

IN THE SUPREME COURT OF NOVA SCOTIA

FAMILY DIVISION

[Cite as: Coombs (Ryan) v. Coombs, 2001 NSSF 32]

BETWEEN:

DONNA MARIE COOMBS (RYAN),

-Petitioner/Respondent herein

-and-

GERALD HERMAN COOMBS,

-Respondent/Applicant herein

DECISION

BEFORE THE HONOURABLE JUSTICE R. JAMES WILLIAMS

PLACE OF HEARING: Halifax Nova Scotia

DATE OF HEARING: September 26, 2001

DATE OF DECISION: November 29, 2001

COUNSEL: Claire McNeil, counsel for the Petitioner/Respondent

Kay Rhodenizer, counsel for the Respondent/Applicant

WILLIAMS, J. S. C. (F. D.)

Gerald Herman Coombs has made application to reduce or terminate the spousal support he pays to his former wife, Donna Marie (Coombs) Ryan. The existing payments are made pursuant to an order under the Divorce Act (1985).

A. BACKGROUND

Mr. Coombs and Ms. Ryan met in 1971. He had been married twice before. He moved into her home that December. They married November 5, 1976. His daughter lived with them for a time. Ms. Ryan's four children lived with them.

They separated in 1984, having been married 8 years and cohabited for 13.

They divorced February 21, 1986. Matrimonial property issues were "resolved", their Agreement and Minutes of Settlement reciting a mutual

release of claims under the Matrimonial Property Act. There was no mention of his pension in the order/agreement. Mr. Coombs was to pay Ms. Ryan \$800.00 per month in spousal support. On May 29, 1989 this was increased to \$950.00 per month. The increase was "in lieu of payments re medical coverage of Ms. Ryan". Effective January 1, 1990 maintenance was again varied. It was reduced to \$500.00 per month. Judge Niedermayer, in making this order, required that Ms. Ryan make efforts to secure a disability pension.

Mr. Coombs had a relationship with Angela Delay from 1985 to 1991. He has lived with Shirley Smith for five years. She is divorced and not in receipt of support. She does not work but receives \$195.00 per month from the Canada Pension Plan.

Mr. Coombs turned 66 on March 17, 2001. He worked until July 15, 2001, then retired. His income, by year, approximated:

1988	\$61,000.00
1997	\$60,000.00
1998	\$62,500.00
1999	\$61,400.00

2000	\$67,500.00
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Mr. Coombs estimates his 2001 income to be as follows:

Employment income	\$39,282.20
CPP August to December	3,682.80
Old Age Security	5,202.24
Investments (est.)	<u>4,397.64</u>
	\$52,564.88

His projected income for a full retirement year (2002) is as follows:

LRIF	\$ 349.00 per month
CPP	736.56
Old Age Security	433.52
RRSP	<u>750.00</u>
	\$2,269.49 x 12 = \$27,233.88

Mr. Coombs also has some \$26,000.00 in a Canada Life RRSP that he is not drawing down on. He plans to reserve it to pay future deficits or to provide income after age 77 - when his LRIF has been drawn down. This RRSP is in lieu of a formal pension plan from his former employment.

He has purchased/built a new home in Newfoundland where he and Ms. Smith live.

Ms. Ryan is 57 years of age. She has not remarried. She receives CPP disability income of \$506.00 per month, Mr. Coombs' CPP benefits having been divided. This is her only income apart from spousal support.

Ms. Ryan's affidavit of August 30, 2001 outlines her work history, health, details of the divorce settlement (from her perspective) and economic situation:

4. I have a grade seven education and I am the mother of four children, now all adults. I am 57 years old and I have not been able to work since 1981. Throughout the marriage I looked after our four children from my previous marriage as well as Mr. Coombs' daughter from a previous marriage who lived with us from 1974 until 1978.
5. I was working part time as a waitress when I met Mr. Coombs. I was also caring for four young children at home. I continued to work part time at various jobs including waitressing and work as a cashier until I underwent back surgery in 1975. I spent three months in hospital on a striker bed before returning home to convalesce. In total I was in hospital on that occasion for 5 ½ months.
6. I attempted to return to work a number of times, and worked among other things as a cashier at Green Gables, until 1981 when I finally abandoned my plans to work. I am disabled as a result of a degenerative condition in my spine and continue to be unable to work as a result.
7. Before I met Mr. Coombs I was previously married. I was widowed at the age of 23. My husband did not have

insurance and I was not eligible for Canada Pension Plan Benefits. I received financial assistance from the provincial government in the form of a "Widow's Allowance" until Mr. Coombs moved in with me when that assistance terminated.

8. Mr. Coombs supported myself and my children financially throughout the time we lived together. Although he did not formally adopt my children, he acted in the place of a father to them. He had various jobs working on ships as a first mate, all of which were well paid, and although I worked my income was far less than his. Mr. Coombs paid the majority of the bills and looked after the major expenses for our family.
- ...
11. In the Corollary Relief Judgment Mr. Coombs agreed to pay me \$800.00 in spousal support and to cover my prescription costs through his medical plan. As far as I was concerned this spousal support needed to be indefinite as a result of the fact that I was disabled and could not work to support myself.
12. The spousal support was increased to \$950.00 in 1987 to pay for my prescription costs when Mr. Coombs remarried and I was no longer eligible to be part of his medical plan.
13. In 1988 I applied for and was granted Canada Pension Plan benefits based on my disability. These benefits, as well as the spousal support I receive from Mr. Coombs have been my sole sources of income since that time.
14. In 1989 in response to an application to vary by Mr. Coombs the spousal support was reduced to \$500.00 per month....
15. Following the application to vary by Mr. Coombs in 1989 and the decision by Judge Niedermayer I applied for provincial family benefits, based on my disability. I was refused because I was financially ineligible.
16. According to Family Benefits I was receiving too much money to qualify for their program, based on my combined

income from the Canada Pension Plan and spousal maintenance which at that time was approximately \$892.00 in total. Attached hereto as Exhibit "A" is the Director's Appeal Report and as Exhibit "B" the decision of the Department of Community Services denying my application for benefits.

17. Mr. Coombs reduced my maintenance payments to \$500.00 based on Judge Niedermayer's decision as of January 1990...
18. As a result of this reduction I found it very difficult to pay my bills. In addition, Mr. Coombs rarely paid his support on time or in full. I was often in a position of not being able to pay my bills and faced considerable financial pressure throughout this period from 1990 to 1992...
19. My income tax and property taxes fell into arrears and I was forced to sell my home on Dawson Street in 1992. Since that time I have resided in rental accommodations paying approximately \$500.00 per month in rent. Over the years I was forced to move to obtain cheaper rent. In 1999 I was finally accepted into public housing where the rent is geared to income which has helped me to balance my budget.
20. My income has not changed substantially since my application for family benefits was rejected in 1990. My income from Canada Pension has increased in accordance with the cost of living.
21. My Canada Pension Plan benefits stay the same regardless of how much money I receive by way of spousal support payments and is based on my credits which I earned or shared with Mr. Coombs based on when we lived together. I am not eligible for social assistance because of my income from CPP and spousal support payments from Mr. Coombs.
...
23. I dispute Mr. Coombs suggestion that I wasted money or assets. I have lived on a very tight budget since my separation from Mr. Coombs.

24. At the time of the divorce I asked for an unequal division of the property. I had been primarily responsible for looking after the household duties and the children during our relationship because Mr. Coombs work took him away from home for months at a time leaving me to look after the home, the properties and the child single handedly. Mr. Coombs had far more savings in the bank at the time of our separation. I was forced to incur debt to maintain myself during our separation.
25. We reached a divorce settlement which I was not entirely happy with, but which I was prepared to accept. I received a larger share of the proceeds of the Fairbanks property but Mr. Coombs kept his savings and vehicle and other assets. I am not convinced that the division was unequal in the end.
26. We owned two properties and two vehicles. He took one vehicle (the newer vehicle) and I sold the other because I am unable to drive as a result of my back condition. I used the money to pay bills on the properties we owned. There was money in Mr. Coombs bank accounts and he had a pension, as well as a speed boat and a camper trailer.
27. I dispute that I received an unequal division of the matrimonial property based on Mr. Coombs pension. The pension was never valued as far as I recall. In our agreement we said nothing at all about the pensions or the Canada Pension Plan.
28. Both properties which were jointly owned by Mr. Coombs and myself were sold and the proceeds divided following the divorce...
29. The proceeds from the Brookside property were divided equally, however I received approximately \$56,787.00 from the proceeds from the sale of the matrimonial home on Fairbanks Street. Mr. Coombs received \$26,341.00 as indicated in the Statement of Proceeds attached hereto as Exhibit "E". After I had paid my lawyer's bills and my other debts I used the remaining funds to put toward another home.

30. I put a down payment on a house in Dartmouth with rental units and obtained a \$30,000 mortgage. However, after approximately 5 months I sold this property because I was unable to supervise the rental of the apartments or maintain the home, due to my health problems. I received about \$50,000 from the sale of this property after all the bills and commissions were paid. These proceeds were my only remaining asset at the time.
31. I then bought a single family dwelling on Dawson Street in Dartmouth with a mortgage and a \$45,000.00 down payment. I lived there from 1986 until 1992 when I sold my home and moved to an apartment. I received approximately \$27,000 from the sale of the Dawson Street house which I had bought for \$75,000 in 1986 and sold for \$70,000.00 in 1992. The house had many structural problems, including problems with the foundation and flooding.
32. In 1990, Mr. Coombs reduced the maintenance payments to \$500.00 which was taxable to me, which left me with a budget deficit each month. I was unable to pay my taxes for two years, fell behind on other bills and finally was forced to sell my home to make ends meet. The money I had left over from the sale, I used to support myself and pay for prescriptions until 1996 when the money ran out.
33. In 1999 I moved into my present home, a unit in a public housing complex where the rent is geared to my income. I currently pay rent in the amount of \$330.00 per month.
34. I suffer from a degenerative disc disease in my neck and lower back. In 1975, while I was cohabiting with Mr. Coombs, I underwent surgery for this condition. I have nerve root pain which cannot be corrected surgically as the risk if I undergo surgery again is that I will become completely paralysed. This condition has caused me constant pain throughout my life and during my relationship with Mr. Coombs.
35. As a result of this disability I have struggled with depression and anxiety from time to time as a result of not being able to

work and financial pressures. In addition to my back problems, I am currently being treated for anxiety, arthritis and high blood pressure...

B. THE DIVORCE ACT, 1985

The Divorce Act (1985) provides:

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.

C. CHANGE IN CIRCUMSTANCES

I am satisfied that Mr. Coombs' retirement constitutes a change in circumstances as contemplated by s. 17(4.1). Other changes include the dissipation of Ms. Ryan's assets and her securing of public housing.

D. SPOUSAL SUPPORT

I have considered the legislative provisions referred to. There has been, in argument, reference to Boston v. Boston (2001) 17 R. F. L. (5th) 4 (S. C. C.) and the issue of "double dipping".

There are two sources of pension income that Mr. Coombs (potentially) has:

1. CPP (he receives \$736.56 per month);
2. Employment Pension - the Canada Life RRSP.

He says the employment pension was valued and divided at the time of their divorce. She says it was not. The Corollary Relief Judgment and Minutes of Settlement make no reference to the pension. In my view the burden of proof is borne by the person asserting that a pension has been divided. Mr. Coombs has not satisfied me that it was. Here the “pension” is not now being accessed - and is in part being retained as potential income for Mr. Coombs after age 77, when his LRIF is drawn down. This is a reasonable course of action/planning.

The CPP pension has been divided, however. Ms. Ryan has, over the years, used the assets she received at the time of the divorce to support herself - they are dissipated, gone.

Ms. Ryan was disabled during the marriage. The support order made at the time of the divorce was indefinite in duration. It appears to have been made based on her need - not compensation for lost opportunity (save perhaps the loss of widow’s pension). In post-Bracklow (Bracklow v. Bracklow (1999) s. C. J. No. 14) language, the order is primarily based on non-compensatory entitlement - and the “basic social obligation” arising from a thirteen year relationship. I cannot identify a rationale for terminating or time-limiting this support order. The intervention of the Court in 1990 acknowledged her disability. The reduction of the support order to \$500.00 per month in 1990 left her little choice but to use her capital for support. She did so.

The Boston case suggests that, where practicable, courts should focus on undivided assets/income and attempt to avoid “double dipping”. That said, where there is need, double recovery may be permitted (see Boston at paragraph 65, Meiklejohn v. Meiklejohn (2001) Carswell Ont. 3480 (Ont. C. A.), paragraph 14).

Apart from CPP (which has been divided), Mr. Coombs’ retirement income is:

LRIF	\$349.00
Old Age Security	433.52
RRSP	<u>750.00</u>
	\$1,532.52 per month

The CPP is \$736.56 per month, which gives him monthly income of \$2,269.08. Her total monthly income is \$506.00 per month (CPP).

Ms. Ryan needs support. Apart from eligibility for some sort of social assistance there was, has been and is no reasonable likelihood that she will become “self-sufficient”. Her rent in public housing is adjusted to her income and appears to be considerably less than market rent. It would be adjusted if her income was reduced. This diminishes her need somewhat.

Mr. Coombs is entitled to some recognition that his retirement

constitutes a change in his circumstances (once his income is so reduced - effectively, I find, commencing January 2002). Ms. Ryan's need dictates that the variation be limited. She has, by any measure, suffered economic hardship since the breakdown of the marriage. This is a circumstance where to the extent that considering Mr. Coombs' entire income, including CPP, constitutes double recovery, some double recovery should be permitted (as contemplated in Boston v. Boston).

Considering the relevant statutory provisions, background, previous orders, circumstances of the parties and changes in those circumstances referred to (including the dissipation of Ms. Ryan's assets), I conclude that:

1. spousal support should not reduce during the calendar year 2001. Mr. Coombs' total income is some \$52,000.00 this year.
2. spousal support shall reduce to \$450.00 per month effective January 1, 2002 and be payable on the first day of each month thereafter, subject to further order of the Court.

There will be no order as to costs.

J. S. C. (F. D.)

Halifax, Nova Scotia