SUPREME COURT OF NOVA SCOTIA
Citation: Kenny v. Kenny, 2011 NSSC 428

Date: 20111118
Docket: 1201-063135
Registry: Halifax

Between:

Maurice Joseph Kenny

Applicant

and

Sharon Lynn Kenny

Respondent

Judge:	Justice Carole A. Beaton
Date of Hearing:	October 7, 2011
Date of Oral Decision:	October 13, 2011
Written Release of Oral Decision:	November 18, 2011
Counsel:	Sarah Harris, Counsel for Maurice Kenny Judith Schoen, Counsel for Sharon Kenny

By the Court:

Introduction

[1] This is the matter of Maurice Joseph Kenny, as the Applicant, represented by Ms. Harris and Sharon Lynn Kenny, also known as Sharon Lynn LeClerc, who is represented by Ms. Schoen.

[2] The Applicant, Mr. Kenny seeks to vary the provisions of the parties' Corollary Relief Judgment as it pertains to parenting time and spousal support. The Corollary Relief Judgment emanated from the decision of Justice Legere Sers in *Kenny v. Kenny*, 2009 NSSC 348.

[3] Specifically Mr. Kenny seeks to have his present parenting time with his daughter Gabrielle, consisting of every second weekend from Friday to Monday and each Wednesday evening overnight, expanded to include an additional overnight each week, preferably on Thursday, plus additional specifically identified times with Gabriel.

[4] With respect to spousal support, Mr. Kenny seeks to terminate his obligation to pay $550 per month to Ms. Kenny. I should mention at the outset that although it was not contained in the pleadings, there was a reference in the affidavit evidence of Ms. Kenny concerning section 7, extraordinary expenses related to orthodontic work for Gabriel. At the outset of the hearing counsel advised that they were agreed in principle that this was an expense to which Mr. Kenny had an obligation to contribute and recognizing the law, it was simply a question of having the parties do the appropriate math.

[5] So, I am not making any order or decision with respect to that matter today, but simply identifying that it was discussed on the record at the outset of the hearing last day and accordingly, it is my understanding that Mr. Kenny will be making that proportionate contribution.

Issue No. 1 - Variation of the Parenting Plan

[6] Turning now to the first aspect of Mr. Kenny's application, the question of variation of the parenting plan, the burden rests with Mr. Kenny, the Applicant, to establish on a balance of probabilities that there has been a material change in circumstances. If I accept there has been such a change, then the question for the court is: what is in the best interests of the child Gabriel, having regard to all of the relevant circumstances?

[7] The applicable provisions of Section 17 of the *Divorce Act* relating specifically to a variation of a parenting and/or custody order are:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> . . .
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> . . .
>
> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
>
> . . .
>
> (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.
>
> . . .

[8] What is meant by a change in circumstances? Chief Justice MacLaughlin, writing on behalf of the Supreme Court of Canada said this in *Gordon v. Goertz*, 1996 2 S.C.R. 27 at paragraph 12:

> 12 What suffices to establish a material change in the circumstances of the child? Change alone is not enough; the change must have altered the child's needs or the ability of the parents to meet those needs in a fundamental way: Watson v. Watson 1991 CanLII 839 (BC SC), (1991), 35 R.F.L. (3d) 169 (B.C.S.C.). The question is whether the previous order might have been different had the circumstances now existing prevailed earlier: MacCallum v. MacCallum (1976), 30 R.F.L. 32 (P.E.I.S.C.). Moreover, the change should represent a distinct departure from what the court could reasonably have anticipated in making the previous order. "What the court is seeking to isolate are those factors which were not likely to occur at the time the proceedings took place": J. G. McLeod, Child Custody Law and Practice (1992), at p. 11-5.

[9] These observations were made by Chief Justice MacLaughlin in the context of an application to vary custody but the principle is equally applicable on the question of a variation of Mr. Kenny's access schedule which is before me in the instant case.

[10] Mr. Kenny asserts that any of the following events amount to a material change in circumstances since the making of the last order in the context of the parenting arrangement:

> (a) Ms. Kenny has relocated to another community which had the effect of adding to Mr. Kenny's driving times and the cost associated therewith in exercising access time with his daughter.
>
> (b) The parties, by mutual agreement, altered the terms of the Corollary Relief Judgment to allow that on the Monday mornings of every second weekend when Gabrielle has been in the Applicant's care, Gabrielle is returned to her mother's home by her father before school as opposed to being delivered to school.
>
> (c) Gabrielle has, since the making of the Corollary Relief Judgment, become the owner of a horse which necessitates her spending more time at the stable where the animal is housed, thereby "cutting into" Mr. Kenny's "quality time" with Gabrielle.
>
> (d) Ms. Kenny has failed to abide by the Corollary Relief Judgment by failing to provide Mr. Kenny with additional parenting time as contemplated in the Corollary Relief Judgment.

(a) Ms. Kenny's relocation

[11] Mr. Kenny's evidence was that Ms. Kenny's relocation from Bedford to Fall River at a specific date, which is unknown to me, has changed his one way driving distance from its former six kilometres to thirteen kilometres, which by my calculation is a difference of seven kilometres per trip.

[12] The relevant provisions of the Corollary Relief Judgment concerning transportation of the child require Mr. Kenny to pick up his daughter every second Friday at her mother's home. It further states that on Monday mornings Gabrielle "shall be delivered to school" but does not specifically direct that the Applicant himself drop Gabrielle off at school. Mr. Kenny agreed in cross examination that it was possible for Gabrielle to take the bus to school from his home. Surely that would be the obvious solution to at least some of Mr. Kenny's concerns about

increased cost associated with driving distances. Likewise, the Corollary Relief Judgment requires that on Thursday mornings Gabrielle "shall be delivered to school", those being the Thursday mornings following Mr. Kenny's Wednesday night weekly access, again with the implication being that the responsibility of seeing that Gabrielle gets to school on Thursday mornings rests with Mr. Kenny. Once again, I suggest that having Gabrielle take the bus could be a partial solution to Mr. Kenny's concerns.

[13] The Corollary Relief Judgment does not specifically require that Ms. Kenny deliver Gabrielle to Mr. Kenny for weekday access, although Mr. Kenny's evidence is that he and Ms. Kenny have, between themselves, agreed that Ms. Kenny will drop Gabrielle to him on those weekdays when she is not working and when road conditions and weather do not prevent it.

[14] I have inferred from Mr. Kenny's evidence on this last point that this particular arrangement also contributes to his increased cost of access, although Mr. Kenny has not provided any details as to what the frequency of him assuming the Wednesday evening transportation, as opposed to Ms. Kenny doing it, has been over time.

[15] Overall, I have great difficulty accepting that the move by Ms. Kenny can be properly characterized as a material change in terms of its affect on Mr. Kenny's ability to spend time with his daughter. An additional seven kilometres of driving one way on Thursday morning, coupled with an additional fourteen kilometres of driving round trip every second weekend, hardly amounts to a material change in my view.

[16] There is no evidence before the court that the increased driving has somehow meaningfully prevented or inhibited Mr. Kenny in his ability to spend time with his daughter as per the Corollary Relief Judgment provisions.

[17] Gabrielle's school location has not changed regardless of her mother's move. Given that both parties live within the boundaries of Halifax Regional Municipality, a fact of which I think I can take judicial notice, a seven kilometre change in the distance between their respective residences is virtually negligible, especially given that the Corollary Relief Judgment is silent as to any residence requirement for either party or as to matters regarding mobility.

[18] Furthermore, the evidence of Mr. Kenny fails to provide any specific figures to explain or cost out the financial implications for him of Ms. Kenny's relocation, despite his repeated references in his evidence to increased costs associated with exercising access to his daughter. By his own evidence, Mr. Kenny could have his daughter take the bus to school from his home, which would presumably help to reduce any expenses in that regard.

[19] I am not satisfied there is anything about Ms. Kenny's move that has materially impacted the relationship between Mr. Kenny and Gabrielle.

(b) Mutual agreement for Monday morning transportation

[20] The change in practice over what was contemplated in the Corollary Relief Judgment was clearly, on the evidence of both parties, a mutual decision which obviously was intended to accommodate both Mr. Kenny's schedule and Gabrielle's needs. The evidence before me establishes that because Mr. Kenny drops Gabrielle off at approximately 7:15 a.m. on Mondays to accommodate his work schedule, the drop off is to Ms. Kenny's house and not Gabrielle's school, as it is more appropriate for Gabrielle to be home and not yet in school at that hour of the morning.

[21] The parties are to be complimented for coming to a solution on their own to adjust the Corollary Relief Judgement, as has obviously occurred. Again, I fail to understand how this consensual and very minor adjustment to the drop off location two times per month could now be relied upon by Mr. Kenny as anything remotely approaching a material change in circumstances.

(c) Gabrielle's time with her horse

[22] The evidence of both parties is that Gabrielle has, for some considerable period of time and certainly prior to the time the Corollary Relief Judgment was issued, engaged her passion for horses through her involvement with the local stable. The difference is that Gabrielle now owns a horse whereas previously she cared for an animal that did not actually belong to her.

[23] Mr. Kenny asserts that Gabrielle's increased time at the barn and in caring for and competing with her horse has cut into his parenting time such that his

"quality time" with Gabrielle now often consists only of the time spent transporting her to and from the barn.

[24] The evidence of both parties, both in their affidavits and through cross examination, clearly establishes for the Court the picture of a young teen whose interest in horses predates the Corollary Relief Judgment and who devotes much of her time to the pursuit.

[25] With all due respect, it seems from the whole of the evidence that Gabrielle's devotion to this hobby has had the effect of keeping her away from home and/or out of the company of *both* parents, not just Mr. Kenny. I agree with Mr. Kenny's counsel's observation that Justice Legere Sers contemplated in the original hearing that future adjustments would likely need to be made to the parenting plan. At paragraphs 49 and 50 of the trial decision, Justice Legere Sers said:

> [49] This order delineating parenting time may well need to be revised in the future to adjust to the ages and stages of development of this young child who is moving into junior high in the September 2009 year.
>
> [50] The parenting schedule herein is a blueprint intended to establish this child, to stabilize her connection with both parents and to allow her to move into her teenage years with some significant connection with both parents in a less conflictual environment.

[26] Those observations by the trial Judge do not, in my view, create room for Mr. Kenny to argue that a material change in circumstances is automatically established by virtue of Gabrielle having grown in age and maturity. It is clear from a reading of her decision that Justice Legere Sers contemplated the *possibility* of adjustments to the parenting schedule reflective of changes in Gabrielle's circumstances, while recognizing the ongoing need for a relationship with both parents.

[27] The evidence of Ms. Kenny is that as Gabrielle matures, she is desirous of spending less time with either parent and more time with her horse, her friends and in engaging in extra curricular activities. This should come as no surprise to either of Gabrielle's parents. That Gabrielle seeks to some extent to move away from the sphere of influence or time with either parent is likely not a reflection of or condemnation of either parent. In the same way, both parents have to accept that while there may be time on the calendar assigned for them to be with their

daughter, by the same token each parent is equally deprived of time that Gabrielle chooses to spend with friends or in other pursuits that would have formerly been time with either parent.

[28] I am not persuaded that the fact that Gabrielle now spends more time at the barn or that either parent now spends more of their time with Gabrielle in facilitating her love of her horse constitutes a material change in circumstances.

[29] In the alternative, were a material change in circumstances found to exist, I am not persuaded that requiring Gabrielle to spend an additional overnight with her father would be in her best interests having regard to all of the circumstances. It would seem that to do so would unnecessarily disrupt Gabrielle's current schedule of time with each parent with only one of two results. Either Gabrielle would lose the opportunity to engage in the other activities she chooses on those nights when she is not with her Dad, or Mr. Kenny would find himself in no different situation than he is now, having time assigned to be with his daughter while she is actually engaged in other activities, possibly with the added expense of additional trips to the barn to which he objected in his evidence.

[30] The essence of Mr. Kenny's wish to change the current schedule is, I don't doubt, rooted in a desire to spend more time of a certain kind with Gabrielle. However, the evidence does not persuade me that requiring an additional overnight visit per week is guaranteed to achieve Mr. Kenny's desired end or enhance his time with Gabrielle in her best interests.

[31] Mr. Kenny has a maturing teenage daughter to accommodate and in that respect, he is in no different situation than Gabrielle's mother. Each parent will undoubtedly end up sacrificing their respective quality time with their daughter as she continues to develop and mature.

(d) Ms. Kenny's failure to abide by the Corollary Relief Judgment

[32] Mr. Kenny asserts that another material change can be illustrated in Ms. Kenny's failure to provide him with additional access time as contemplated in the Corollary Relief Judgement. The relevant paragraphs of the Corollary Relief Judgement are:

> 1.(c) In the event the Respondent fathers' employment is shut down for the purposes of weather, that coincides with a storm day for school he shall be entitled to have Gabrielle in his care for that day, pending arrangements can be made to safely have Gabrielle transported to his residence.
>
> 2.(f) - All other access times not specifically referred shall be agreed to between the parties.
>
> 8.(a) - The petitioner mother shall provide the Respondent father on a monthly basis, with her full monthly work schedule and any revisions.
>
> 8.(b) - The petitioner mother shall advise immediately and in advance of her needs relating to child care and if the respondent father is able to attend to his child's care for that period of time, he shall immediately advise her as soon as is reasonably possible so as not to jeopardize her availability for employment.

[33] Mr. Kenny's evidence in the hearing last week was: (i) that he has never received Ms. Kenny's work schedule; (ii) he has never been offered additional access times; (iii) he has seen Ms. Kenny's car at her place of work on three occasions in the summer of 2010 when he was not offered the opportunity to have Gabrielle with him during those times, and finally; (iv) Ms. Kenny deliberately frustrates additional time between the Applicant and Gabrielle on an ongoing basis, by taking Gabrielle to the horse farm during Gabrielle's free time instead of encouraging Gabrielle to be with her father.

[34] Some of Mr. Kenny's evidence concerning these perceived problems which arguably might well be characterized as enforcement issues as opposed to variation issues was, in my view, somewhat contradictory. At paragraph 10 of Exhibit 1 Mr. Kenny stated in his affidavit: "to date I have not received a full and complete work schedule from Ms. Kenny and I have not had much access outside of the ordered schedule". Yet at paragraph 12 of the same Exhibit, Mr. Kenny stated "those work days have not appeared on Ms. Kenny's schedule that she had sent to me". The Court is left uncertain, in the face of these two statements, about whether there

actually has been a failure by Ms. Kenny to provide any work schedules to Mr. Kenny, such that it has frustrated his access opportunities.

[35] The Corollary Relief Judgment identifies a very specific schedule for access and a more broad recognition in Clause 2(f) that there could be other access as the parties might agree upon. Presumably, if they never agree, that won't happen. That lack of agreement, while unfortunate, cannot in my view be said to be a material change in circumstances in the instant case, being vastly less significant than in those cases where it is found that a fundamental or significant frustration of the terms of an order by one party is said to constitute a material change in circumstances.

[36] In addition, I heard no evidence that Mr. Kenny was not being afforded the opportunity for additional access as per Clause 1(c) relating to storm day arrangements.

[37] The overall thrust of Mr. Kenny's evidence was that he never has an opportunity for additional time with Gabrielle over and above the specifics of the Corollary Relief Judgement and that the blame for this failure lies with Ms. Kenny's unwillingness to encourage Gabrielle to spend time with her father. Ms. Kenny was clear in her evidence that Gabrielle is spending increasingly more time at the stable and indeed the suggestion was made during submissions that if Mr. Kenny wants to assume a greater role in driving Gabrielle to and from the stable, then Ms. Kenny is, perhaps not surprisingly, prepared to agree to the same.

[38] It appears that this past summer Mr. Kenny did not exercise the additional two weeks of summer access available to him under the Corollary Relief Judgment. He asserted in his evidence it was because he never receives work schedules from Ms. Kenny and she doesn't take vacation herself, so the usual routine of parenting time continued uninterrupted over the summer months.

[39] With all due respect, the exchange of monthly work schedules, or lack thereof, has little to do with the specific provisions of the Corollary Relief Judgement that allow in Clause 9 for Mr. Kenny to give notice of his preferred weeks for block access by May 15th, 2011 and in each odd numbered year thereafter, with the same opportunity applying to Ms. Kenny in even numbered years. Nonetheless, the failure of either party to actually exercise or follow this clause does not in my view constitute a material change.

[40] Ms. Kenny in her evidence maintained that Gabrielle wants to spend time with her father and clearly Mr. Kenny understandably wants to spend time with his daughter. However, it is clear from the evidence before me that Gabrielle wants to spend more time at the stable and as I indicated earlier, both parents will have their respective time with Gabrielle encroached upon as a result.

[41] The evidence satisfies me that Mr. Kenny, as he acknowledged in his Affidavit, Exhibit 2, paragraph 3, has been exercising all of the regularly scheduled access contemplated in the Corollary Relief Judgment, even if Gabrielle now has other interests that in effect, compete with her time with either parent. That Mr. Kenny has not had any additional unspecified time with Gabrielle is not persuasive of a material change in circumstances.

[42] The whole of the evidence at worst suggests, or hints at a lack of meaningful communication between the parties. At best it suggests that Gabrielle functions well with the specific times set out in the Corollary Relief Judgment.

[43] Ultimately none of the evidence points to a situation where the schedule set out in the Corollary Relief Judgment has been ignored in any material way, much less in a way that might compromise Gabrielle's best interests. Gabrielle has a relationship with both parents and she has fixed time with both parents, such that each parent is responsible for a variety of the necessary child rearing tasks during their respective time with her. I see no reason to alter or change the current schedule and more importantly perhaps, no underlying trigger that could permit me in law to even contemplate the question of a change.

Issue No. 2 - Variation of Spousal Support

[44] As I stated earlier, the burden rests with Mr. Kenny to establish on a balance of probabilities that there has been a material change in circumstances. The provisions of section 17 of the Divorce Act relevant to this particular issue are as follows:

> 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;

. . .

(3) The court may include in 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.

. . .

(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.

. . .

(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.

[45] Mr. Kenny maintains that the change in circumstances is two fold: (a) Ms. Kenny's reduction in her monthly rent expense as a result of her relocation from Bedford to Fall River; and (b) Mr. Kenny's belief that instead of increasing her hours of work in an effort to become self sufficient, Ms. Kenny has actually decreased her work hours and further that Mr. Kenny does not receive copies of her work schedule to assist him in understanding her actual hours of work.

[46] In the context of considering Mr. Kenny's arguments, it is important to attend to the characterization of this marriage and the justification for an award of spousal support as originally found by Justice Legere Sers at trial:

> [82] In large part this is a traditional marriage with the father being the primary income earner and the mother supplementing the family income and being the primary parent.
>
> [83] The mother's work between the time of the first child's birth until both children were older was structured around childcare responsibilities.

And later at paragraphs 90 to 99, the trial judge said:

> [90] The child support essentially takes priority at this stage. One child is in university and one child is living at home.
>
> [91] The father cannot, by way of spousal support, make up the deficiency in the mother's budget.
>
> [92] It is clear that the mother will have to make greater efforts to increase her hours of work to assist her toward obtaining self-sufficiency if she wants to have additional items including in her budget by way of holidays and entertainment expenses. She has historically provided her services free to many of her friends. She has sufficient time to dedicate more hours to employment. According to the mother, night shifts and Saturdays are the most lucrative times for her to work.
>
> [93] It seems that she could increase her income and also at the same time address the father's wish to have further weekly contact with his child on a regular basis.
>
> [94] In reviewing the totality of the evidence with respect to expenses, I am satisfied that the relationship between the mother and the father and the division of roles between them resulted in the mother putting her employment possibilities on hold while she was the primary parent.
>
> [95] The mother will now have to focus on increasing her hours of work and earning capacity.
>
> [96] The mother has decided that continuing in hairdressing is the most reasonable choice and likely the most reasonable course of action for her. She has advised that night hours and weekends are her most lucrative. She has further advised that her skills are best applied to hairdressing as opposed to any other endeavour. She further concludes that working with her current employer is the most appropriate way to ensure an increase in her income.
>
> [97] It is clear that she is not working as many hours as she is going to need to work in order to live up to the requirements under the Divorce Act to attempt to achieve to the extent possible some degree of self-sufficiency. The mother will be responsible for increasing her hours sufficiently to assist her in gaining some degree of self-sufficiency.

> [98] She has also indicated that she does haircuts for friends and family members without payment, which is understandable, although in her current financial circumstance if there is time to do that in a family setting, she will certainly have to put greater effort at increasing her income.
>
> [99] This is a 19-year traditional relationship and division of roles. It is premature to consider a termination date with respect to spousal support. Based on the evidence, entitlement cannot be seriously considered an issue.

[47] Justice Legere Sers ordered a monthly payment of $550 in spousal support by the husband to the wife, reviewable when the first child graduates from university or before on a material change of circumstances.

(a) Ms. Kenny's move

[48] That Ms. Kenny has moved since the Corollary Relief Judgment was imposed, thereby reducing her monthly rent expenses, is clearly established through the evidence of both parties. The financial information provided and referred to at the hearing of this matter allows me to conclude both that Ms. Kenny has reduced her monthly rental expense since the original trial by approximately $800 per month and also, that she continues at the time of the hearing, to have a deficit in her monthly budget. That Ms. Kenny has relocated herself to less expensive accommodations only mere kilometres from her former residence cannot even begin to approach a material change in circumstances, in my view.

[49] What Ms. Kenny has done is reorganize her financial affairs by reducing one aspect of her monthly expenses. Striving to live within her means is a reasonable approach and must not be construed in and of itself as triggering an automatic downward adjustment or in this case, termination of spousal support as Mr. Kenny argues should be the case.

[50] Nothing about the reduction in Ms. Kenny's monthly accommodations expenses can be property characterized as a material change in circumstances, much less one that would require me to consider the impact of the change.

(b) Ms. Kenny's work hours

[51] The evidence of Mr. Kenny was that because he is no longer in receipt of a copy of the Respondent's work schedule, he has no capacity to understand whether she has increased her hours of work (in view of the comments about striving for self sufficiency that are contained in the trial judgment). Nonetheless, Mr. Kenny maintained in his evidence his belief that Ms. Kenny has actually reduced her hours of work as a hairdresser since the Corollary Relief Judgement came in to effect.

[52] I gleaned nothing from Mr. Kenny's affidavit evidence, nor the cross examination of him that assisted me in understanding the basis of his belief. Likewise, neither the affidavit evidence, nor the cross examination of Ms. Kenny assisted me in understanding the actual amount of hours she works in a week, month or year in comparison to the number of hours she worked at the time of the Corollary Relief Judgment.

[53] What was established in Ms. Kenny's evidence was that in the summer of 2011, her workplace of 22 years went out of business. While the location was soon occupied by a new employer, nonetheless it has affected business, although Ms. Kenny is optimistic the volume of clientele will improve with time. In addition, Ms. Kenny has recently tried to "moderate" her work hours due to recent health problems. She also testified she is going to try to increase the hours in an attempt to earn more income.

[54] Ms. Kenny's income tax returns contained in Exhibit 12 before the Court, show a net income in 2009 of $17,240 and in 2010 of $17,957. Her statement of income dated September 2011 shows a total annual income for table amount of $16,184. Broadly speaking, it would appear that there has been relatively little change in Ms. Kenny's income since 2009.

[55] The Corollary Relief Judgment required Ms. Kenny to provide Mr. Kenny with the details of her work schedule in paragraph 8(a): "The petitioner mother shall provide the Respondent father on a monthly basis with her full monthly work schedule and any revisions". This requirement, it is plain, related to the parenting plan and the need for Ms. Kenny to organize child care for Gabrielle so as to allow Mr. Kenny the opportunity to fulfill that role when possible. The only requirement

for disclosure in the Corollary Relief Judgment that relates to spousal support is contained in paragraph 18 of the Judgment regarding the yearly exchange of income tax information between the parties.

[56] By Ms. Kenny's own admission, I am satisfied that she has not provided her work schedule to Mr. Kenny for some unspecified period of time. However, that lack of disclosure relates to a difference of opinion between the parties as to whether Gabrielle needs child care at her current age (13) and not to some failure on the part of Ms. Kenny that can be said to be related to any material change in circumstances, much less to ongoing entitlement to spousal support.

[57] I take nothing from the evidence that is persuasive of any change in the conditions, means, needs or other circumstances of either party that could or should be pointed to as triggering an analysis under section 17(7) of the *Divorce Act.*

[58] As noted by Justice Freeman of the Nova Scotia Court of Appeal in *Read v. Read*, 2000 NSCA 33 at paragraph 14:

> [14] The guiding principle in deciding whether in any given case there is a change of circumstance was laid down by Sopinka, J. in Willick v. Willick, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670 where he said at para. 21:
>
> > In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation . . .

[59] There is nothing in the evidence before me concerning the situation of these parties today that supports the suggestion that there exists any circumstances which are different than in 2009, such that it could be said that Justice Legere Sers would likely have ordered time limited spousal support for Ms. Kenny at that time.

[60] If it were to be said that this court has erred in finding an absence of a material change in circumstances relating to the question of termination of spousal support, then in the alternative, I consider the following factors would be relevant in permitting me to conclude that a variation effecting termination of spousal support for Ms. Kenny could not be justified at this time:

(a) this was a lengthy traditional marriage that left the Respondent dependant on the Applicant and created both compensatory and non compensatory entitlement;

(b) the relative current income of each party based on their respective statements of income is marked by a significant disparity, with Mr. Kenny earning $73,800 as per Exhibit 7 and Ms. Kenny earning $16,180. This is not unlike the range between incomes referenced in the 2009 Corollary Relief Judgment, being $73,300 for Mr. Kenny and $22,500 for Ms. Kenny at that time;

(c) ongoing support is necessary to relieve the economic hardship to Ms. Kenny arising out of the end of the marriage; and

(d) finally, while the judgment of Justice Legere Sers clearly identified the statutory obligation that rests with Ms. Kenny pursuant to the *Divorce Act* to work toward economic self sufficiency, the trial judgment was some 14 months old when Mr. Kenny filed this application, which timing is in my view suggestive of an attempt to re-litigate the original decision on both entitlement and quantum as opposed to a variation of it.

[61] For all of the foregoing reasons, Mr. Kenny's application is dismissed.

J.