

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Endorsement

Citation: *H.H. v. M.W.*, 2020 NSSC 122

Date: 20200402

Docket: SFH-1201-066536

Registry: Halifax

Between:

H.H.

Petitioner

v.

M.W.

Respondent

Judge: The Honourable Justice Cindy G. Cormier

Heard: October 1, 2019

Counsel: Peter Ghiz for the Petitioner

Alex Embree for the Respondent

By the Court:

Introduction

1. In 2018, Mr. H applied to vary the child and spousal support terms of his Consent Corollary Relief Order. He and his former wife, Ms. W, both retained lawyers and began negotiations. Now each former spouse says that an agreement was reached: but each refers to a different order, drafted at a different time.
2. I've been asked to determine if the parties did agree on varying the Consent Corollary Relief Order's terms and, if so, to fix the terms of the Consent Variation Order.
3. If I decide that they didn't agree, there will be a contested variation hearing.

The variation application

4. Mr. H's variation application sought to:
 - a. terminate child support for the parties' two oldest children;
 - b. determine child support for the parties' youngest child based on a shared parenting arrangement; and
 - c. reduce or terminate spousal support as of September 1, 2018.

Issues

5. Did the parties reach an agreement?
6. What are the terms of the Variation Order?

Family history

7. H.H was born August 6, 1962 (58), and M.W was born February 22, 1961 (59). The parties began living together in 1991, and they were married on June 18, 1993.

8. The parties have three children born between 1995 and 2001. M.W stayed home with the two eldest children until she returned to work part-time in 1999. After M.W gave birth to the parties' third child in September 2001 she took maternity leave, returning to work two days per week in the "Fall of 2002".
9. After twenty years of co-habitation the parties separated on June 17, 2011. M.W was 50 years old when the parties separated. They had been residing together for 20 years.
10. H.H paid child and spousal support beginning June 17, 2011. The parties enjoyed a joint shared parenting arrangement. The parties resolved all issues arising from their separation by way of Consent Corollary Relief Order. They were divorced by Divorce Judgment dated February 12, 2016.

Facts

11. The Corollary Relief Order provided for some of the following relief:
 1. child support (monthly 3 children): \$4,235.00; and
 2. spousal support (monthly): \$5000.00.
12. On January 23, 2019 H.H proposed the following variation of the terms of the Consent Corollary Relief Order issued February 2016, retroactive to July 1, 2018 for child support:
 1. Child support terminate for the two eldest children effective July 1, 2018. The children would continue to have access to the RESP and Trust Accounts in accordance with the Consent Corollary Relief Order issued February 2016;
 2. Spousal support would be reduced to \$2,500.00 per month, and would remain payable until 2023 at which time spousal support would terminate; and
 3. The terms of the Corollary Relief Order respecting special and extraordinary expenses; access to RESP accounts and the children's trust funds would remain unchanged.
13. H.H's position is that M.W replied on January 25, 2019 advising him she

was off work for health reasons, and she anticipated remaining off work for some time, and that on January 30, 2019 M.W offered a counter proposal.

- 14.H.H's position is that "the only apparent difference between his proposal and M.W's proposal was that spousal support would be reduced to \$4,500.00 per month from \$5,000.00".
- 15.H.H acknowledges an agreement was made that child support would be reduced to \$2,128.00 for one child, and that the reduction would be retroactive to July 1, 2018, and they also agreed spousal support would be reduced to \$4,500.00 beginning February 1, 2019, with all other terms of the Consent Corollary Relief Order remaining the same.
- 16.H.H indicated that he agreed to less of a reduction in spousal support as M.W was going to be off work.
- 17.H.H submits that he agreed to the terms on February 7, 2019, and that his legal counsel undertook to prepare the Order to be issued by the Court.
- 18.The parties have indicated they both agree that the offer was M.W's January 30, 2019 supplemental formal settlement offer. They both agree that H.H's acceptance was crystallized with his legal counsel's email on February 7, 2019.
- 19.The parties' dispute is with respect to the form of the Consent Variation Order.
- 20.The following are charts comparing the parties' terms for child support, and spousal support, comparing their positions with respect to these.

21. Child Support Chart:

	H.H Emails acceptance	H.H Consent Variation Orders	M.W Email offer	MW Consent Variation Order
What order or terms are sought to be varied?	<p>Email Feb 7, 2019 (further confirmed by email Feb 21)</p> <p>Email: I have instructions to accept your proposal. I will prepare the Order and arrange to have it issued by the Court. The Notice of Application is done. I will file it with the consent order signed by you in advance.</p> <p>March 27, 2019 H.H files a Notice of variation application: requests to change terms of CRO Feb 12, 2016; per agreement reached February 7, 2019</p>	<p>Consent Variation Order Feb 8, 2019, and Feb 22, 2019</p> <p>Email: Attached in (sic) a draft of the Order. Pleaser (sic) review if (sic) and if it is acceptable, please sign five copies and return them to me.</p> <p>On the first page of the Draft Consent Variation Order the CRO is referred to alternatively as the “last order on February 12,</p>	<p>Email Jan 30, 2019</p> <p>Child support Reduced from \$4235 (three children) to \$2,128 (one child). Child support reduction backdated to July 1, 2018</p> <p>H.H be credited by not paying child support from July 1, 2018 to Jan</p>	<p>Jan 30, 2019</p> <p>Draft Consent Variation Order attached as part of offer, also attaches the 2016 CRO as schedule A</p> <p>Refers to paragraphs 5 to 11 of the CRO referencing section 7 expenses.</p> <p>Determines H.H’s 2016 income to be \$359,501; and M.W’s 2017 income to be \$79,202.</p> <p>Indicates H.H makes the last payment of \$4,235 on January 1, 2019</p> <p>H.H to then make child support payments of \$2,128 starting September 1, 2019.</p>

		<p>2012 (sic); the Corollary Relief Order dated February 12, 2019 (sic); and the Corollary Relief Order issued February 12, 2016.</p> <p>The parties' incomes are not included in this Draft Consent Variation Order.</p> <p>Attaches the 2016 CRO as Exhibit A.</p> <p>Indicates: paragraph 2 and 12 of the CRO are Varied from \$4,235 to \$2.128 commencing July 1, 2018.</p>	<p>1, 2019 (7 payments of \$2107 or \$14,749). Recovered by H.H not being required to pay child support for the youngest child between February 1, 2019 – to the end of August, 2019.</p> <p>Resuming payments of \$2,128 in September 2019.</p> <p>Limited time offer with cost implications</p>	<p>Clarifies that only paragraphs 2 and 12 of the CRO are being varied, that all other provisions of the CRO remain in full force and effect, including but not limited to the MEP provisions paragraphs 21 and 22, and the enforcement provisions paragraphs 23, 24, and 25.</p> <p>Includes an additional clause dealing with prospective child support for the youngest child / with an explanation regarding the set off - \$2799 - \$671 = \$2128</p>
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		Credits 8 months of retroactive child support payments to HH. \$2,107 x 8 (adding February) for a total of \$16,856.	if not resolved / offer not accepted by February 8, 2019.	
Do the parties agree there has been a change?	Yes, negotiated a variation		Yes, negotiated a variation	
What is the change? Per CRO 2016	Eldest child over the age of majority, completed four years of post-secondary in April 2018, living part-time with each parent. Section 7 now applies: child has access to RRSP and Family Trust for any further post-secondary or living expenses. Middle child now residing away from home more than			

	eight months. Section 7 now applies: University and living expenses entirely covered by RRSP and Family Trust			
Evidence regarding circumstances existing when the order sought to be varied was granted?	Two eldest children had not completed post-secondary or been away from home for more than eight months.			
Do the parties agree on the number of children for whom support is payable?	Three children. 2 over the age of majority receiving support under s.7 / 1 under age applying sections 3, 7 and 9.			
Do the parties agree on the nature of the parenting arrangement?	Yes, joint custody and shared parenting		Yes, joint custody and shared parenting	

Do the parties agree on the payor's province of residence?	Yes		Yes	
What section(s) applies to the calculation of child support	Two children over age of majority and one child under.		Agreed	
Clause 3(1)(a) table for a child under the age of majority	One child, as agreed between the parties		Agreed	
subsection 3(2)(b) children over age of majority	Two children, as agreed between the parties		Agreed	

<p>Payor's income exceeds \$150,000.00 subsection 4(a) – amount determined under section 3 (with shared care)</p>	<p>The parties agreed to incomes (2016 / 2017) to be applied to child support. The amount of child support payable for one child is the set-off amount.</p>		<p>The parties agreed to incomes (2016 / 2017) to be applied to child support. The amount of child support payable for one child is the set-off amount.</p>	
<p>Payor's income exceeds \$150,000.00, subsection 4(b)</p>	<p>Set-off applied</p>		<p>Negotiated agreement</p>	
<p>Statement of Special or Extraordinary Expenses</p>	<p>None filed Previous agreement, refer to CRO</p>		<p>None filed, previous agreement</p>	

Section 9 – do the parties know what the set-off amount is?	Yes. The prospective child support payable for one child equates set off based on incomes incorporated into the agreement.		Yes	
Do the parties agree on the identity or amount of the increased costs of the shared custody arrangements?	No evidence provided to the Court		No evidence provided to the Court	
Do the parties agree on the payor's income?	All versions of the parties' draft orders correspond.		The terms are the same.	

22.Spousal support

CRO	January 30	February 7
Paragraph 12 vary pursuant to the DA.	M.W offer	H.H accepts
Nov 5, 2015: Recognition re: entitlement / issue is duration. H.H agreed to pay spousal support in the amount of \$5000.00 per month	Email: Spousal reduced from \$5000 to \$4500 as of Feb 1, 2019; Attached draft Consent Variation	Email: I have instructions to accept your proposal. I will prepare the Order and arrange to have it issued by the Court. The Notice of Application is done. I

<p>commencing on the first day of the month following the day the Order was filed (Feb 2016).</p> <p>Either party had the right to apply to vary spousal support in accordance with the provisions of the <i>Divorce Act</i>.</p>	<p>Order: spousal support \$4,500 per month, beginning on February 1, 2019 on the first day of each month thereafter.</p>	<p>will file it with the consent order signed by you in advance.</p> <p>Further confirmed / clarified by draft orders Feb 8, 2019, and Feb 22, 2019)</p> <p>Confirms spousal support agreement reduced to \$4500 as of Feb 1, 2019</p>
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Law

23. I have considered all the communications between the parties, including those leading up to Mr. W's formal settlement offer with the Consent Variation Order attached.
24. It is clear to me that the parties intended to negotiate, and they did negotiate an agreement including an agreement to vary child support for the two eldest children, and an agreement to vary spousal support. I am satisfied there was a meeting of the minds on the issues of child support and spousal support. There was no mistake in reducing the terms to a Consent Variation Order.

Analysis

25. A formal settlement offer was made on January 30, 2019, which clearly incorporated a Consent Variation Order outlining the terms proposed by Ms. W. The offer was clear and unequivocal. Mr. H accepted the offer on February 7, 2019.
26. Thereafter, Mr. H says he did not read the attached draft Consent Variation Order. In his email of February 7, 2019 Mr. H did not state his acceptance of the terms of the agreement was conditional on Mr. H filing a different version of the Consent Variation Order. Any oversight was his, and neither party has clearly indicated how Mr. H would be or could be prejudiced if the Consent Variation Order included with Ms. W's offer on January 30, 2019 is issued by the court
27. The Consent Variation Order included with the offer on January 30, 2019 outlines the agreement. The offer was made, and Mr. H accepted it. Thereafter the parties acted on their agreement. On March 1, 2019 Mr. H adjusted his child support and his spousal support payments according to the terms of the agreement.
28. On March 27, 2019 Mr. H filed a Notice of Variation Application confirming an agreement was reached on February 7, 2019. As of February 7, 2019, the only Consent Variation Order incorporating the terms of the parties' agreement as noted above, was the one prepared by Ms. W and forwarded to Mr. H on January 30, 2019.

Conclusion

29. I do not need to determine the terms to be included in the Consent Variation Order.

30. Counsel for Ms. W shall submit the Consent Variation Order filed with the formal settlement offer on January 30, 2019, which shall be endorsed and then issued by the court.

31. Counsel shall file electronically at scfamilyhfx@courts.ns.ca any submissions with respect to costs. The submissions must be filed within one month of receipt of this decision.

Cindy G. Cormier, J.S.C. (F.D.)

Halifax, Nova Scotia