SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Daigle v. Daigle, 2013 NSSC 205

Date: 2013-06-27
Docket: 1201-061203; SFHD-049708
Registry: Halifax

Between:

Deborah Daigle

Petitioner

v.

Henri Daigle

Respondent

Judge: The Honourable Justice Elizabeth Jollimore

Heard: June 14, 2013, in Halifax, Nova Scotia

Counsel: Jennifer L. Schofield for Deborah Currie

C. LouAnn Chiasson, Q.C. for Henri Daigle

By the Court:

Introduction

[1] Deborah Daigle (now known as Deborah Currie) and Henri Daigle divorced in March 2008. Their Corollary Relief Judgment provides for the payment of spousal support to Ms. Currie, and Mr. Daigle has applied to terminate this obligation. He also applied for a retroactive variation of support payments which was resolved by consent at the commencement of the hearing.

The Corollary Relief Judgment

[2] The terms of the Corollary Relief Judgment were resolved at a judicial settlement conference. According to the Judgment, Ms. Currie's annual income was $15,281.47, and Mr. Daigle's was approximately $70,000.00, "comprised of $36,000.00 base salary, overtime and pension income".

[3] The couple's daughter, Brianne, who was within one month of her eighteenth birthday, lived with Mr. Daigle, as did their older daughter, Danielle. According to the Judgment, in lieu of child support for Brianne, Ms. Currie was to pay $2,756.00 in outstanding orthodontic costs over the next two years. There was no support for Danielle. Mr. Daigle was to maintain health care coverage for Ms. Currie and for Brianne for so long as permitted by his insurance policies.

[4] Mr. Daigle was to make monthly spousal support payments of $1,200.00. The Corollary Relief Judgment said that if he was "unable to sustain the amount of overtime presently being earned, that this may warrant a variation". Mr. Daigle's Canadian Forces pension was ordered to be equally divided. The Corollary Relief Judgment further stated:

> When Deborah Daigle receives her share of Henri Daigle's pension, the amount of spousal support payable by Henri Daigle shall be reduced by the greater of the dollar amount of the reduction in his pension, or the amount of the pension she draws whether those events happen at the same time or at different times.

[5] The pension was divided in October 2009. It was only at the commencement of this hearing that the parties finalized an order which reduced Mr. Daigle's spousal support payments by the amount by which his pension

payments were reduced as a result of the pension division. Mr. Daigle's current spousal support obligation is $604.55 each month.

[6] Ms. Currie argues that there is no basis for any further variation of Mr. Daigle's support payments to her.

Subsection 17(4.1) of the *Divorce Act*

[7] The provisions of the Corollary Relief Judgment relating to Mr. Daigle's overtime and the division of his pension are the only specific references the Corollary Relief Judgment makes to its variation. Regardless, pursuant to paragraph 41 of the majority reasons in *L.M.P. v. L.S.*, 2011 SCC 64, I still have jurisdiction under section 17 of the *Divorce Act*, R.S.C. 1985 (2nd Supp), c. 3, to consider a variation application.

[8] My authority to vary the spousal support provisions of the Corollary Relief Judgment exists only where the requirements of subsection 17(4.1) of the *Divorce Act* are met. This subsection provides that before I vary a spousal support order I shall satisfy myself that there's been a change "in the condition, means, needs or other circumstances of either former spouse" which has occurred since the making of the spousal support order sought to be varied.

[9] In *Willick*, 1994 CanLII 28 (SCC) Justice Sopinka wrote the reasons for the majority of the Supreme Court. At paragraph 20 of those reasons he described the test:

> 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 a variation.

[10] *Willick*, 1994 CanLII 28 (SCC) was a case involving the variation of child support payments. In *G. (L.) v. B. (G.)*, 1995 CanLII 65 (SCC), this analysis was clearly stated to be applicable to cases involving the variation of spousal support: Justice Sopinka says so at paragraph 73 of the majority reasons and Justice L'Heureux-Dubé says so at paragraphs 49 to 51 of the minority reasons.

[11] According to the Supreme Court in *G. (L.) v. B. (G.)*, 1995 CanLII 65 if the parties foresaw or ought to have foreseen the new circumstances, the required

change has not occurred. In *G. (L.) v. B. (G.)*, 1995 CanLII 65, the Supreme Court upheld the trial judge's decision that there was no material change in circumstance where the former wife was now cohabiting with the person she had been "seeing" when she and her former husband reached their agreement.

[12] More recently, in *Miglin*, 2003 SCC 24, the majority wrote, at paragraph 88:

> We note that it is unlikely that the court will be persuaded to disregard the agreement in its entirety but for a significant change in the parties' circumstances from what could reasonably be anticipated at the time of negotiation. Although the change need not be "radically unforeseen", and the applicant need not demonstrate a causal connection to the marriage, the applicant must nevertheless clearly show that, in light of the new circumstances, the terms of the agreement no longer reflect the parties' intentions at the time of execution and the objectives of the [Divorce] Act. Accordingly, it will be necessary to show that these new circumstances were not reasonably anticipated by the parties, and have led to a situation that cannot be condoned.

[13] In addition to the requirement that the change be one which was not reasonably anticipated by the parties, the change must have other qualities. In *P.M B. v. M.L.B.*, 2010 NBCA 5 at paragraph 2, Justice Robertson said that, "As a general proposition, the court will be asking whether the change was significant and long-lasting; whether it was real and not one of choice." The Nova Scotia Court of Appeal approved of *P.M B. v. M.L.B.*, 2010 NBCA 5, at paragraph 21 of *Smith v. Helppi*, 2011 NSCA 65, referring to the decision by the style of cause under which it had earlier been reported.

[14] The burden of proof is Mr. Daigle's.

Has there been a material change in circumstances?

[15] Mr. Daigle asserts a number of changes have occurred. He says:

(a) he is no longer employed as aresult of his various medical disabilites;

(b) his income has changed significantly since 2008;

(c) his household consists of himself, his two adult daughters and four grandchildren;

(d) his medical condition is worsening;

(e) Ms. Currie's income has almost doubled; and

(f) Ms. Currie continues to work nine months of the year.

[16] While he itemizes six changes, I believe they are best approached as two: Mr. Daigle's situation (items a through d) and Ms. Currie's (items e and f).

Mr. Daigle's situation

March 2008

[17] In 2008, Mr. Daigle had been disabled from military employment for approximately fifteen years. He was employed by Metro Transit. This employment did not come about because his disabilities had abated. According to his affidavit evidence, he was able to secure this employment despite his disabilities. At the time, Mr. Daigle was working more than full-time hours. His annual income was approximately $70,000.00, comprised of "$36,000.00 base salary, overtime and pension income". According to his 2008 T4 slip from Metro Transit, he earned $58,443.00. His salary and overtime earnings were taxable income. He says he was receiving "a pension from the military, as well as a Department of Veterans Affairs pension." I don't know how much he was receiving from each source. A pension from his military employment is taxable, while a pension paid by the Department of Veterans Affairs is not taxable. Without this information I don't know how the annual income figure of $70,000.00 was calculated: were tax-free amounts grossed up for taxes or were amounts simply totalled, regardless of whether they were taxable?

[18] I have no evidence of Mr. Daigle's expenses at the time of the divorce.

[19] In 2008 Mr. Daigle was providing a home to the couple's daughters, Danielle and Brianne. He wasn't receiving child support for Danielle, who was one month away from her twentieth birthday, working part-time at Tim Horton's and not attending school. Ms. Currie discharged her monthly child support obligation for Brianne by paying $2,756.00 toward orthodontic costs over two years (approximately $115.00 each month). Based on section 3 of the then-existing *Federal Child Support Guidelines*, SOR/97-175 and her annual income of $15,281.47, Ms. Currie's monthly child support obligation would have been $126.00.

[20] Mr. Daigle said his hearing problems began in 1978. He said he's had bowel problems (Crohn's disease) for a "long long time", which he explained meant thirty years (since 1983). His vision problems began, he said, in 1993. These problems and "a lot more than that" originated with his employment by the Department of National Defence: he testified that his post-traumatic stress disorder and muscular problems (his legs don't work, he can't walk and he loses all feeling in his hands) also came from "events in the forces". Mr. Daigle left the Armed Forces in 1993 as a result of his disabilities. I should note that Mr. Daigle's comment that he "can't walk" is not literally true. He was able to walk unaided in the courtroom. I accept that his muscular and hearing problems make walking problematic for him.

Current circumstances

[21] In 2009, Mr. Daigle was off work for a number of months because of problems with his vision and his bowels, and he received short term disability benefits. He lost his license to drive commercial vehicles. When his short term disability benefits ended and he was unable to return to work, he lost his job in June 2009. In 2013, Mr. Daigle's been awarded various disability benefits as a veteran. These benefits are based, to borrow the language of the Veterans Affairs Canada disability adjudicator, on Mr. Daigle's "total and permanent disability" and his "permanent requirement for the physical assistance of another person for most aspects of daily living: feeding, dressing, washing, and grooming. There is no evidence that this requirement is daily."

[22] Mr. Daigle continues to provide a home for his daughters. Danielle works full-time as a hairdresser, while Brianne doesn't work outside the home. As well, he provides a home for Danielle's child, for Matthew Duggan (Brianne's common law husband who has recently come to live with them), and for Brianne and Matthew's three children, all of whom are under the age of three. Mr. Duggan has recently found work and, once he and Brianne have saved enough money, they will move out on their own. Mr. Daigle admits it has been his choice to provide a home for his daughters, their children and Mr. Duggan.

[23] With the advent of his new disability benefits, Mr. Daigle says that he needs assistance and it is less expensive to have family live with him than to hire a stranger. It's not clear what assistance his family members provide. Mr. Daigle is still able to drive himself to visit family in Truro and New Brunswick on occasion and, while Brianne does not work outside the home, with three small children, her time cannot be exclusively devoted to her father. Once Brianne, Mr. Duggan and

their children move, Mr. Daigle's assistance will be limited to Danielle, who works full-time.

[24] I wasn't provided with information about Danielle's earnings, Mr. Duggan's earnings or any other funds (child maintenance payments, social assistance benefits, the Canada Child Tax Benefit, the National Child Benefit Supplement, the Nova Scotia Child Benefit or the HST rebate) which might come into the household. Neither his daughters nor Mr. Duggan dependably contribute to the expenses of Mr. Daigle's home.

[25] Mr. Daigle's current income is shown in the table below.

Source	**Gross annual amount**
Canadian Forces Superannuation Act pension	17,044.92 (taxable)
Department of Veterans Affairs pension	10,699.32 (tax-free)
Department of Veterans Affairs permanent impairment allowance	6,837.12 (taxable)
Department of Veterans Affairs permanent impairment supplement	12,570.36 (taxable)
Earnings loss reimbursement	28,271.76 (taxable)
Sub-total	75,423.48

[26] If I tally the gross amounts Mr. Daigle receives, it appears that his current income is approximately $5,000.00 (eight percent) more than it was at the time of the Corollary Relief Judgment. This comparison assumes that the income figure shown in the Corollary Relief Judgment similarly totalled all his sources of income without regard to whether they were taxable or not.

[27] Grossing up the Department of Veterans Affairs pension of $10,699.32 by Mr. Daigle's marginal tax rate of thirty-nine percent, means that Mr. Daigle's annual income is $79,595.93: approximately $9,600.00 more than his income in 2008. This is an increase of almost fourteen percent. This comparison is appropriate if the income figure shown in the Corollary Relief Judgment similarly grossed up his non-taxable income.

[28] Looking at Mr. Daigle's Statement of Expenses, if I accept all of his expenses except the short term expense of $1,000.00 per month for appliance purchases (which will conclude in three months' time – the entire expense was spread over only six months), he can afford all his costs (including his current spousal support payments) with a monthly surplus of over $790.00. In making this

calculation, I have assumed that Mr. Daigle's spousal support garnishee will disappear as a result of the retroactive support variation order granted at the start of the hearing. I have also made my calculation without grossing up Mr. Daigle's income. His surplus almost covers the short term debt remaining on his appliance purchase and will allow him to repay his family debts and budget for dental work he says he needs.

[29] Mr. Daigle has a myriad of health problems: vision problems, impaired hearing, post-traumatic stress disorder, bowel problems (Crohn's disease) and muscular problems. He said that if he wears his hearing aid, he loses his balance and he's had a few accidents resulting in visits to the hospital. These health problems existed at the time of the divorce. This year the Department of Veterans Affairs has determined that he has a total and permanent disability.

[30] Mr. Daigle has referred me to the decision in *Smith* (1990), 27 R.F.L. (3d) 32 (MB C.A.), leave to appeal to the SCC refused, 22139 (May 16, 1991). The case arose from a former husband's application to vary his support payments and to cancel his arrears. The Smiths had been married for twenty-two years and had four children. Mr. Smith fell into arrears before he suffered a devastating stroke which left him unable to speak, write and use his right arm. Inside his home he required a cane and, outside his home, he used a wheelchair. Mr. Smith needed full-time personal care which was being provided by his current wife.

[31] At trial, Justice Diamond found that there were some temporary changes to Mr. Smith's income and she remitted some of the arrears which had accumulated. Her Ladyship didn't accept there'd been any other change in circumstances and she dismissed the remainder of Mr. Smith's application. She said that Mr. Smith's poor health hadn't affected his ability to pay: by virtue of his generous pension, Mr. Smith's net income hadn't changed. In the absence of a change in circumstances, Justice Diamond didn't have jurisdiction to vary the existing order.

[32] In its decision, the majority of the Court of Appeal said that Justice Diamond erred by focussing on money when she should have focused on Mr. Smith's stroke. Justice Twaddle, with whom Justice Huband concurred, said, at paragraph 41, "The stroke brought about such a truly catastrophic change that some variation is a matter of necessity if the law is to be humane." After finding this "material change", the Court of Appeal had jurisdiction to consider how it might vary the support order.

[33] Justice Twaddle wrote, at paragraph 52, that he was "deeply conscious" of Mr. Smith's special need to compensate himself for his loss of faculties. At paragraph 10, he wrote:

> As a severely disabled person, the husband has a special need to seek out alternatives to the simple joys of life which the ability to speak and write and walk can bring. This need was not articulated at the hearing, but should nonetheless be recognized. The search for those alternatives, to put it in blatantly materialistic terms, usually costs money.

[34] Recognizing Mr. Smith's increased expenses, the majority ordered that arrears be remitted in their entirety and spousal support be reduced and payable only so long as Mr. Smith was receiving his private disability payments.

Has there been a material change in Mr. Daigle's circumstances?

[35] The change in Mr. Smith's health was not foreseen and could not have been reasonably anticipated at the time of the support order he sought to vary. In contrast, Mr. Daigle has long suffered vision, hearing, muscular and bowel problems and post-traumatic stress disorder. He has not shown that the deterioration in his health was not reasonably anticipated or ought not to have been foreseeable in 2008 when he had already been disabled from his previous employment.

[36] Mr. Daigle's income has increased by between $5,000.00 and $9,600.00. In the absence of complete information about his income at the time of the Corollary Relief Judgment I cannot determine exactly how great the increase has been. In the absence of evidence about his expenses in 2008, I don't know if his current monthly surplus of approximately $790.00 is a change from his financial circumstances at that time.

[37] Mr. Daigle's daughters lived with him in 2008. He says that he now needs assistance, and it is less expensive to have family provide care than a stranger. Without evidence about his expenses in 2008, I don't know whether having this assistance has changed his financial situation.

[38] Mr. Daigle's support for his grandchildren and for Mr. Duggan are new circumstances, but his support for Brianne and her family is expected to be short-lived and may not, on that basis, be a material change because it is not long-lasting.

[39] In *R.P. v. R.C.*, 2011 SCC 65, Justice Abella, writing for the majority of the Supreme Court of Canada, identified "crucial evidentiary gaps" in Mr. C's variation application which meant that his variation application failed. Where Mr. C was now arguing that he had a reduced ability to pay support, one evidentiary gap was the absence of evidence about his ability to pay support at the time of the order sought to be varied. Without this evidence it was impossible for Mr. C to prove his ability to pay had materially changed. In determining whether there's been a material change I must know the circumstances at the point from which the change is measured. At paragraph 44, Justice Abella said that an applicant should provide evidence of "specific financial circumstances at the time of the original order", though she admitted a trial judge may, on occasion, be able to make findings of those circumstances "based on non-documentary, circumstantial or indirect evidence".

[40] Here, I have no evidence of Mr. Daigle's prognosis or his expenses in March 2008. The Corollary Relief Judgment contained reference to his overtime employment, but it was not clear as to whether the loss of overtime employment related to an anticipated inability to work extra hours or a staffing reduction by his employer. If the former, then the Corollary Relief Judgment expressly anticipated a decline in Mr. Daigle's health. If not, then the issue remains whether the decline in his health could have been reasonably anticipated which I believe it could, given the variety of health problems he had, their long duration and the impact they already had on him.

[41] The absence of evidence relating to Mr. Daigle's health and expenses in 2008 are what Justice Abella would call "evidentiary gaps". Her Ladyship did note that an evidentiary gap may be filled by "non-documentary, circumstantial or indirect evidence". I have no such evidence which might fill the gap.

[42] The tests in *Willick*, 1994 CanLII 28 (SCC) and *Miglin*, 2003 SCC 24 have not be met. I am not satisfied that the current circumstances, if known in 2008, would have resulted in a different order or that the decline Mr. Daigle's health wasn't reasonably anticipated and that the current situation cannot be condoned.

Ms. Currie's circumstances

[43] Mr. Daigle makes two arguments with regard to Ms. Currie's circumstances: her income has increased and, absent any excuse, she has failed to secure employment for more than ten months each year.

March 2008

[44] Ms. Currie and Mr. Daigle had cohabited for one year before they married. They'd been married for twenty-one years and were separated for almost six years when they divorced. Mr. Daigle was the primary breadwinner during the marriage. Ms. Currie worked "for a bit at the first" of their relationship and then stayed home when the children were born.

[45] At the time of Corollary Relief Judgment, Ms. Currie was working during the school months of each year and drawing Employment Insurance benefits at other times. Her annual income was $15,281.00.

[46] Ms. Currie received an equal share of Mr. Daigle's Armed Forces pension in 2009. This has been deposited into an RRSP for her retirement. She received between $20,000.00 and $30,000.00 from Mr. Daigle when he purchased her interest in their matrimonial home.

[47] With Mr. Daigle's spousal support payments, Ms. Currie had a gross annual income of $29,681.00. Mr. Daigle's gross annual income was $55,600.00.

Current circumstances

[48] Ms. Currie contributes to no pension through her employment, according to her paystubs and Statement of Expenses. Her share of Mr. Daigle's pension remains in the RRSP for her retirement. Of the money she received from Mr. Daigle, she has approximately $8,500.00 remaining. The rest was spent on bills and buying a car.

[49] According to her Statement of Income, Ms. Currie has annual earnings of $24,842.16. She continues to work for the same employer, working the same schedule she did in 2008. She receives annual Employment Insurance of approximately $2,632.00 and annual interest income of $120.00. This is earned on the money she received from Mr. Daigle for the matrimonial home. Her annual income from all sources is $27,594.16.

Has there been a material change in Ms. Currie's circumstances?

[50] Ms. Currie continues to be employed only during the school year, and she receives employment insurance the remainder of the year. Her income has increased because her salary and the rate of Employment Insurance benefits have both increased. It is reasonably anticipated that wages and government benefits are

not stagnant and will increase over time. I find this is not a material change in circumstances.

[51] Mr. Daigle objects to Ms. Currie's employment for only part of the year.

[52] In *L.M.P. v. L.S.*, 2011 SCC 64, Mr. S argued that Ms. P had a duty to seek employment based on subsection 15.2(6) of the *Divorce Act* and her failure to seek employment was a material change in circumstances. The Supreme Court rejected this argument, at paragraphs 58 and 59, saying that there was nothing in the parties' order which suggested that Ms. P was expected to seek employment and there was nothing in the *Divorce Act* which imposed a duty of self-sufficiency. For Ms. P, spousal support was intended to last for an indeterminate period. The Corollary Relief Judgment before me contains no indication that Ms. Currie was to take any steps to advance her employment or self-sufficiency. Her failure to do so is not a material change in circumstances.

[53] Here, as well, I believe the tests in *Willick*, 1994 CanLII 28 (SCC) and *Miglin*, 2003 SCC 24 have not be met. Ms. Currie's current circumstances were foreseeable. In the current situation, Ms. Currie receives monthly spousal support of approximately $605.00 following a twenty-two year relationship where she remained at home to care for four children. Her gross income is $34,848.76. Mr. Daigle's income, after he pays support, is $68,168.88, and he has an attractive monthly surplus. This situation is one which can be condoned.

Conclusion

[54] In the absence of a material change in circumstances, I have no authority pursuant to subsection 17(4.1) of the *Divorce Act* to grant Mr. Daigle's variation application. Accordingly, it is dismissed.

[55] I make no order for costs: none were claimed and, while Mr. Daigle failed in his effort to terminate spousal support, he succeeded in reducing his payments to reflect the division of his pension.

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Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia