SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Cochran v. McBean-Cochran, 2012 NSSC 79

Date: 20120228
Docket: 1201-55649
Registry: Halifax

Between:

Andrew Cochran

Applicant

v.

Brenda McBean-Cochran

Respondent

Judge: The Honourable Justice Moira C. Legere Sers

Heard: December 1 and 2, 2011

Counsel: Deborah I. Conrad for Andrew Cochran
Kenzie MacKinnon for Brenda McBean-Cochran

By the Court:

Introduction

[1] This is an application filed on July 23, 2010 under section 17 of the *Divorce Act*. The Corollary Relief Judgment is dated June 14, 2001.

[2] The applicant maintains that this Judgement was altered by oral contract and by consent in April 2002.

[3] The applicant seeks to terminate his obligation to pay child and spousal support to the respondent. He wishes all arrears, if any, expunged.

[4] Both parties agreed formally on September 15, 2011 that the child is now independent and has been since 2006.

[5] The respondent objects to a termination of her spousal support and is seeking a retroactive analysis to the year 2007 when the applicant returned to a salary commensurate to his pre 2002 salary. She asks the Court to "identify the appropriate amount of support he owes in arrears and what he should pay prospectively".

History

[6] The parties were married in May 1984. This was the applicant's first marriage, the respondent’s second.

[7] They were 32 years old at the time of the marriage. Both were 46 years of age when they separated. They were 59 years of age at the hearing of this matter. One child was born in April 1986.

[8] Separation occurred in March 1998. This relationship lasted just shy of fourteen (14) years. Reasons for my finding on this issue are set out in paragraphs 167-179.

[9] Before a formal agreement, the applicant continued his pre separation practice by contributing $5,000 a month to an account in support of the respondent’s household.

[10] The respondent then bought a home in which she and their son lived. The applicant cosigned a demand loan to cover the down payment on this house to ensure the home was financially sustainable.

[11] The applicant made additional payments to the respondent and his son's support subsequent to separation and before an official agreement dictated $7,200 monthly.

[12] Two years after separation, in December 2000, the parties resolved all remaining matters and were finally able to enter into an Agreement and Minutes of Settlement. At that time, the respondent had obtained a position in the Dalhousie University's College of Pharmacy as a skills lab administrator.

[13] **The Agreement and Minutes of Settlement** was signed December 28, 2000. In this agreement:

> The parents retained joint custody of their son.
>
> The father agreed to continue to pay $1,600 monthly for child support, a sum he paid since separation in 1998. He also agreed to pay $5,600 spousal support commencing January 15, 2001.
>
> The applicant agreed to maintain insurance coverage and health benefits for his wife; the latter benefit as long as she was receiving spousal support.
>
> The parties agreed that they would waive any entitlement the other had in the business assets of each of them.

[14] A variation of the agreement was anticipated. The second portion of paragraph 10 states as follows:

> This spousal support shall continue until varied either by the agreement of the parties or order of a court having jurisdiction over family and matrimonial matters.
>
> Both parties were represented by counsel and continue to be represented by counsel at this proceeding.

[15] In considering a variation of a Corollary Relief Judgement, I look to section 17 of the *Divorce Act*:

> *Order for variation, rescission or suspension*
> 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
> (b) n/a
>
> *Terms and conditions*
> (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.
>
> *Factors for spousal support order*
> (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.

"Material Change"

[16] The material change must be a change that, if known at the time, would have resulted in different terms. (*L.M.P. v. L.S.* 2011 SCC 64)

[17] In this case there are two significant changes in circumstances:

1. In 2001 the applicant's income plummeted; and

2. In 2001 the respondent was hospitalized and diagnosed with bipolar disorder. Although she continued to experience periodic significant success, she argues she is unable to work.

1. The Applicant's Income

[18] In 1997, one year before the separation, the applicant's income was approximately $162,000, thereafter rising for approximately three years to exceed $200,000. Both parties believed the applicant's business future was bright.

[19] In 2001 the applicant's declared income was $45,383. He did not formally apply to vary the agreement.

[20] They were both aware of the significant change. The applicant advises they agreed on a payment of $2,000 per month commencing May 2001. The respondent advises this was a unilateral decision which occurred without her consent.

[21] On April 2, 2002, the applicant ceased his then current business operations and his company went into receivership. In 2002, the year of his receivership, he declared an income of $96,000. He declared personal bankruptcy in January 2003.

[22] The issue in this case arises out of the radical decline in the applicant’s income in 2001 when his income dropped from $257,047 to $53,627.

[23] The parties experienced significant financial duress. This material change in the applicant’s business and employment prospects lasted from 2001 to August 2007.

[24] This change was not transitory. It was a fundamental change in income requiring a complete reordering of the applicant's employment strategy.

Current Application

[25] On February 5, 2009, the respondent’s counsel requested disclosure of the applicant's financial information. For reasons explained in the evidence no disclosure took place until February 16, 2010.

[26] The parties were unable to resolve their differences. The applicant refused to increase/reinstate support at the agreement level and the respondent refused to provide a receipt to the applicant for the spousal support payments. This would have allowed him a corresponding tax deduction. Adverse tax implications for the applicant resulted.

[27] The respondent also sought enforcement of the original order through the Maintenance Enforcement Program.

[28] Maintenance Enforcement assessed the applicant's arrears in accordance with the original Corollary Relief Judgement, resulting in an arrears calculation of $536,800 as of January 05, 2011 for child and spousal support. A garnishment was effected.

[29] Maintenance Enforcement did not adjust their calculations in accordance with the "disputed" oral agreement between the parties subsequent to the applicant’s bankruptcy and business loss.

[30] On July 23, 2010, an application to vary the Corollary Relief Judgment was commenced by the applicant and filed with Maintenance Enforcement. This was not brought to the attention of the respondent's lawyer until January 19, 2011.

[31] The filing of the application with Maintenance Enforcement caused them to cease to enforce the original order.

[32] By an in-court agreement dated September 15, 2011, the respondent agreed to provide a letter to the applicant for tax purposes, acknowledging the $2,000 paid toward spousal support from 2006 to 2010. The applicant did not receive tax relief from 1998 to 2000.

Quantum of Spousal Support

[33] It is the applicant’s contention that the original award of spousal support and child support was the result of a global agreement directly tied to the respondent's agreement to waive any entitlement she thought she may have to the applicant’s then strong business performance. This was critical to the applicant.

[34] The applicant testified that both believed his business would continue to grow and generate a significant income into the future. (Exhibit #1,Tab 8, paragraph 20)

[35] The respondent maintains the spousal support award was simply related to her actual needs.

[36] Portions of several letters exchanged between counsel predating the separation agreement were tendered. These letters were tendered to support the applicant's contention that keeping his business assets free from any involvement was critical to him.

[37] The Agreement increased the transitional payments of child and spousal support from $5,000 to $7,200.

[38] There is insufficient evidence of their then current needs to allow me to draw a conclusion that the award of support was directly related to an assessment of entitlement and need. Simply reinstating this agreement for the purpose of assessing retroactive support in light of the delay is impractical.

[39] I am unable to determine what should have been the entitlement in terms of duration and the quantum of a spousal support award based on the needs of this particular respondent at the time of separation.

[40] It is clear to me that the applicant was prepared to agree to a global settlement. He advises he did this as long as his business assets were not included.

[41] I conclude that the award of spousal support was based on global considerations. I cannot conclude they were based on the respondent's then current need.

[42] It would be unwise to draw any more precise conclusions about the intentions of the parties on the basis of their current memory or pieces of correspondence taken out of the whole of the pre agreement negotiations.

[43] Any finding of fact or inference twelve years after the Agreement was signed would be suspect unless it was specifically included in the Agreement itself.

[44] In light of the recent decision *L.M.P. v. L.S.* 2011 SCC 64 and given this is a variation application pursuant to section 17 (4.1) and not an originating application, the approach to the application to vary is somewhat different.

[45] The original agreement is a consideration but less weighty than it might be if this were an originating application to incorporate a pre-existing agreement before making a final original order.

[46] It is impossible on this evidence to determine the applicant's total contribution to his son and the respondent’s household over the years.

[47] The evidence is uncontradicted. The applicant maintained his responsibility to his son from separation forward directly through child support payments and other payments to his son directly, whether he lived with his mother or father.

[48] The respondent does not deny the applicant’s contribution or generosity.

[49] **The Corollary Relief Judgment** dated June 14, 2001 incorporated the parties' Agreement and Minutes of Settlement.

2. Illness

[50] The second significant change relates to the aggravation of the respondent's mental health issues. She is currently dependant on income from other sources than herself.

[51] The respondent was first diagnosed in 1994 (10 years after their marriage) with chronic episodic clinical depression, anxiety and panic disorder. This existed in some form and to some extent after the breakup of her previous marriage.

[52] The applicant was aware of the respondent's health concerns prior to marriage. They were not prominent at that time although she informed him her depression was aggravated by her first divorce.

[53] The respondent’s illness worsened considerably subsequent to the marriage.

[54] She is currently unemployed and considers herself disabled.

[55] The respondent was referred to Dr. MacDonald in 1994 because she was developing significant symptoms of a depression.

[56] The November 11, 2011 letter by the respondent's treating psychiatrist is the only medical evidence before the Court.

[57] The respondent describes in her affidavit her continuing search to work and maintain a life balance to ensure she remains non symptomatic.

[58] By 1995 Dr. MacDonald indicates that the reports of difficulties in the marriage were precipitating further stress. Medication and cognitive behavioural therapy did not appear to address the issue.

[59] In the spring and summer of 1995, the respondent reduced her work load on doctor's advice.

[60] In 1996 the respondent began to struggle with episodes of panic and experience significant mental health issues. Her doctor advises this was related to her difficult family circumstances.

[61] Her depression worsened in 1997, as did the marriage, and in the fall of 1997 it was clear that the marriage was over.

[62] The stress of her own business and her two corporations aggravated the respondent's her health issues; her mental health deteriorated; her anxiety and panic attacks increased.

[63] The respondent's doctor noted that in 1998 the respondent "at present ... is very positive making a new life for herself and is functioning well".

[64] By April of 1999 the respondent had difficulty functioning in her work environment, increased difficulties with concentration and memory with some passive suicidal ideation.

[65] The respondent was advised in the spring of 1999 not to return to work. At that time her doctor noticed an improvement in her mood but noted there were still significant episodes of anxiety.

[66] In the fall of 1999, the doctor advises the respondent's capacity disintegrated and attempts to restart some clinical work failed. Changes in medication did not appear to have a positive affect on the respondent's functioning.

[67] In 2001, the respondent's mental health deteriorated such that in the summer of 2001, she required involuntary admission to a psychiatric hospital on August 21, 2001 for two months. At that point in time she was diagnosed with bipolar disorder, with the presence of a severe manic episode.

[68] On admission to hospital, the respondent's mood symptoms were severe. She was completely disorganized and had significant cognitive impairment.

[69] During 2001 the child stayed with the applicant for a number of months. The applicant and the respondent’s doctors carefully orchestrated the son’s transition back to the respondent's care in November 2001.

[70] When released from hospital, the respondent attended a day treatment program.

[71] There have been no future episodes of psychosis as of the date of the letter.

[72] The respondent reduced her working hours, wrote an exam completing a three-month practicum and once again obtained her licence to make it possible to work part time for a drug store.

[73] The respondent was successful in completing this program in February 9, 2002.

[74] In 2002 the respondent was rejected from long-term disability. She put her house up for sale in June 2002 and began to borrow money from her father's retirement savings. I am unaware of the nature and extent of this source of assistance.

[75] The respondent and child moved to a duplex in Bedford in October 2002 and in April 2003 she obtained part-time work as a pharmacist for 25 hours per week. As well she took a second home-based job as the continuing education clinical coordinator for Pharmacy Practice, a national publication for pharmacists.

[76] This second employment yielded $7,400 per year.

[77] However, by February 2004, the respondent once again left her part-time pharmacy job. With the deterioration in her health, the child again went to live with his father.

[78] The respondent was under significant financial and medical stress. She sold some of her furniture and personal items in order to supplement her income.

[79] In May 2004, the respondent was offered an Assistant Professorship of Pharmacy at Memorial University. She testified she was unable to take this job. She states that her prior experience at working part time placed significant demands on her health.

[80] In 2009 the respondent's doctor noted some improvement such that the respondent’s medications were reduced. The respondent testified she felt able to commence informal legal discussions to require disclosure of the applicant's income to reinstate spousal support, including reinstatement on the applicant's health plan.

[81] Since 2009, the respondent resigned as continuing education clinical coordinator for Pharmacy Practice because this work exacerbated her illness.

[82] The applicant responded to the respondent's lawyer’s request and was able to restore medical coverage for the respondent with his new employer in 2010.

[83] The health care coverage the respondent enjoyed at the time of the agreement in 2002 was lost when the applicant lost his business. As a result, the respondent was unable to obtain the services of a psychologist.

Medical Evidence

[84] The medical events themselves are not seriously contested.

[85] The conclusion that the respondent is permanently disabled and unable to perform any function for gain is contested.

[86] Dr. MacDonald notes that over the past seven to eight years, the respondent has tried on a number of occasions to work in both local pharmacies and to try to function working on a part-time basis from her home.

[87] This has not proved effective. The respondent has been advised by Dr. MacDonald on a number of occasions to formally withdraw from her work environment "because of her inability to cope with the stress and deal appropriately with other staff members and customers".

[88] Dr. MacDonald concluded:

> Although Ms. McBean-Cochran has persisted over the years in trying to set up some form of a working environment where she would be able to function effectively, she has not been able to maintain a consistent stability of mood, nor has she been able despite multiple medications to monitor her anxiety and to deal with her recurrent severe episodes of fear and panic when she is under stress.
>
> Although she has strong educational experience and professional experience as a pharmacist, both independently and working in a pharmacy, it has been clear watching her through the multiple episodes of attempting to return to work after the past ten years that she decompensates under stress, is easily overwhelmed with anxiety and fear and usually deals with these issues by procrastination or avoidance of a difficult situation.

[89] Dr. MacDonald concluded:

> I do not see her being able to function in a work environment that puts stress or responsibility on her to be functionable and to abide by specific hours of work or specific guidelines about when work is to be completed and passed on. As I stated in my letter to Janet Stevenson of September 2004 I really do not see Ms. McBean-Cochran being able to function as a pharmacist in any form of clinical capacity in the future.

[90] It is clear her illness and her response has had significant impact on her professional and personal life. While the seeds of the illness arose prior to the marriage, they were not apparent in its current severity or diagnosed until after the marriage ended.

[91] I am unable to conclude how much impact this pre-existing illness contributed to the breakdown of the marriage.

[92] Nor can I conclude that this illness was caused by the marriage, although the unhappy circumstance certainly aggravated her illness.

[93] It is clear by the respondent's in-court presentation that her memory has been affected as has her career potential.

[94] Dr. MacDonald's evidence is the only non-party evidence that the respondent does not appear to have responded well to medication. Dr. MacDonald has been her treating psychiatrist and is clearly operating on the respondent's self reporting.

[95] I am unclear if there has been an independent assessment of the respondent's ability to function.

[96] However, the respondent has not qualified for CPP disability. The evidence indicates she was rejected in 2002. That she has not been qualified for disability pension means there has been some independent assessment preliminary to that decision.

[97] I am unaware of more recent attempts to qualify.

[98] There is no evidence from any other doctor or employment assessment whether the respondent is disabled from any sort of employment.

[99] While this illness has had a significant impact on the respondent's ability to function, certainly without a more thorough assessment I would be unable to conclude the respondent is permanently and totally disabled from <u>any</u> occupation even if only to assist her in supplementing her income.

Modified Agreement

[100] As a result of the first significant change (the applicant's business loss), the quantum of child and spousal support changed.

[101] The applicant testified his business decline was public knowledge. He spoke to the respondent and committed to pay her $2,000 per month, beginning in May 2002 regardless of his income.

[102] The applicant further advised that $1,600 of the $2,000 he committed to pay would be classified as child support and exceeded what he would have been required to pay pursuant to the "Guidelines". This would increase the amount of tax-free money for the respondent.

[103] This also identified a smaller portion of the payment as spousal support payment, giving the applicant less of a tax deduction.

[104] The applicant considered they reached an agreement.

[105] The respondent denies that an agreement was reached.

[106] The respondent maintains this was a unilateral decision in which she played no part. She testified she was told in April 2002 that commencing May 1, 2002 the applicant was going to reduce her total support payments from $7,200 to $2,000 per month, $1,600 of which would be classified as child support and $400 spousal support.

[107] Neither the applicant nor the respondent took action to have the Court review the matter.

[108] Subsequent to the change in payment, there were cordial emails between the two parties, significant events attended by the two together and indeed, the applicant responded to many requests to have payment early or to adjust payments, with the same ceiling, at the respondent’s request.

[109] In addition to the $2,000 per month, the applicant maintained the special expenses for tuition for private school, residence and travel associated with his son's educational enterprise. He assumed all living expenses when the child was not living with the respondent and continued with his commitment to pay $2,000 toward child and spousal support.

[110] The applicant also supplemented the child support paid to the respondent for several years with $50 per week paid directly to his son for spending money, travel to and from university, living expenses, clothing, etc.

Exhibit 12

[111] The respondent submitted exhibit 12 to demonstrate the disparity in the income positions of both parties predating and following the May 2002 change in support payments.

[112] At first glance this depicts a significant disparity during those years between 2002 and August 2007. However, this exhibit requires a closer look at the actual household income, adding in support, EI payments and business income. A closer look reveals a significantly different picture.

2001

[113] In 2001 the exhibit shows the applicant's reported income was $53,627; the respondent's was $41,770. The summary acknowledges this figure excludes the support payments made by the applicant in that year for $67,200, leaving the applicant with a negative income. His tax deductions of approximately $16,000 were refunded to him. This appeared to be his worst financial year.

[114] The respondent's 2001 total income of $108,970 included spousal support payments, her EI, as well as her T4 earnings of $36,814. To determine actual income available to her household one must also acknowledge that she received child support payments of $19,200 for a total income of $128,170.

[115] I recognize that this is the year the respondent was hospitalized and her illness more correctly identified.

[116] However, the applicant liquidated assets and borrowed from family to maintain these 2001 support payments.

2002

[117] The exhibit shows 2002 as the year the applicant's business went into receivership. His reported income was $96,066 and the respondent's show to be $4,146, exclusive of support payments.

[118] However, the applicant claimed support payments of $35,461 less compulsory deductions with income of $58,931; less tax of $19,328 for a net disposable income of $39,603.

[119] The respondent's 2002 reported income show support payments of $54,661. She paid tax on $35,461 for a total taxable income of $39,607 while her actual household income was $58,807. In 2002 she was still receiving child support payments.

[120] The respondent's reported income does not always reflect her total household income.

[121] It is clear that the effect of the change was at least as devastating to the applicant as the respondent.

[122] The parties continued for eight years to follow this reduction. The applicant maintained the $2,000 payment at the expense of his business tax responsibility. This resulted in a need to address that once his income stabilized in 2007.

[123] The $2,000 payment continued while their child lived in university residence in Halifax in 2004 and 2005 and in Toronto and coming home during vacations. He moved out finally in the fall of 2006.

[124] This continued the tax advantage to the respondent even after the child left the respondent’s home in 2006 and was considered by both parents to be independent. It also continued during those periods of time the child lived with his father.

[125] The respondent telephoned the applicant weeks after this reduction asking for additional funds. He advised he could not make additional payments.

[126] The respondent approached the applicant to provide additional support in 2005 when the applicant's income was $67,400. He refused, although he offered to allow her to share in a percentage of his business income. The respondent was looking for more certainty.

[127] The applicant remarried in December 2005. This was a short-term marriage and has since dissolved.

[128] In 2005, before his recovery and before his second marriage, the applicant asked the respondent for a formal change in the order. She refused.

[129] Thus, at least twice after the change each party had an opportunity to reflect on their options and opted to maintain the status quo. They also opted not to make a formal application to court.

[130] I find as a fact that the respondent accepted, although was not pleased, with the reduction in her support payments. She did not take any steps to review the applicant's circumstances. She accepted what was public knowledge: that the applicant's business was terminated.

[131] The respondent retained counsel in late 2008 and the formal request for financial disclosure began with her counsel’s letter to the applicant in February 2009.

[132] The respondent, although suffering from depression, was a capable, intelligent professional. She accepted the offer of at least a consistent payment, one that the applicant felt that he would be able to meet, regardless of his actual income. She had no difficulty admitting the applicant did try to maintain his responsibilities. She was not critical of his efforts.

[133] Twice their child moved out of the respondent’s home and into the applicant’s residence due to the respondent’s illness.

[134] For five months of the 2001 year the child of the marriage lived with the applicant. During this time the applicant maintained his payment to the respondent.

[135] Throughout the 2002, 2003, 2004, 2005 and 2006 years the applicant earned less income than in the previous years. It was during this time he was freelancing and studying to upgrade his educational credentials, making himself more marketable.

[136] The applicant successfully re-entered the marketplace earning a total income in August 2007 of $155,425 and ultimately reached his current income from all source of $252,550.

[137] I accept that the respondent knew of this new employment. This, too, was well publicized.

[138] The respondent phoned the applicant a month after he became employed and wrote to him at his new work address.

[139] While the applicant has been successful in reinstating his income level, the respondent has not.

[140] In summary, I find that there was a material change in circumstance in 2002 and that there have been significant changes in the conditions, means and circumstances of both parties since then.

[141] It was clear in the evidence that neither party had a great deal of information about the other's financial circumstances at the time nor did they exchange this information frequently.

[142] I also find that throughout this entire period of time each party consciously decided not to "rock the boat" and contented themselves with the status quo.

Would these changes have affected the terms of the original agreement or Corollary Relief Judgment?

[143] Having concluded there have been significant/material changes in the circumstances of the parties that were not transitory, I must now look to whether these changes, if known, would have resulted in different terms.

[144] First, at the time of the original agreement both parties clearly anticipated the applicant’s business would prosper.

[145] Second, if the business had faltered, and the applicant had been in bankruptcy or had anticipated the bankruptcy, the issue of a share of business assets would not have held the same importance to the applicant; perhaps not to the respondent as well.

[146] This would not have provided any incentive to the respondent to enter into a global settlement that did not consider the applicant's ability to pay or given their respective professional abilities may have been considered final.

[147] Even if I accept the respondent’s testimony that the award of spousal support was based only on need at the time of the Corollary Relief Order (which is the same as the agreement), the applicant's ability to pay, which was not seriously in issue then, most certainly would have been in 2001 to 2006 and into 2007.

[148] The guideline amount of child support would have been significantly reduced in 2001, higher in 2002 and reduced in the following years up to 2007.

[149] By 2007 it would have terminated as the child was no longer living with the respondent.

[150] Needless to say the spousal support would have been greatly reduced in priority for the child support.

[151] At the time of the agreement, the parties had assets including individual business, personal and real property. The applicant's post separation assistance was clearly aimed at helping the respondent reestablish herself.

[152] By 2002 the applicant was in bankruptcy; by 2011 both had lost all their assets.

[153] Although the applicant has been able to reinstate his income levels, neither the applicant nor the respondent have investments, property to speak of, savings account or RRSPs and critically, no pensions on which to rely.

[154] It was the escalation in the respondent’s illness subsequent to separation which aggravated her employment prospects until she ultimately considered herself totally disabled.

[155] The applicant also has medical issues that demand attention. He is 59 years old and his ability to continue to work will depend to some extent on his health.

[156] I find as a fact that the Corollary Relief Judgment that currently exists would not have existed under these circumstances.

[157] The respondent had every prospect of retaining her independence and reestablishing herself but for the effect of an illness which, at the time of the agreement, was considered to be depression. It was aggravated by the marriage breakdown. This illness has now been more clearly identified. This in and of itself does not draw me to a conclusion that she is total disabled and unable to be employed in any reasonable employment.

[158] The applicant admits that the sharp decline continued up to but not including the year 2007 when he was able to successful augment his salary to the $155,425 mark.

[159] I now examine the factors outlined in section 17.

> **Objectives of variation order varying spousal support order**
> (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.
>
> (8) [Repealed, 1997, c. 1, s. 5]

[160] Concerning *(a)* and *(b)*, there were not economic disadvantages or negative financial consequences suffered by the respondent arising from the marriage or care of the child.

[161] On the contrary, there were obvious advantages with two professional incomes and the career potential of each party.

[162] Respecting *(c)*, the economic hardship arose from the respondent's illness and as a consequence, how she was able "or not" to cope with the dissolution of her second marriage.

[163] The only factor relating to the applicant is that the respondent's transitional financial recovery was interrupted both by the applicant's business loss and its effect on his ability to continue to pay per the Corollary Relief Judgement and her illness and its effect on her ability to cope with the loss of her marriage.

[164] It is *(d)*, that has been significantly altered, not because of or arising out of the marriage but because of the progression of the respondent's illness and her belief she cannot stabilize her disorder while employed.

[165] It is reasonable to conclude that neither the applicant's business loss nor the respondent's mental illness were anticipated. It is equally reasonable to conclude the quantum of child and spousal support would have been different.

[166] This is important for two reasons. Once a material change in circumstances has been proven, the court must consider what changes should be made, having regard to the condition, means and circumstances of the parties.

Length of Marriage

[167] The parties met in February 1980.

[168] The applicant maintains they did not cohabit until marriage. The respondent argues that they essentially cohabited in fact four years prior to the marriage, although she admits they each maintained separate residences.

[169] Both parties agree that when they started to date, they maintained separate residences. The respondent was adamant that she would not give up her residence for the applicant. She confirmed in this proceeding she wished at that time to maintain some level of independence.

[170] Initially, the applicant lived in Winnipeg and the respondent in Manitoba.

[171] In the fall of 1980, the applicant relocated to Toronto. He established a separate residence. The respondent continued to reside in Manitoba.

[172] The respondent decided to move to Toronto, staying in the applicant's residence until she obtained her own place in 1981.

[173] The respondent then relocated to another apartment in Toronto. The parties continued to date occasionally, each living in a separate accommodation.

[174] Essentially both parties agree with this statement of facts except that the respondent indicates that while she maintained a separate residence, for all intents and purposes she lived out of the applicant's residence, had clothes in the applicant's residence, prepared meals there and stayed overnight there.

[175] The triggering event precipitating their marriage was the death of the applicant's father in January of 1984. The respondent assisted the applicant in resolving all issues outstanding from his father's death including travelling to New York to assist him in funeral arrangements. This triggered their decision to marry.

[176] They moved to Nova Scotia and married in May 1984.

[177] From that point in time, the parties lived together exclusively, first at the applicant's mother's residence in Mahone Bay, then in a home together. They ultimately relocated to Halifax where they lived together.

[178] I am satisfied on the totality of the evidence that while they did spend considerable time intermittently between their meeting date in 1980 to their marriage date, effectively they only established a common residence together when they moved to Nova Scotia in 1984.

[179] The duration of their marriage is very close to 14 years, not the 18 years proposed by the respondent.

Financial Independence

[180] Both parties were financially independent at the time of marriage.

[181] The respondent at marriage had attained a higher level of education than the applicant.

[182] Each was successful in their own right, independent and able to be self sufficient.

[183] Each were sole owners in their businesses, each highly competent professionals.

[184] The respondent has considerable education.

[185] The respondent describes herself in her resume as a seasoned pharmacist with exceptional communication, patient counselling and program development skills with more than 25 years of productive community, hospital and family medicine practice.

[186] The respondent obtained her Bachelors of Science degree in Pharmacy in 1973; her Masters of Science (Clinical Pharmacy, Adult's Education) in 1979 out of the University of Saskatchewan and advanced training in ambulatory care practice with emphasis on development and evaluation of consumer education materials and procedures. Her name is associated with a number of professional publications.

[187] At the time the parties met, the respondent was an assistant professor of Clinical Pharmacy at the University of Manitoba and a clinical pharmacist at a nearby hospital.

[188] When the respondent moved to Toronto in 1982, she became an assistant professor at the University of Toronto and a pharmacy consultant at the Toronto General Hospital's Department of Family Community Medicine.

[189] When the respondent moved to Nova Scotia, she established two companies, developing continuing education packages for health professionals and educational programs and materials for consumers. She was teaching as a session lecturer at the School of Pharmacy at Dalhousie University from 1985 until 1994.

[190] The respondent was successful in utilizing her pharmacy degree, wrote articles and freelanced on individual assignments. She wrote for professional publications and pharmaceutical companies.

[191] At the time of marriage the applicant was a successful businessman until his business hit hard financial times for reasons set out in the affidavits. The facts regarding this financial loss were not in contest.

[192] The applicant then returned to school in 2003, completed a Masters' Degree in October 2005 and began a PhD program in 2006 while working on freelance projects.

[193] At the time of and during the marriage, the applicant had stable, strong income. In 1997 he earned $161,717; in 1998 he earned $229,499; and in 2000 he earned $257,047.

[194] The parties had a significant lifestyle, full in-home child care and their child attended a private school, graduating in May of 2009.

[195] In-home child care was available to the family almost from the beginning until the child's early adolescent.

[196] Due to the level of income and child care, arranged and paid for by the applicant, the career potential of the respondent did not suffer.

[197] The respondent’s mental illness was not diagnosed until 2001 after the marriage ended. Her struggle with anxiety and depression was known. It was aggravated by her first divorce although the degree to which it would have affected her life was not reasonably within the contemplation of the parties.

Retroactive and Prospective Support

[198] The court must also consider many factors including what spousal support obligations continue to exist under the legislation and what effect the respondent’s delay in seeking enforcement though Maintenance Enforcement and the applicant’s delay in seeking a formal variation of the order have in these circumstances.

[199] **Kerr v. Baranow,** [2011] S.C.J. 10 is a leading authority in this regard. Starting at paragraph 207, Cromwell, J. said:

[207] While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.

[208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see *D.B.S.*, at paras. 36-39, 47-48, 59, 80 and 100-104. *In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, e.g., M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.* (Italics mine)

[209] Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to *the certainty of the payor's legal obligations;* the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns *placing proper incentives on the applicant to proceed with his or her claims promptly* (see *D.B.S.*, at paras. 100-103). (Italics mine)

[200] Misconduct is not an issue.

[201] Notice of the respondent's intent to proceed exists as of 2009.

[202] The applicant delayed in his application by not advising of his change in circumstances in August 2007.

[203] The original order envisioned variation of its terms. The modified agreement arose out of the applicant's inability to maintain the support.

[204] In short and medium term relationship one does not reasonably expect a pension for life.

[205] The obligation on the applicant to support the respondent must arise out of their marital relationship.

[206] However, the respondent may well require assistance due to her conditions, means and circumstances that arise outside of the obligations of the applicant to provide support.

[207] Marriage in and of itself is not a substitute for nor does it absolve society/government from providing assistance to needy citizens in accordance with its policies and directives just because there is a former spouse who may have an ability to pay.

[208] Should the respondent be classified as disabled, the respondent might qualify for government assistance. Otherwise, there was a reasonable expectation that she would be self sufficient.

[209] There has been insufficient information before me to allow me to conclude the respondent made and continues to make all reasonable efforts to be employed or to seek financial assistance due to her disability.

[210] Should the respondent not be classified as disabled, she has an obligation to seek some level of self sufficiency.

[211] I have no information as to what efforts have been made in that regard to assist her in supplementing her income on a prospective basis. She appears to have accepted that she cannot work.

[212] I have evidence that she has given up on attempts to retrain or seek employment due to her perception of her own disability.

Historical Income

[213] The applicant has provided a record of income from 1997 to 2010; the respondent has provided income tax information from 1984 to 2010.

[214] I attribute no fault to the applicant for the lack of information from 1984 to 1996 as this information was not requested.

[215] In assessing the respondent's ability to generate income, one has to review the actual returns to see that her professional income was at times significant. The table provided reflects her net business income.

[216] It is impossible to retroactively determine the validity of her deductions for child or spousal support purposes on the information provided. Clearly the respondent was at one time capable of producing solid professional income.

[217] The respondent's income for 1984 was $28,552. Thereafter, it declined to a low in 1986 of $14,400 and climbed again post separation in 1991 to a level approaching $55,000.

[218] The respondent suffered a decline in 1992 and a recovery in 1993 when her annual income was $105,935 to 1994 when her income was $144,526.

[219] The respondent's income then gradually declined to $92,332 in 1995; in 1996 approximately $60,000; and in 1997 and thereafter a considerable reduction, save for one or two peaks between 1997 and 2009.

[220] In 2006 the respondent received $26,600 in support payments (monthly payments of $2,166) and business income of $8,800 for a total gross income of $35,466 (net $11,305).

[221] In 2007 the respondent received $24,000 support and $10,800 business income for a gross of $34,800 (net $7,600).

[222] In 2008 the respondent received $24,000 in support payments (processed $3,600) and $10,800 gross business income for a total gross of $34,800 and net of $4,762.

[223] Aside from spousal support of $24,000, the respondent's 2009 declared net business income is $2,551.

[224] In 2010 the respondent received $27,000 gross support, claiming $7,800 and declared a business loss of $433.61.

[225] The marriage provided considerable benefits and professional freedom to the respondent. Her role as mother was well supported. The breakdown of the marriage exacerbated her mental health issues but cannot be said to be the cause of her financial distress.

[226] If any of the section 17 factors apply as it relates to the applicant’s responsibility, it is the fact that the applicant’s business failure may have prematurely interrupted the respondent’s ability to recover from the financial effects of the marriage breakdown.

[227] The date for recommencement of an income commensurate with the applicant's previous abilities to earn income is August 7, 2007.

[228] The spousal support guidelines suggest in these circumstances for these parties upon dissolution of their marriage the minimum duration for payment would be seven years and the maximum 14.

[229] Given the respondent's abilities and education were on the high side of the equation, one could reasonably have expected an earlier recovery.

[230] Currently at their age and stage in life, the suggested duration in the guidelines is indefinite.

[231] However, aside from the illness, this is not a fact situation that would have produced an indefinite order.

Current Circumstances

[232] The respondent relocated to her parents' home in Saskatchewan in 2010. She attended to her elderly parents during her mother's illness and assisted and managed the transfer of her mother from her home to a senior citizen's residence.

[233] The respondent is currently now addressing her father's needs and caring for him in the family home.

[234] The respondent described this as a very stressful and demanding task and she has been able to continue to be occupied fulfilling this function.

Income and Expenses

[235] Currently the respondent's income comes only from the applicant.

[236] The Court had little information as to her current expenses and the extent of the support received as a result of her residence with her father. Nor did the Court have any information as to her entitlement under her parents' will although the Court was advised that early on in 2002 the respondent began to draw on her entitlement or their goodwill to sustain her.

[237] There are two periods of time relevant to this application: the period between 2002 and the reinstatement of the applicant's income in 2007 to date.

[238] I do not have exact calculations on what money was paid to the child independently or how much time the child lived with the father for that period of time.

[239] From 2002 to at least 2004 the respondent likely received more by agreement than she would have received had there been a review of all the then current conditions.

[240] I decline to retroactively assess the circumstance from 2002 to 2006 inclusive, concluding the payments were agreed upon or at very least the respondent accepted them as appropriate in the circumstances.

[241] In addition, the payments appear to be equal to or greater than what might have been ordered had there been a complete review.

[242] Finally, it is clear on the totality of the evidence that the applicant acknowledged his responsibility up to this point and diligently maintained not only the respondent's support but the support of their son.

The Period from 2007 forward

[243] In 2007 the applicant through diligent efforts reestablished himself. Initially, he earned less than he earned at the time of the agreement. However, his income for 2008, 2009 and 2010 exceeds $200,000.

[244] This is not a traditional marriage; rather it is a second marriage for the respondent, a first marriage for the applicant. They were both capable, intelligent, independent professionals when they married at age 32 separated at age 42. They were at the hearing 59 years of age.

[245] The December 2002 agreement anticipated or ought to have anticipated that each party would and could become self-sufficient.

[246] The child was well supported and the respondent's role was not such that she suffered discernable career difficulties because of any role she assumed with the child.

[247] Currently the applicant has the ability to pay spousal support. The marriage is medium term not ordinarily associated with long term support. Both parties were self-sufficient coming into the marriage and in large part throughout the marriage.

[248] The respondent’s obligations in the home did not create economic dependancy or affect her career. The decisions regarding the nature and extent of her work related to her moves, occasioned to live with the applicant, her career choices and her deteriorating health aggravated but not caused by the dissolution of the marriage.

[249] At what point does the obligation of the applicant arising from the marriage to support the respondent cease and at what point does the state and the respondent become totally responsible for the respondent's welfare, if at all?

[250] Does the respondent's disability prolong the applicant's obligation?

[251] As between the applicant and respondent, the interruption in the payment of spousal support in year 2002 may have aggravated and prolonged the applicant's obligation to pay for a limited period of time.

[252] I have reviewed the relevant case law on this point.

[253] The entitlement if any in this marriage does not arise out of compensatory entitlement.

[254] At the most, in the beginning the applicant's obligation might have extended to 2012.

[255] It is also my finding that the respondent has not given the Court enough evidence that would support her own finding of permanent disability although clearly she has suffered.

[256] The respondent's need arises out of the fact she is not working. This is caused in part by her belief she is unable to work at any occupation due to illness.

[257] The respondent's need may be in some part related to the fact that the business crises significantly undercut the terms of their agreement within that minimum period proposed by the support guidelines. All these factors aggravated her circumstances.

[258] The respondent's reaction also aggravated her condition and her circumstances.

[259] Given the interruption in the payment of spousal support essentially from 2002 to 2006, a critical period of four years, it is premature to terminate support.

[260] Certainly, had the applicant applied when the respondent's income in 1993 was $105,935 and $144,526 in 1994, the spousal support would have been reduced if not terminated.

[261] The final consideration to include in this evaluation is the fact that up to 2008 the respondent maintained some business income.

[262] Her assertion that she cannot earn any income has not been supported on the balance of probabilities. How much she could now earn is open to question.

[263] I will extend the applicant’s obligation to support the respondent solely based on the interruption in what was considered an appropriate amount of spousal support in their original agreement.

[264] I caution the respondent that she will have to diligently look to supplementing her income and to other resources in the near future and most certainly to termination of spousal support when the applicant retires.

[265] I conclude that the respondent's need arises almost exclusively now out of her own circumstances, decisions and illness and does not arise out of the marriage as a principal cause.

[266] I also note with concern that the health of the applicant is a concern and he is without pension resources to sustain himself let alone the respondent.

[267] I also caution the respondent that if she is claiming total disability, she must provide proof of that by objective sources. That in and of itself will not in future trigger a corresponding obligation on the applicant.

Delay

[268] The application is dated February 2009.

[269] Each party suffered significant financial distress due to the business losses in circumstances in 2002 to 2005.

[270] The applicant preferred his child and spousal support obligations to his business debts and tax obligations.

[271] Upon his financial recovery in 2007, the applicant was obliged to address some of the deferred business and tax debt.

[272] A large lump sum award back to 2002 is not justifiable. A retroactive award back to the actual date of reinstatement of the applicant's salary in August 2007 would be onerous and likely unenforceable particularly if he is obliged to continue to pay support forward.

[273] The applicant has no ability to pay a significant lump sum retroactive award. He has no assets.

[274] I assess the applicant's ability to pay support effective January 2009. That is one month prior to the respondent's first request for a review and reinstatement of spousal support. I am unable to conclude she was prohibited by her disability from taking such action sooner.

[275] That formal notice clearly gave the applicant an opportunity to review his financial circumstances, consult with a lawyer and understand the risks associated with delay.

[276] The change of circumstances that caused the applicant to seek a reduction ended in August 2007. His then deferred business and tax obligations had to be addressed.

[277] The applicant took the risk when he became re employed when he did not address the issue formally that absent agreement he would one day have to apply to change the order formally through agreement or court order.

[278] Fourteen years have lapsed and the respondent currently does not appear to be making further efforts to become employed.

[279] I have reviewed the Statement of Expenses and Statements of Property filed by the respondent. She shows monthly living expenses of $2,805 although some of these would be relevant to her apartment in Halifax and not her living situation in Saskatchewan.

[280] It does have a $250 expense for her son which would no longer be relevant.

[281] I have reviewed both parties' statements of income and expenses. Based on the respondent's needs and ability to pay, the amount of spousal support for the year 2009 to 2010 will be reduced from $5,600 to $3,000 per month.

[282] Assuming the applicant has paid $2000 per month, this results in arrears pursuant to the Corollary Relief Order dated June 14, 2001 as amended by this application to vary, of $12,000.

[283] Likewise for the year 2010 to 2011, the applicant's monthly payments will be reduced from $5,600 to $3,000 per month for arrears of $12,000 providing he has maintained a payment of $2,000.

[284] For the year 2011 to 2012, again the applicant shall be obliged to pay $3,000 per month resulting in arrears of $12,000 or such amount as is calculated by Maintenance Enforcement after considering his payments.

[285] This is of course provisional on the applicant having actually paid $2,000 per month.

[286] In other words, the applicant will be credited with any monies he paid during this period of time from January 2009 forward.

[287] The spousal support guideline information provided by the respondent in these circumstances was not as helpful as expected in part due to the fact that the respondent relied on 18 years rather than 14 years.

[288] The calculations I received from the applicant assisted only in so far as to suggest what ought to have been the reasonable expectations of the parties had they used them initially .

[289] The interruption of his income and thus the agreed upon payments, the time lapse in resolving issues and the aggravated health concerns subsequent to the separation require more than a formulaic approach to resolve these issues with equity.

[290] If the applicant has maintained support of $2,000 a month, the arrears and retroactive award would result in arrears of $36,000.

[291] All other arrears associated with the years between January 2002 and December 31 2008 are erased.

Tax Considerations

[292] The applicant and respondent shall at the request of the opposite party from time to time execute all such documents as may be required by the Canada Revenue Agency to permit the above mentioned arrears of spousal support to be included for income tax purposes by the recipient in the tax year in which those arrears were ordered to be paid rather than a year in which they were actually paid.

[293] This includes the execution of Canada Revenue Agency form T1198 if required.

[294] The respondent has asked to be reinstated on the applicants life insurance plan and the applicant has asked to be free to name his son as sole beneficiary.

[295] The applicant shall name the respondent as beneficiary in the amount of ½ the policy's face value until the arrears are satisfied and he no longer has an obligation to pay spousal support.

[296] The applicant is to maintain that policy as long as he has a spousal support obligation and provide proof upon request.

[297] I order him to advise the respondent immediately when this is accomplished.

[298] If the applicant has not advised the insurer in writing and provided a copy to the respondent of these mandatory changes within two weeks of the date of this decision, the respondent shall be authorized by this order to advise the company through her counsel that these changes must be made to provide security for the unpaid retroactive award.

[299] I want to be clear. This award of spousal support is being extended beyond what would ordinarily occur in accordance with spousal support as agreed upon between the two parties in their global settlement. This agreement was short-lived. It was not frustrated by any wilful act of the applicant.

[300] In the ordinary course, each party must adjust to the ebb and flow of actual life circumstances.

[301] The respondent’s financial recovery was interrupted by the applicant’s business loss. That was one of the many aggravating factors that no doubt affected her own mental health problems.

[302] This award effects a reinstatement for the applicant to fulfill his obligations in accordance with the Corollary Relief Judgement because he now has the ability to pay. The maximum of 14 years is clearly a guideline and not mandatory.

[303] However, it would be an error to interpret section 17 conditions to conclude that due to the respondent's mental illness existing at the date of marriage and significantly aggravated by her business and personal life after the divorce, the Court would be justified in placing all responsibility on the applicant.

[304] For the duration of his obligation to pay support, the applicant shall continue the respondent's medical coverage as long as coverage is provided by his employer.

[305] The applicant shall also pay on a prospective basis $3,000 per month commencing January 1, 2012 subject to the right of the parties to seek a review and termination in 2014.

[306] At that time the respondent will be required to provide further evidence of her medical condition and efforts she has made to increase her income either through employment or assistance.

[307] The respondent shall also be obliged to submit a statement of income and expenses and a statement of property.

[308] This does not prohibit either party from making an application to vary in future.

[309] It is realistic to conclude that the applicant will be considering retirement options in the foreseeable future and a termination date is inevitable.

[310] Counsel for the applicant shall draft the order.

Legere Sers, J.