note that it is appropriate the coverage continue as is presently provided for through the Respondent's employment. Furthermore, in

his evidence the Respondent not only reiterated his commitment to maintain that coverage, but additionally to ensure that he takes all steps necessary and appropriate to cooperate with and assist the Applicant in realizing maximum and timely reimbursement under the policy.

[42] Regarding a life insurance policy held by the Respondent through Sunlife (page 4, Exhibit 9) in the face amount of \$100,000, the beneficiaries of that policy are currently the parties' grown children. The Applicant seeks to be named as the beneficiary of that policy until further court order or agreement, so that her spousal support entitlement can be appropriately protected.

[43] Section 15.2(3) of the Divorce Act provides as follows:

Terms and conditions

15.2(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.

[44] Section 15.2(3) creates an ability in the Court to require the Respondent to secure life insurance coverage in favour of the Applicant to protect her interim spousal support payment. Although the Applicant had requested the Respondent carry a minimum of \$200,000 insurance in her favour, it is apparent from the evidence that the Respondent's current coverage of \$100,000 is what is affordable for him, given the cost of the premiums and his present income.

[45] Accordingly, I am satisfied the \$100,000 life insurance coverage held by the Respondent is sufficient to protect the Applicant and the Respondent shall name her as beneficiary on that policy. Ultimately, a final disposition of matters between the parties may reveal another result, however, for present this coverage directed to the Applicant as beneficiary, meets the intended goal. It is to be noted that the parties also enjoy an insurance policy carried through Woods Realty having a face value of \$350,000, being coverage designed to protect both parties as shareholders of the company, to provide each with the ability to ensure the longevity of the company and allow it to sustain itself in the event of the untimely death of the other shareholder.

Reimbursement to the Applicant

[46] The Applicant submits the Respondent should be required to reimburse her for the difference between the payments he was to make in the Interim Order and the cash in hand actually realized by the Applicant as a result of the Respondent applying portions of some payments to certain debts as opposed to making the payments directly to her.

[47] While it has been noted herein the role certain past actions by the Respondent have played in the Court's determination that a designated spousal support payment on a monthly basis is necessary, nonetheless the reality is the Applicant ultimately benefited from payments made under the Interim Order. While she did not realize all of the cash owing to her, some of her debt obligations were being addressed through the Respondent's actions. Accordingly, spousal support payable pursuant to this decision will be from May 1, 2011 forward and will not require any type of reimbursement or retroactive contributions by the Respondent to the Applicant.

[48] In a related matter, the Respondent decided, as majority shareholder, to remove \$10,000 in dividends from the business asset Woods Realty. He perceived this as "fair", as a result of him having been required by the Interim Order to arrange for certain dividend payments to the Applicant. The Court does not share the Respondent's view and accordingly it is important, as ultimately conceded by both parties, that this decision specifically directs that neither party is permitted to encumber or dispose of any matrimonial or business assets without specific written consent of the other party. Again, given the interim nature of this decision the Court declines to require repayment of the \$10,000.00 dividend to the business, insofar as there might be jurisdiction to do so in an interim spousal support hearing.

[49] I ask that counsel for the Applicant prepare the Order giving effect to this decision, which shall provide for registration of the Order with the Director of Maintenance Enforcement at the election of the Applicant.

J.