IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Stening-Riding v. Riding, 2006 NSSC 221

Date: 20060712
Docket: 1201-56085 (SFHD-12303)
Registry: Halifax

Between:

Marie-Louise Annette Stening-Riding

Applicant

v.

Michael David Riding

Respondent

Judge: The Honourable Justice Leslie J. Dellapinna

Heard: June 12, 2006, in Halifax, Nova Scotia

Written Decision: July 12, 2006

Counsel: Paul Thomas, for Marie-Louise Stening-Riding
Deborah Conrad, for Michael Riding

By the Court:

[1] The Applicant, Marie-Louise Stening-Riding, has applied to vary the spousal support provisions of the parties' Corollary Relief Judgment dated February 20th, 2003.

[2] The parties were married on December 31, 1971. They had one child, a daughter, who is now living independently of the parties.

[3] The parties separated in or around May 2001 when the Respondent, Dr. Michael Riding, moved from the matrimonial home and they were divorced in February 2003. At the same time as their divorce was granted a Corollary Relief Judgment was also granted which incorporated the terms of an agreement signed by the parties dated January 30, 2003. That agreement came at the end of lengthy negotiations between the parties and their counsel stretching from April 2001 to the end of January, 2003. In addition to the negotiations that took place over those months, the agreement also followed a number of court appearances, a discovery examination of both parties, an interim application and a settlement conference with a judge of the Supreme Court.

[4] The Agreement includes the terms of the parties' settlement of the property division issue as well as the parties' agreement with respect to spousal support.

[5] Some of the provisions of that Agreement are as follows:

...

> **3. <u>AGREEMENT</u>**
>
> The husband and the Wife each agree to be bound by the provisions of this Agreement, acknowledging that the provisions meet the requirements, objectives and spirit of all applicable legislation and legal principles.
>
> **4. <u>FINANCIAL PROVISION FOR WIFE</u>**
>
> (a) Commencing on the first day of February, 2003, and on the first day of each and every month thereafter, the Husband shall pay to the Wife, by way of direct deposit, for the support of the Wife, the sum of $5,500.00 until November 1, 2003 when he shall pay $4,535.00, subject to section 5 below.
>
> (b) The Husband shall maintain in force for the benefit of the Wife an unencumbered policy or plan of life insurance in an amount of not less than $175,000.00. The Husband will irrevocably designate the Wife as the sole beneficiary under this policy. The Husband shall give to the Wife a true copy of the designation within thirty days of the execution of this Agreement and shall provide, at the Wife's request, no more than once annually, proof that the policy remains in effect.
>
> (c) If the Husband dies without the aforementioned insurance in effect, the Husband's obligation to provide $175,000.00 to the Wife shall be a first charge on his estate.
>
> 5. When the Husband's gross professional and professional corporation income falls below $200,000.00 per annum, assessed on any three consecutive months of fulltime [sic] employment, the spousal support payment shall be

prorated to 20% of his professional and professional corporation income. Spousal support payments shall cease when the Husband's gross professional and professional corporation income falls below $80,000.00 per annum.

...

10 **RELEASES**

...

(d) General: the Husband and the Wife each accept the provisions of this Agreement in satisfaction of all claims for support, interim support, possession of or title to Property, or any other claim arising out of the marriage of the Husband and the Wife, EXCEPT for claims:

(i) arising under this Agreement; and

(ii) for a Divorce Judgment.

...

11. **AGREEMENT**

(a) The within Agreement shall constitute Minutes of Settlement of the corollary matters in the within divorce proceeding, and insofar as the jurisdiction of the Court allows, shall be incorporated in and form part of the Corollary Relief Judgment.

(b) When a Divorce Judgment is obtained, all the terms of this Agreement shall survive the Divorce Judgment and continue in force.

...

12. **GENERAL**

...

(b) The Husband and the Wife each warrant that there are no representations, collateral agreements or conditions affecting this Agreement other than as expressed in this Agreement.

(c) This Agreement may be amended only by a further instrument in writing signed by the Husband and the Wife and witnessed.

...

13. **JOINT PREPARATION OF AGREEMENT**

Each party personally and by his or her lawyer has participated in the preparation of this Agreement. This Agreement must be construed as if the parties were joint authors, and it will not be construed against one party as if that party or that party's lawyer were the sole or major author of the Agreement.

...

16. **INDEPENDENT LEGAL ADVICE**

The Husband and the Wife each acknowledge that he and she:

(a) has had or has had the opportunity to obtain independent legal advice before and since concluding the terms of this negotiated Agreement;

(b) has read the Agreement in its entirety and has full understanding and knowledge of its contents and understands his or her respective rights and obligations under this Agreement;

(c) acknowledges that the terms of the Agreement are fair and reasonable; and

(d) is signing this Agreement voluntarily, without any duress or undue influence, fraud or coercion, while in good mental and physical health.

[6] The Agreement listed which assets each party was to retain and what debts each was to assume.

[7] There were numerous assets including a farm property in Lunenburg County which had been professionally appraised, registered retirement savings as well as other investments, household contents, bank accounts, etc.

[8] The Applicant assumed responsibility for her motor vehicle loan having a balance outstanding as of the date of the parties' separation of approximately $7,545.00 and the Respondent assumed responsibility for the bulk of the matrimonial debt which, according to my calculations, amounted to approximately $340,000.00.

[9] In addition to the matrimonial debts both parties had significant legal expenses to pay.

[10] In March, 2005 the Applicant applied pursuant to section 17 of the ***Divorce Act*** to vary the spousal support provisions of the Corollary Relief Judgment. By

that time the Agreement was just over two years old. The parties once again exchanged financial disclosure and provided the Court with their affidavits and financial statements and both counsel were given the opportunity to cross-examine the opposing party and present submissions.

[11] At the risk of over simplifying the Applicant's position, on her behalf it was argued that the Agreement reached in January, 2003 did not conform with the objectives of the ***Divorce Act*** and that in any event her circumstances and the circumstances of the Respondent have unfolded in a way different from that which they contemplated when the Agreement was signed and therefore a variation of the spousal support provisions of their Agreement is not only justified but required. She proposed that the monthly support be increased to a figure that more closely resembles that which would be assessed pursuant to the *Spousal Support Advisory Guidelines* and that she receive a substantial lump sum to compensate her for the "underpayment" of spousal support since the 1st of February 2003. The Court was also asked to remove the clause that permits the discontinuance of spousal support when the Respondent's professional income drops below $80,000.00, so that her spousal support would be "unfettered", to use the term of her counsel. It would then

be left open to the Respondent to apply in the future to vary spousal support should circumstances change again.

[12] It is the Respondent's position that the Agreement was sound when it was signed, that there have been no material change in the circumstances of either of the parties since it was signed or since it was made an order of the Court and that the Applicant should be bound by the terms of the Agreement.

[13] The relevant provisions of the ***Divorce Act*** 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.

[14] The first issue is whether there has been a “change in the condition, means, needs or other circumstances” of either of the parties since their divorce.

[15] When the Agreement was signed the Applicant was 56 years of age and the Respondent 62. (She is now 59 and he is now 66). The Applicant was in the process of completing her doctorate in English. She had previously obtained her Bachelor of Arts degree in 1992 and her Masters in 1994. She eventually obtained her Ph.D. in October 2004. She essentially had no income other than the support that was given to her by the Respondent. The Respondent is a physician with a specialty in neuro- radiology. According to the Agreement the Respondent stated his 2001 income was $247,242.50 (based on his 2001 income tax return) and in

addition he had gross earnings from a radiology practice of $95,000.00. Based on that he was projecting an income in 2002 of approximately $342,000.00. He was also estimating gross earnings in 2003 of $285,000.00.

[16] The Court received expert evidence from Mr. Stephen Shupe, a Chartered Accountant. According to his calculations the Respondent's actual income in 2002 was $337,773.00 (approximately $4,400.00 less than what the Respondent had estimated) and in 2003 it was approximately $314,300.00. In 2004, including income paid by Dr. Riding to his current wife, his total gross income was $383,178.00 and in 2005 $448,275.00. Therefore, since 2002 his gross income increased by approximately $110,500.00. Mr. Shupe assumed the Respondent paid his wife a salary simply to income split. There is no evidence of what she does to earn that income and similarly no evidence that she doesn't earn it.

[17] According to the Respondent during the course of the divorce proceeding and after he worked many hours and many weekends to earn extra money because of the significant legal costs that he incurred in relation to the divorce. He also had substantial debt to pay down as a result of the divorce agreement. He was in his

sixties and both parties acknowledged that he was hoping to retire in the near future.

[18] The Applicant's income also changed since the Agreement was signed. She went from an income of almost 0 to an income of approximately $76,284.00 a year inclusive of the spousal support payments paid by the Respondent or, $21,864.00 exclusive of those support payments. The additional income comes from investment income and rental income that she receives from a tenant who rents a basement apartment in her home as well as rent from a boarder. The household expenses that the Applicant claims in relation to her rental income exceed the actual rental income and therefore there are no adverse tax consequences to receiving those monies. Her investment income, which is modest, receives the favourable tax treatment which is accorded dividend income.

[19] The Applicant also argued that following the settlement she was left "deeply in debt".

[20] I find that there have been changes in circumstances since the granting of the divorce, most notably the changes in both parties' income. I do not agree with the

Applicant’s description of her debt position. With the exception of legal and other fees associated with the divorce and this variation proceeding, the bulk of her debt relates to loans which she incurred for investment purposes and a mortgage which she took out to finance renovations to the former matrimonial home in order to create an apartment for rental purposes. The rental income more than covers that mortgage payment.

[21] The Court has been referred to the Supreme Court of Canada’s decision in *Miglin v. Miglin*, [2003] 1 S.C.R. 303. The opening paragraph of that case says that the decision concerns the proper approach courts are to take in determining an application for spousal support pursuant to section 15.2 of the ***Divorce Act*** where the parties have executed a final agreement that addresses all matters respecting their separation, including a release of any future claim for spousal support. However, paragraph 2 states:

> In broader terms, the appeal raises the question of the proper weight to be given to any type of spousal support agreement that one of the parties subsequently wishes to have modified through an initial application in court for such support. In that sense, the matter is not restricted to spousal support agreements that contain a time-limited support arrangement or to agreements which contain a full and final release from support obligations by one or both parties.

...

[22] While *Miglin (supra)* was decided primarily with section 15.2 in mind, it also applies to variation applications under section 17. At paragraph 91 the Court stated:

> As we noted above, it would be inconsistent if a different test applied to change an agreement in the form of an initial order under s. 15.2 and to variation of an agreement incorporated into an order under s. 17.
>
> ...
>
> Consideration of the overall objectives of the Act is consistent with the non-exhaustive direction in s. 17(7) that a variation order "should" consider the four objectives listed there. More generally, a contextual approach to interpretation, reading the entire Act, would indicate that the court would apply those objectives in light of the entire statute. Where the order at issue incorporated the mutually acceptable agreement of the parties, that order reflected the parties' understanding of what constituted an equitable sharing of the economic consequences of the marriage. In our view, whether acting under s. 15.2 or under s. 17, the Court should take that into consideration.

[23] When faced with a pre-existing agreement the Supreme Court in *Miglin (supra)* says that a two-stage investigation into all of the circumstances surrounding the agreement is required - first at the time of its formation, and second at the time of the application. In the first stage the court should look at the circumstances in

which the agreement was negotiated and executed to determine whether there is any reason to discount it. As stated in paragraph 81,

> "...the Court should be alive to the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerabilities, taking into account all of the circumstances, including those set out in s. 15.2 (4)(a) and (b) and the conditions under which the negotiations were held, such as their duration and whether there was professional assistance."

[24] It is not necessary for the court to determine the agreement was unconscionable. Rather, the court is to look at all of the evidence and determine whether one party took advantage of the vulnerability of the other party in the negotiations. Paragraphs 82 and 83 of *Miglin (supra)* state:

> "[T]here must be evidence to warrant the court's finding that the agreement should not stand on the basis of a fundamental flaw in the negotiation process. Recognition of the emotional stress of separation or divorce should not be taken as giving rise to a presumption that parties in such circumstances are incapable of assenting to a binding agreement. ... We stress that the mere presence of vulnerabilities will not, in and of itself, justify the court's intervention. The degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties.
>
> Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere.

[25] The Applicant testified that she found the divorce proceedings “very stressful” and at the same time she was under a great deal of pressure to finish her thesis. She stated she was attending counselling with a psychologist in the fall of 2001 and summer of 2002 (before the Minutes of Settlement were signed) and she consulted with her family physician on a regular basis. She also said that she was taking antidepressants until the Agreement was signed. She said she felt totally exhausted and under pressure to sign the Agreement. Because of her emotional state and the huge legal costs, she felt the need to settle made her vulnerable at the time of the execution of the Agreement.

[26] The Respondent testified that he too felt the stress of the negotiations.

[27] I find that there was no pressure exerted by the Respondent upon the Applicant and no oppression during the course of the negotiations or the signing of the Agreement and I find further that the Respondent did not take advantage of any vulnerability of the Applicant as contemplated by the Supreme Court in *Miglin* (supra). There is certainly no evidence of coercion or anything of that nature. Both parties felt pressure and stress including financial pressure to sign the Agreement as is not uncommon when divorcing couples finally reach the point of either going to

trial or agreeing to settlement terms. The Applicant however had the assistance of very experienced counsel as well as financial advice from Mr. Shupe. The main parcel of real estate had been professionally appraised (by an appraiser retained by the Applicant) as had the household contents. To the extent the Applicant was vulnerable, such vulnerabilities were more than offset by the professional assistance that she received.

[28] Both parties are intelligent and educated people. I am satisfied that both were competent to enter into a contract in the nature of the Separation Agreement which they signed. I am satisfied too that both read and understood the contents of the Agreement and its effect. It should be noted (notwithstanding the wording of paragraph 13) that the Agreement was drafted by the Applicant's counsel.

[29] Having reached that conclusion the next step in the Court's analysis is to determine whether the Agreement signed by the parties adequately takes into account the factors and objectives listed in the ***Act***. Does the Agreement reflect an equitable sharing of the economic consequences of the parties' marriage and its breakdown? In paragraph 85 of *Miglin* (supra) the Court stated:

> When examining the substance of the agreement, the court should ask itself whether the agreement is in substantial compliance with the *Divorce Act*. As just noted, this "substantial compliance" should be determined by considering whether the agreement represents a significant departure from the general objectives of the Act, which necessarily include, as well as the spousal support considerations in s. 15.2, finality, certainty, and the invitation in the Act for parties to determine their own affairs. The greater the vulnerabilities present at the time of formation, the more searching the court's review at this stage.

[30] On behalf of the Applicant it was argued that the Agreement does not comply with the objectives of the ***Act***. If the Agreement was to stand without variation it is conceivable that at some future date that the Respondent would earn an income of $80,000.00 and not be required to pay any spousal support to the Applicant even if she is able to demonstrate a need. The Agreement makes sense, it was submitted, only if the parties contemplated that the Applicant would be able to obtain employment of her own such that she would become self-sufficient.

[31] The Respondent argued that all of the objectives in section 15.2 (6) were taken into account. Both parties wanted a final agreement so as to avoid the necessity of future court proceedings. Retirement was contemplated by both parties and by the Respondent in particular and the Agreement was designed with retirement in mind.

[32] The onus is on the Applicant to satisfy the Court that the Agreement was not in substantial compliance with the ***Divorce Act*** . She has not met that burden.

[33] The Agreement made provision for an approximately equal division of matrimonial assets and debts. The assets received by the Respondent exceeded in value the assets received by the Applicant but that was offset by the Respondent's assumption of debts far greater in value than the debts assumed by the Applicant. The Agreement provided for spousal support of $5,500.00 a month for the months of February 2003 to an including November 2003 and thereafter in the sum of $4,535.00 per month. The Applicant submits that the quantum of support was insufficient and compares it to the figure that could have been ordered had the *Spousal Support Advisory Guidelines* been applied.

[34] The *Spousal Support Advisory Guidelines* are not law. At best they are a tool that the Court may sometimes use in assessing the appropriateness of possible levels of support. The authors of the guidelines describe them only as a tool and as a "starting point for negotiation and adjudication". Further, the *Spousal Support Advisory Guidelines* allow for exceptions to the general formulas provided in the guidelines and one such exception mentioned is the assumption of debt by one of

the parties. Further, the guidelines make it clear that the exceptions listed are not intended to be an exhaustive list and each case must be decided on its own facts.

[35] Although the parties were married for over 29 years prior to their separation, in determining the appropriate spousal support terms, one has to take into account a number of factors including the Respondent's age, his health (which has not been good) and the reasonable expectation of retirement. The spousal support figure also had to recognize that the Applicant was left essentially debt free while the Respondent was assuming debts in excess of $300,000.00. Though his income was substantial he was also working very hard to earn it at an age when most people are trying to slow down. I am unable to conclude that the Agreement was not in substantial compliance with the objectives of the ***Divorce Act*** . It appears that in reaching their agreement on spousal support the parties did consider their respective circumstances and took heed to all of the objectives in section 15.2(6). It is not for this Court to substitute what it *might* have ordered had the parties proceeded to trial. The parties should be free to arrive at their own agreement (and should be encouraged to do so) and in assessing whether there has been substantial compliance, the Court should be willing to give some deference to the terms that the parties chose.

[36] While it is certainly not determinative, paragraph 3 of the Agreement says that the parties acknowledge that the provisions of the Agreement “meet the requirements, objectives and spirit of all applicable legislation and legal principles.”

[37] The second stage of the court’s inquiry requires an assessment of the extent to which the enforcement of the Agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the ***Act***.

[38] In paragraph 88 of *Miglin* the Court stated:

> The parties' intentions, as reflected by the agreement, are the backdrop against which the court must consider whether the situation of the parties at the time of the application makes it no longer appropriate to accord the agreement conclusive weight. **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 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.** [Emphasis added]

[39] The onus is again on the Applicant to demonstrate that the Agreement is no longer a reflection of the parties' original intentions.

[40] To satisfy the second stage of the test it is not enough to merely demonstrate that changes have occurred. Change is inevitable. As noted in paragraph 89 of *Miglin*:

> We stress that a certain degree of change is foreseeable most of the time. The prospective nature of these agreements cannot be lost on the parties and they must be presumed to be aware that the future is, to a greater or lesser extent, uncertain. It will be unconvincing, for example, to tell a judge that an agreement never contemplated that the job market might change, or that parenting responsibilities under an agreement might be somewhat more onerous than imagined, or that a transition into the workforce might be challenging. Negotiating parties should know that each person's health cannot be guaranteed as a constant. An agreement must also contemplate, for example, that the relative values of assets in a property division will not necessarily remain the same. Housing prices may rise or fall. A business may take a downturn or become more profitable. Moreover, some changes may be caused or provoked by the parties themselves. A party may remarry or decide not to work. Where the parties have demonstrated their intention to release one another from all claims to spousal support, changes of this nature are unlikely to be considered sufficient to justify dispensing with that declared intention.

[41] The Applicant said that the divorce settlement has left her deeply in debt. That is not the case. Since the signing of the parties' Agreement the Applicant chose to place a modest mortgage on her home to finance renovations to create a rental unit. That rental unit generates $1,000.00 a month in income. The

mortgage payments are $320.00 per month. In addition she receives a further $500.00 a month from a boarder. Her total rental income is surpassed by the portion of her household expenses which she claims as rental expenses (including the interest on the mortgage). The net result is that her rental income is effectively tax free. The renovation (and the mortgage it required) would appear to have been a wise decision on her part. In addition she borrowed approximately $150,000.00 on a line of credit, using her home as security, to purchase mutual funds as an investment. How prudent that decision was remains to be seen. Nevertheless it was a debt that she voluntarily assumed. Her only other debts of any consequence are legal fees and accounting fees relating to the divorce proceedings and these variations proceedings. She either was aware or should have been aware of her legal costs before signing the Agreement and the fees incurred in relation to these variation proceedings were voluntarily assumed.

[42] She also argued that she has few job prospects and that the employment market is difficult, particularly for a woman of her age. The Applicant should have been aware that whereas she was in her late fifties when she received her doctorate the prospects of her obtaining a full-time teaching position at a university in the narrow field of her expertise were far from great. It was completely foreseeable

that she would have difficulty and perhaps no chance at all of obtaining such a position. Of the many universities in Nova Scotia she has applied only to those in the Halifax Regional Municipality. The only non-teaching position that she appears to have applied for was the position of Administrator and Communications Officer with the Atlantic Metropolis Centre in Halifax.

[43] The Applicant has an impressive resume. She speaks five languages (some more fluently than others). In addition to her B.A., M.A. and Ph.D. she has a degree in Journalism and Mass Communications. She has teaching experience, and experience in journalism and public relations. Her job search since the divorce was granted has been very narrow - limited both with respect to occupations and geography. There appears to have been no effort to seek less challenging employment or even part-time work such as tutoring. Given the limitations that the Applicant has placed on her job search, it is not surprising and in fact foreseeable that her efforts to date to find employment would be unsuccessful. In her affidavit the Applicant also referred to her health problems. Specifically she suffers from glaucoma and cataracts. Neither of these conditions were included in the reasons given for her inability to obtain a teaching position. I also understand that she has received surgery for her cataracts.

[44] The Applicant claims she lives a lifestyle of survival. Again I disagree. Her income, inclusive of the support that she is presently receiving, exceeds $76,000.00 per year. Her rental income and investment income which totals almost $22,000.00 a year is taxed very favourably or not at all because of the legitimate expenses that she can claim and the tax treatment of dividends.

[45] Her Statement of Expenses discloses high housing costs. She lives in a large older home in central Halifax which, if sold, according to her could attract a selling price in the $500,000.00 range. It is more house than one person needs but she is, as I said, sharing the house with tenants. It is for her to decide whether to continue to maintain the house or to sell it, buy or rent less expensive accommodation and invest any excess sale proceeds. She reports expense figures like food of $650.00 a month, toiletteries and household supplies of $200.00 a month, holidays of $500.00 a month as well as:

Miscellaneous	$300.00
Garden	100.00

Furniture 200.00

Computer and Office 100.00

[46] Her Statement of Expenses is very similar to one which she filed with the Court in January 2003 (the month the Agreement was signed). The major differences in her reported expenses are the voluntary debts that she has assumed. Her Statement of Property discloses that her house has apparently increased in value as have her registered retirement savings and other investments.

[47] The incomes of both parties have increased since the Agreement was signed but that too was a foreseeable event. The Respondent worked long hours throughout his career and having assumed very substantial debts as a result of the parties' settlement worked even harder in order to pay those debts down and to begin to prepare for retirement. Retirement was and still is a goal. He is 66 years of age and has had two hip replacements.

[48] The affidavits and the briefs filed with the Court prior to the parties signing their Agreement, make it abundantly clear that the Applicant was aware of the Respondent's income potential and the challenges she would be facing given her

circumstances including her age and her years out of the workforce. It is also apparent that she was alive to the issue and was advised of the law with respect to terminal support orders prior to the Agreement being signed.

[49] The Applicant also referred to what appears to be a dramatic increase in the value of the Lunenburg property now owned solely by the Respondent. Prior to the signing of the parties' Agreement the Applicant had the property appraised. Its gross value was then determined to be $996,000.00. The Respondent gave evidence that the farm has recently been appraised for 2.9 million dollars and is currently listed for sale at 3.4 million dollars. There have been no offers on the property and in fact no one has even come to view the property. Relying on the appraised value he placed a mortgage on the property of over a million dollars and used the money to consolidate other debt and to purchase a home in the United States where he and his wife plan to retire. It is unclear to me from the evidence whether the Respondent made further renovations to the property subsequent to the signing of the Agreement that may account for its increase in value or whether it is simply the desirability of the location.

[50] Fluctuation in property values is a foreseeable event. It is possible that the Applicant’s properties both in Halifax and in Finland have also increased in value but more recent appraisals have not been obtained. I do not consider the increased appraised value of the Respondent’s real estate to be a reason to vary the spousal support provisions of the parties’ Agreement.

[51] In short, while there have been changes in circumstances since the Agreement was signed approximately three and a half years ago those changes were or should have been reasonably anticipated by the parties and are not such that the Court can now conclude that the Agreement no longer reflects the parties’ intentions. In fact, the circumstances that have unfolded are on track with what the parties had intended and expected with the possible exception that the Respondent has not retired as soon as he had hoped. That however only benefits the Applicant as she continues to receive support of $4,535.00 per month, or $54,420.00 per year.

[52] The Applicant’s future is not as bleak as she might believe. In addition to whatever income she may be able to earn as a result of her own efforts, she presently has registered retirement savings and other investments having a gross

value in excess of $380,000.00 not including the investments which she purchased on credit. (If she was to liquidate those investments and pay off the balance of her line of credit she would have a further $35,000.00 according to her own figures.) Given her age, she should not be looking just at the interest or dividends those investments can generate but she should also be giving some thought to drawing down on the principal gradually over time. Also, very shortly she will be able to collect Canada Pension.

[53] By the terms of the parties' Agreement, the Respondent will continue to provide her with support until such time as his professional income drops below $80,000.00. When that time comes he too will have to rely on his investment income, Canada Pension and perhaps Old Age Pension.

[54] In conclusion, the current circumstances of the parties are not a "significant departure from the range of reasonable outcomes anticipated by the parties" when they signed their Agreement. The application is dismissed.

COSTS

[55] Subsequent to the hearing of the variation application, I received written submissions from counsel on the issue of costs.

[56] These proceedings began in March, 2005 when the Applicant filed her application to vary the spousal support provisions of the Corollary Relief Judgment. The parties and their counsel appeared for a pre-hearing conference on May 9, 2005 at which time further dates were scheduled for a settlement conference (which took place in September, 2005) and a full hearing to take place on December 8, 2005.

[57] While I do not know precisely what occurred during the settlement conference it appears that the parties thought that they were making some progress and the trial was postponed until June 2006 with the intent that the parties would get together again for a further settlement oriented conference in November 2005.

[58] When November arrived the parties decided not to proceed with a settlement conference. In fact the Applicant filed another application on November 9, 2005 in which she requested “Relief by way of constructive trust or in the alternative, a quantum meruit based on unjust enrichment”.

[59] The settlement conference judge directed that the parties arrange a telephone conference with me (as I was scheduled to hear the applications) and that telephone conference took place on November 17, 2005. As a result of that telephone conference a further organizational pre-trial conference was scheduled for January 31, 2006.

[60] At the January 31, 2006 pre-trial conference the Applicant's counsel verbally requested that I order an appraisal of the Respondent's farm property. I directed that if the Applicant wanted such an Order, a formal motion would have to be filed with the Court. I also expressed concern with the form of the Applicant's affidavit filed in support of her applications. A Chambers date of April 6, 2006 was scheduled and I indicated to counsel that I would be prepared at that time to entertain any applications the parties wanted to make in advance of the June hearing.

[61] The Respondent applied to have the affidavit of the Applicant (dated January 20, 2006) struck. The Applicant chose not to formally apply for an Order to have the Respondent's farm property appraised and her counsel advised the Court

verbally that the Applicant would be withdrawing her application of November 9, 2005. I granted the Respondent's application and struck the Applicant's January 20, 2006 affidavit in its entirety. The Applicant was given another opportunity to file an affidavit in proper form in support of her application to vary.

[62] The Applicant did file a new affidavit and the hearing of her application to vary proceeded on June 12.

[63] Civil Procedure Rule 70.03(4) provides:

...

> (4) Where any matter of practice or procedure is not governed by statute or by this Rule, the other rules and forms relating to civil proceedings shall apply with any necessary modification.

Other than Rule 70.24 which deals with suit money, Rule 70 does not have its own rule with respect to costs.

[64] Civil Procedure Rules 40.02 and 40.03 provide as follows:

Discontinuance of proceeding, etc., with leave

40.02. At any time after a proceeding is entered for trial or its hearing is commenced in chambers,

(a) a plaintiff may discontinue the proceeding or withdraw any cause of action therein, against any defendant;

(b) a defendant may withdraw his defence or any part thereof against any plaintiff; with the leave of the court, and the order may contain such terms as to costs, the bringing of any subsequent proceeding, or otherwise, as are just.

Costs

40.03. (1) Subject to rule 40.02, a party, discontinuing a proceeding or withdrawing any cause of action therein, or withdrawing his defence or any part thereof, shall pay the costs of any opposing party to the date of giving notice of discontinuance or withdrawal to the party, and if before payment of the costs he subsequently brings a proceeding for the same, or substantially the same claim, the court may order the proceeding to be stayed until the costs are paid.

(2) When an opposing party produces a notice of discontinuance or withdrawal that was served on him, he may tax his costs and enter judgment for the costs.

[65] Rule 63.02(1) reads:

Costs in discretion of court

63.02. (1) Notwithstanding the provisions of rules 63.03 to 63.15, the costs of any party, the amount thereof, the party by whom, or the fund or estate or portion of an estate out of which they are to be paid, are in the discretion of the court, and the court may,

(a) award a gross sum in lieu of, or in addition to any taxed costs;

(b) allow a percentage of the taxed costs, or allow taxed costs from or up to a specific stage of a proceeding;

(c) direct whether or not any costs are to be set off.

[66] And Rule 63.04(1) provides:

> **Party and party costs fixed by court**
>
> 63.04. (1) Subject to rules 63.06 and 63.10, unless the court otherwise orders, the costs between parties shall be fixed by the court in accordance with the Tariffs and, in such cases, the “amount involved” shall be determined, for the purpose of the Tariffs, by the court.

[67] The Respondent seeks substantial costs. He argues that the Agreement of January 30, 2003 was intended and designed to avoid Court applications such as those that were filed by the Applicant. As a result of her applications he was put to considerable expense because of his need to retain counsel, his and his lawyer's attendance at a number of Court appearances, the extensive financial disclosure that he had to provide and the work that went into his application to strike the Applicant's affidavit of January 20, 2006 and to respond to her application to vary the spousal support.

[68] The Respondent also argues that the applications were motivated by revenge and greed and he therefore asks the Court to consider granting to him solicitor-client costs.

[69] The Applicant's position is that the facts of this case do not warrant solicitor-client costs and if costs are to be awarded they should be in the vicinity of $1,750.00 or less.

[70] Costs are in the discretion of the Court. Generally speaking a successful party is entitled to costs and should only be denied costs for very good reason. (See *Bennett v. Bennett* (1981), 45 N.S.R. (2d) 683 (T.D.) and *Kaye v. Campbell* (1984), 65 N.S.R. (2d) 173 (A.D.)). I have not been convinced that there is a principled reason to deny the Respondent costs.

[71] As a result of the application of Rule 40.03(1) he is entitled to costs in relation to the Applicant's November 2005 application up to the date that it was discontinued. I find too that he is entitled to costs for having successfully defended the March, 2005 application to vary.

[72] In addition to the hearing which took place in June, the two applications necessitated two pre-trial conferences, a phone conference and an appearance on April 6, 2006 which resulted in the Court striking the Applicant's affidavit of

January 20, 2006 (although the Court declined the Respondent's application at that time to strike the Applicant's variation application). The Respondent is entitled to party and party costs. I am not prepared to order costs on a solicitor-client basis. Solicitor-client costs are awarded only in "rare and exceptional circumstances" to highlight the Court's disapproval of the conduct of one of the parties. (See *Wournell (P.A.) Contracting Ltd. and Wournell v. Allen* (1980), 37 N.S.R. (2d) 125 (A.D.)). The Applicant's conduct throughout these proceedings was not so reprehensible or distasteful to warrant such a rebuke.

[73] The amount of costs to be awarded is also in the discretion of the Court.

[74] I have considered what this Court has awarded by way of costs in previous cases and have reviewed the case law that has been presented by counsel. I have considered too the Tariffs including Tariffs A, C, and F. I have considered the number of Court appearances and phone conferences that the applications necessitated, the Respondent's success in having the Applicant's January 20, 2006 affidavit struck and his success in defending the application to vary. I have taken into account also the considerable financial disclosure that the two applications required of the Respondent and the length of each Court appearance and the

average complexity of the issues that were before the Court. I therefore order the Applicant pay to the Respondent costs, inclusive of disbursements, in the sum of $6,500.00.

J.