

**IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)**

Citation: *Ryan v. Hardy*, 2004 NSSF 111

Date: 20041202

Docket: SFPAD-009950

Registry: Port Hawkesbury

Between:

Patrick Ryan

Applicant

v.

Janice Hardy

Respondent

Judge: The Honourable Justice M. Legere-Sers

Heard: November 5, 2004, in Port Hawkesbury, Nova Scotia

Written Decision: December 2, 2004

Counsel: Harold MacIsaac, for the Applicant
Theresa Forgeron, for the Respondent

By the Court:

[1] On July 22, 2003 Mr. Ryan applied to vary the Corollary Relief Judgement dated August 30, 2001. He seeks to terminate spousal support.

[2] Ms. Hardy filed a reply requesting; a dismissal of the application to terminate spousal support; an increase in the amount of child support payable by Patrick Ryan to Janice Hardy and costs. She subsequently amended this application to include a request for lump sum spousal support to cover the costs of a final qualification year to obtain her TC5.

[3] Mr. Ryan amended his application to include a request to clarify an access provision.

[4] The parties were married on July 9, 1988, separated on December 25, 1999 and divorced on August 30, 2001. There are two children; Brittany, born [...], 1991 and Chesley, born [...], 1993.

[5] The parties share joint custody of the children. Ms. Hardy has day to day care. The parents have experienced some access difficulties and have consulted with a psychologist. All matters relating to access are deferred in order to complete this consultation.

[6] The costs of the consultation, not covered by the Applicant's health plan, will be shared on a pro-rata bases. The Applicant shall immediately tender the account for services to his health care plan within 48 hours of receipt of a bill. Should the services be covered, he shall compensate the Respondent forthwith upon receipt.

[7] The Applicant now pays as ordered \$629.00 per month for the support of the children based on an annual averaged income as of August, 2001 of \$46,00.00.

[8] The learned trial Judge granted an unequal division of property having regard to the circumstances of the parties at the time of divorce. Mr. Ryan was charged with the obligation to discharge the matrimonial debt of \$31,115.98. The Court noted the bare bones budget Mr. Ryan presented. Given the income of the Respondent and her inability to respond to that debt, Mr. Ryan was the only one who could pay the debt. He was also obligated to pay spousal support to Ms. Hardy in the amount of \$200.00 per month (having regard to his obligation to retire the matrimonial debt) commencing the 1st day of May, 2001.

[9] Paragraph 12 of the Corollary Relief Judgement states A Spousal maintenance is of an indefinite duration but shall be subject to the usual variation provisions as set out in the *Divorce Act*.”

[10] Paragraph 24 states “Patrick Ryan shall be solely responsible for the payment of the Royal Bank Line of Credit in the approximate amount of \$23,978.58; the Royal Bank overdraft in the approximate amount of \$1,385.28; the Scotia Bank VISA in the approximate amount of \$2,892.04; Fred Morrison Fuels in the approximate amount of \$1,260.08; Revenue Canada debt in the approximate amount of \$1,600.00 and any Revenue Canada debt associated with the cashing in of the RRSP’s.” (a total of \$31,115.98).

[11] All the property was divided including Mr. Ryan’s pension.

[12] In **2000** Ms. Hardy had a total **income of \$15,059.00** of which \$5,180.00 was from earnings; \$7,377.00 from EI; \$1,500.00 from spousal support and social assistance support of \$1,002.00.

[13] In year **2001** her line 150 **income was \$20,982.00** made up of total earnings of \$7, 112.00; EI benefits of \$8,120.00; Court payments received in the amount of \$5,750.00.

[14] In **2002** her line 150 income was **\$15,958.00** made up of total earnings of \$9,797.00; EI of \$5,911.00; Family support payments in the amount of \$250.00 are showing as received.

[15] In **2003** her T4 shows earnings from Cape Breton Victoria Regional School Board in the amount of \$15,014.00; EI benefits of \$9,941.00; \$1,200.00 for support payments for a total line 150 income of **\$26,155.00**.

[16] Ms. Hardy holds a TC4 certificate level. Effective July 31, 2001, the minimum certificate level for a permanent contract is a TC5. She could not have known about this provision at the time of separation. To obtain the TC5 she needs 41 credit hours.

[17] Ms. Hardy graduated from Nova Scotia Teacher’s College in 1986 with an Associate in Education diploma and was granted a teachers certificate class 4. Only early in 2004 did she request information from the Department of Education to

determine what would be required to up grade from a TC4 to TC5.

[18] On October 5, 2004, she was informed that she could have registered in an approved upgrading program or applied for a change in classification to receive a TC5, in accordance with Section 30J (2) of the *Governor in Counsel Education Act* regulations. That option was available to her until July 31, 2001.

[19] Having missed that deadline she now must satisfy the requirements post July 31, 2001, that is the 41 credit hours. This would include 3 credit hours in Social Studies and the award of a Bachelors Degree. The Board has credited her with 109 hours. This requirement would approximate 1 and 2/5 years of University study.

[20] Clearly, no inquires had been made by Ms. Hardy prior to the 2004 year. This application triggered the enquiry to determine what would be required to put her in a position to obtain a permanent job in the field in which she is qualified.

[21] Having learned of these requirements, Ms. Hardy amended her application on April 5, 2004 to request a payment of a lump sum spousal support to pay for the University expenses necessary to upgrade her teaching license. She seeks to continue to receive periodic spousal support throughout her education to the date of obtaining full time employment.

[22] A comparative tax summary which shows for the years 1999 to 2003 the following income:

Mr. Ryan Ms. Hardy 1999 - \$43,864.00

2000 - \$49,593.00 \$15,059.00

2001 - \$48,128.00 \$20,989.00 + \$5,032.00

2002 - \$51,892.00 \$15,958.00 + \$7,548.00

2003 - \$51,534.00 \$26,155.00 + \$7,548.00

Richard Scott's 2003 - \$22,024.00 (work term weekly pay \$750.00=

\$3,247.00/month.)

(weekly EI \$272.00 = \$1,177.00/month)

[23] Mr. Ryan continues to pay based on 2001 rates of \$46,000.00 (as averaged in the Corollary Relief Judgement), child support of \$629.00 plus spousal support of \$200.00. According to his budget prepared on May 3, 2004, his annual income would be \$45,309.00. He receives overtime and an incentive bonus which is more difficult to quantify.

[24] By letter dated May 5, 2004 from his employer, Little Narrows Gypsum Company, indicates that his normal work week consists of 40 hours at an hourly rate of \$21.60 per hour with overtime subject to production demands and shipping schedules. A quarterly incentive payment is paid out upon meeting the criteria of said calls.

[25] The total T4 earnings of Mr. Ryan fluctuates. To obtain the most reliable figure I accept until December is the salary proposed by his counsel as have averaged the last three years to arrive at an income of **\$54,560.00** for 2004. As of November 1, 2004 child support for two children is **\$736.00 per month.**

[26] Determining annual income with these variables is of necessity an estimate. The Corollary Relief Judgement requires an annual disclosure and an adjustment that would naturally occur sometime in May-June. Given there maybe an adjustment needed in this year, Mr. Ryan will obtain a letter from his employer by January 15, 2005 depicting his total 2004 income and the child support will be immediately adjusted from that date forward for the 2005 year.

[27] After the divorce his parents deeded him the property in which they lived and continue to live. In order to address the debt and to purchase a new vehicle in addition to clearing other debt, he borrowed \$62,000.00 for a five year term ending June 1, 2007 amortized over 25 years. He also purchased a vehicle over a four year

term ending April 1, 2008 for \$20,000.00. He shows an estimated value for the home at \$75,000.00 and is paying \$510.00 on the mortgage and another \$520.00 for his vehicle payment.

[28] Ms. Hardy's current income as declared by her budget on June, 2004 would yield an annual income of \$24,955.00 from employment and when including the Child Tax benefit of \$512.00 would yield \$31,099.00 per annum. Adding in her child support at last years rate would amount to an additional \$7,548.00 (non-taxable); this years new rate would add \$8,832.00 into her income.

[29] In addition, she is living with a partner, Richard Scott. He earned \$22,024.00 in the 2003 year. Mr. Scott works seasonally as well. He was employed when he lived in Halifax. He is now alternately working and is on EI.

[30] When working Mr. Scott's weekly pay before deductions was \$750.00. When on EI his weekly gross rate is \$272.00.

[31] I have little information concerning his employment status and what efforts Mr. Scott makes to find employment.

[32] Her employment since separation consisted of summer work at her brother's cottages in Cape Breton and drawing EI for the balance of the year. She worked long enough to obtain credits to draw EI.

[33] Ms. Hardy purchased a mini home which she values at \$65,000.00 as of March, 2003. Her mortgage is \$60,521.00 as of August of 2003. Her brother has assisted her in financing a loan in the amount of \$15,500.00 and she pays him \$400.00 per month. He also leases to her land for the trailer at \$1.00/year. She has the usual Visa, Sears and Master Card debts.

[34] The trailer is an effort to house herself and her children in more stable housing. She has, however, chosen to place the trailer in a living area which is somewhat isolated and which severely limits her job opportunities as well as those of Mr. Scott. Her travel costs are increased and her accessibility to schools, to

continue with her substitute teaching, which she is able to do, is increased as a result of the location of her trailer and life style choices. She is in a position of applying to one school only .

[35] The access costs for the children and their father have increased as a result of this move.

[36] Ms. Hardy has been able to increase her substitute teaching hours and more diligently pursue employment. Unfortunately, she no longer keeps the summer job in an effort to make herself available for school employment. I know of no efforts to work during the summer.

[37] For a period of time, subsequent to the divorce, she was under employed. It is also clear that she has only made inquiries lately to determine how to enhance her employability by the acquisition of a TC5 license. These inquiries are made some three years after her divorce and three years after an assessment was done as to her needs and entitlement by the learned trial Judge at divorce.

[38] The rates for substitute teaching have increased as have her number of days. She worked 117 days during 2002-2003 school term and 92.5 days during the 2003-2004 school term to the date of the hearing. She is able to do this being available only to one school, a restriction imposed due to the location of her home. These are life style choices not necessarily tied to the breakdown of her marriage.

[39] I have reviewed the budgets of both parties. There are many items that can be trimmed although each parent has leeway to spend on necessities leaving more optional items a discretionary expenditure. For these purposes, it is not necessary for an in depth analysis of the budgets other than to conclude, given current contributions, there is sufficient flexibility within the budgets and an ability on the mother's part to self contribute towards her mandatory educational costs, making the goal of attaining a TC5 achievable.

CONCLUSION

[40] This is an 11 year marriage. The roles of the parents are somewhat traditionally defined such that during the early years of the children's lives the mother stayed at home. The father was for a period of time the only income provider. The parent's do not agree as to their long term intentions.

[41] Clearly once separated given the age of the mother, the length of the marriage, her skills, employability, educational potential and marketability once her qualifications are upgraded she will be required to support herself. Spousal support will end. The real issue is duration.

[42] The question of spousal support was first considered in the Interim decision of November 21, 2001. The learned trial Judge determined that both parties were employed throughout the marriage at various points. Ms. Hardy was employed as a teacher's aide with the Ingonish School Board prior to her marriage. After her marriage she worked at a nursery school close to the matrimonial home.

[43] After the first child was born she remained at home. After the birth of the second child she became employed with her brother's business, cleaning cottages during the summer. This allowed her and the children to stay in the cottages for the summer months while her husband worked.

[44] At the Interim hearing she managed her brother's cottages 50 hours per week for \$7.40 per hour. She proposed she would be employed from June to September each year, approximately 12 weeks. This allowed an average income for the summer months of \$4,500.00-\$5,000.00. This allowed her to collect EI as well.

[45] When she began to substitute she ceased this employment, apparently to her lack of availability for the month of June. Due to the area in which she chooses to live she is available for substituting jobs in only one school. Notwithstanding these

obstacles to find employment, Ms. Hardy purchased a trailer and leased a piece of land from her brother at a nominal rate.

[46] She now resides close to family yet in an area of high unemployment with the additional difficulties associated with transportation in the winter. There is no public transportation.

[47] The Respondent began living with her current partner in August, 2003.

[48] At the time of the divorce hearing the Judge noted the isolation and employment problems associated with her residence, noting that employment would not be readily available. He concluded that she was perhaps as self-sufficient as circumstances would permit at the time.

[49] The trial Judge considered the economic circumstances of the parties and the consequences to the parties and required the Applicant to absorb the matrimonial debt. This is an obligation that will reasonably take 4-5 years to retire given his other obligations.

[50] The learned trial Judge also recognized that payment of this debt would limit the monies available for spousal support. He found that both has presented a bare bones budget and noted that each received support from their extended family.

[51] The Judge concluded:

14
that the Respondent's budget takes into consideration the payment of the matrimonial debt. As a consequence this is a benefit to the Petitioner and necessarily limits the overall financial ability of the Respondent to meet his own needs especially after also paying the required amount of child support."

[52] He also noted that:

The Petitioner is I conclude as equipped at the time of the hearing as she was at the time of her marriage to engage in an occupation. She is still young. She has the professional qualifications to pursue an occupation and can do so if one becomes available. She is still young enough to acquire some greater financial security for herself. She has no financial debt. Her lifestyle is comparable to that which she had during the marriage and similar to

that of the Respondent. Both rely to an extent on extended family support, neither has an interest in a home and both will continue to share responsibility for child support, although the Petitioner will have the children in her day to day charge with all that that entails. In this regard then I am cognizant of the provisions of the **Divorce Act**, the objectives therein set out and the scheme of support entitlement referred to in the case law in light of the above circumstances of the Respondent and the Petitioner.”

[53] Material changes have occurred across the board. Child support will be adjusted to reflect his current income. He will pay \$736.00 per month commencing November, 2004 and continuing thereafter until varied by Court Order or consent.

[54] The parties are obliged to exchange their full income tax returns by May 15th of each year.

[55] The Respondent has restricted herself to one school, walking distance from home. The driving is notoriously difficult. In that, one school the Respondent managed to obtain considerable substituting days. With her TC5 there is a greater probability of full time employment.

[56] To date the Respondent has not made serious efforts at full time employment. She has though experienced a positive upturn in her employment situation. There is an absence of evidence that upgrading her licence was something that she gave serious thought to between the separation and this variation.

[57] Understandably, there is a period after separation where a custodial parent must recover and assist the children in dealing with the emotional and financial effects of marriage breakdown. However, the Applicant is not obliged to bear responsibility for lifestyle choices made which inhibit not only the Respondent’s opportunity for employment but may limit as well her partner’s options for employment.

[58] Nor given the analysis of their obligations and households should he be

obliged to pay a lump sum to finance her plans, at this stage. This is something that the Respondent can finance within the confines of her new life given the flexibility of their employment and the availability of at least one of the partners in the household to assist in many ways the completion of her degree.

[59] The request for lump sum now to obtain her TC5 may have been better received if it had been put forward at divorce and diligent efforts exhibited to pursue this. Even then the learned trial Judge indicated he apportioned what could be expected by way of debt payment and spousal support.

[60] That is not to conclude that one cannot put forward such a request at a variation application. In this circumstance at divorce, the trial Judge compensated, as he could, for the economic disadvantages by the unequal division of debt for which the Applicant remains responsible. Because of the lifestyle choices which admittedly bring the advantages of family support, the Applicant has had to bear increased access costs.

[61] Lump sum support is the exception of the rule. In this circumstance, a case has not been made out to justify increasing the burden of the Applicant given the current appointment of responsibilities. I have also considered the percentage of his gross annual income that he pays out to matrimonial debt, spousal support and child support as well as access costs. Further taxing the Applicant is not justified in these circumstances

[62] Mr. Ryan seeks a termination of his responsibility to pay spousal support. Case law is clear that living common law or remarriage are not in and of themselves an automatic bar to the receipt of spousal support from a previous partner. This is, however, a material consideration.

[63] In this instance there is stability in the second relationship and potential for sustained self-sufficiency. There is clear improvement in her circumstances. It will take Ms. Hardy, working diligently, 1 and 2 years to obtain her TC5. When the

learned trial Judge noted that spousal support would be of indefinite duration and re-viewable he was no doubt considering that circumstances would change and self-sufficiency was a possibility if not a probability, with appropriate planning.

[64] There have been sufficient material changes in the circumstances of the parties to consider variation. Mr. Ryan and Ms. Hardy have improved income. Ms. Hardy has been living in a common law situation since August 2003. It is now November, 2004 and there is apparent stability in this relationship.

[65] The spousal support payable must be considered in light of the payments made by the Applicant towards the debts, freeing the mother to focus on providing as she can for her children in her home in the short term and the long term. Re-employment fits with a long term goal. The Respondent seeks to have the support continue until she is full time employed. The Respondent was 35 years old at the date of separation and was marketable and employable. She is now 39 years old. It is appropriate that she immediately retrains to achieve self-sufficiency. Spousal support payments will continue until June, 2006 at the current level. They will cease altogether June, 2006.

[66] Mr. Ryan will ensure any missed payments are brought up-to-date.

[67] As to the request for retroactive support based on the increases in Mr. Ryan's income, I decline to award these. In these circumstance both had the opportunity to seek disclosure, both failed to do so and at this time a retroactive award would be a windfall, and would be onerous to the Applicant.

[68] Mr. Ryan has the loan payments respecting the marriage, spousal support and child support payments. The denial of retroactive support based on the increases in Mr. Ryan's annual income will not be a hardship on the children given their current situation.

[69] There is mixed success in the matter. Each party shall bear their own costs.

[70] Counsel for the Applicant shall draft the order.

Justice M. Legere-Sers