

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

**Citation:** *Coles v. Coles*, 2020 NSSC 200

**Date:** 20200708

**Docket:** 1201-67011; SFH-D 85967

**Registry:** Halifax

**Between:**

**David Keith Coles**

Petitioner

v.

**Sharon Lynn Coles**

Respondent

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**LIBRARY HEADING**

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**Judge:** The Honourable Justice Elizabeth Jollimore

**Heard:** March 16 – 17, 2020

**Submissions:** March 21, 2020 by Judith A. Schoen  
March 30, 2020 by Julia E. Cornish, Q.C.

**Summary:** Former husband applied to reduce spousal support prospectively and retroactively, to impose a termination date on spousal support and vary life insurance obligation. Support payments reduced. No evidentiary or legal basis to impose a termination date. No jurisdiction to vary life insurance obligation.

**Key words:** Family, Variation, Material change in circumstances, Termination, Spousal support

**Legislation:** *Divorce Act*, R.S.C. 1985 (2<sup>nd</sup> Supp.), c. 3, subsection 17(4.1)  
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March 16 – 17, 2020

**Submissions:**

March 23, 2020 by Judith A. Schoen  
March 30, 2020 by Julia E. Cornish, Q.C.

**Counsel:**

Julia E. Cornish, Q.C. for David Coles  
Judith A. Schoen for Lynn Coles

**By the Court:****1) Introduction**

[1] David Coles wants to vary his obligation to pay spousal support to his former wife, Lynn Coles, prospectively and retroactively to March 1, 2019. He wants a date for the end of his spousal support payments imposed.

[2] Mr. Coles also wants to terminate child support for his younger two children who are now aged 28 and 24. Ms. Coles agrees that child support for these children should terminate, effective May 2015 for the older child and June 2016 for the younger child.

[3] Lastly, Mr. Coles wants to vary his obligation to provide life insurance for Ms. Coles and their 3 children.

[4] His variation application is under subsection 17(4.1) of the *Divorce Act*, R.S.C. 1985 (2<sup>nd</sup> Supp.), c. 3.

**2. Prospective spousal support****(a) Has there been a material change in circumstances?**

[5] Mr. Coles must prove there's been a change in his condition, means, needs or other circumstances or in Ms. Coles's condition, means, needs or other circumstances, before I may vary spousal support: *Divorce Act*, subsection 17(4.1). The change "must have some degree of continuity, and not merely be a temporary set of circumstances": *LMP v. LS*, 2011 SCC 64 at paragraph 35.

[6] I'm to consider the parties' circumstances when the Corollary Relief Order was granted in deciding whether a change is material: *RP v. RC*, 2011 SCC 65 at paragraph 25. If a circumstance existed when the Corollary Relief Order was granted, that circumstance can't be a material change. If the circumstance didn't exist, but the parties actually contemplated it, the circumstance isn't a material change: *Dedes v. Dedes*, 2015 BCCA 194 at paragraph 25.

[7] If a change is proven, I'm to consider the change in making the variation order.

[8] Mr. Coles says that there have been various changes in circumstances since the divorce in August 2014. Broadly, there are two:

- Ms. Coles's income has increased
- Mr. Coles's business, Coles Insurance Services Limited, has been in decline

[9] I don't accept that the increase in Ms. Coles's income is a material change, but I do accept the decline in Mr. Coles's business is a change which gives me the authority to vary spousal support.

**(i) Ms. Coles's income has increased**

[10] To be a material change, Ms. Coles's income must have increased, and the increase must be more than a temporary set of circumstances. I don't accept that there has been a material change in Ms. Coles's income because if there has been any change to her income it has only been temporary.

[11] Ms. Coles's income wasn't explicitly stated in the Corollary Relief Order. The Corollary Relief Order stated Ms. Coles's annual income in 2014 was "approximately \$25,000." It's more difficult to prove there's been a material change where income is approximated.

[12] Ms. Coles's job encoding cheques at a bank was eliminated a few months before the divorce. She moved to a job as a balancer, working 15 hours each week, earning \$16.15 per hour. She also worked a 50% term position as an educational program assistant for the school board. The parties didn't know and didn't agree on the exact amount of Ms. Coles's income. Ms. Coles testified that there was negotiation about resolving the amount of her income.

[13] Ms. Coles testified that she wasn't sure that the \$25,000 stated in the Corollary Relief Order was presented as her accurate income at the time of the divorce and said that \$25,000 may not have been accurate. She said she thought her income was "a little" higher, \$30,000. She couldn't be positive that an annual income of more than \$30,000 "would be too high".

[14] In 2017, Ms. Coles's job as an educational program assistant increased from a 50% position to an 80% position. However, in May 2018 her job at the bank ended. She received a 24-month severance package which ended in April 2020. Without the severance payments, Ms. Coles's annual income is approximately \$31,000.00.

[15] The severance package was temporary. Ms. Coles's income without the severance payments is in the range of the income she had at the time of the divorce, so I find this is not a material change.

**(ii) Mr. Coles's business has been in decline**

[16] I accept that the decline in Mr. Coles's business, Coles Insurance Services Limited, is a material change.

[17] Mr. Coles's annual income was \$130,000 when the Corollary Relief Order was granted in 2014, and again in 2015. In 2016 and 2017, his annual income from the

business was \$120,000. In 2018, it was \$109,900. His 2019 T4 shows employment earnings of \$91,555. His income has declined for 4 years. This was not contemplated.

[18] Since the divorce, Mr. Coles has had 2 knee replacement surgeries which forced him to take time away from work for operations, recuperation, and rehabilitation, and he's no longer able to devote long hours to the business. Ms. Coles didn't challenge this. I accept that Mr. Coles has slowed down.

[19] Mr. Coles testified that throughout his involvement with the insurance industry since 1984, brokerages have been involved in profit sharing with their suppliers. While profit sharing contracts still exist, Mr. Coles says that his company didn't receive any profit-sharing payments in 2016, 2017 or 2018.

[20] Mr. Coles testified that the insurance market has become more competitive and one insurance provider has dropped Coles Insurance Services Limited.

[21] While Mr. Coles said that his company is being sued, he provided no details that would allow me to understand how this impacts the company.

[22] His company has been repaying a debt to Wawanesa Insurance which is to be fully repaid in September 2020. It's expected that in December 2020 the company will begin to repay \$235,000 it borrowed from a company owned by Mr. Coles's brother, Coles Benefits Consulting Inc. (CBCI) between November 2015 and May 2019. In January 2018, Mr. Coles signed a promissory note committing to repay \$115,000. In January 2020, Mr. Coles signed a second promissory note committing to repay the full amount borrowed.

**(b) How much spousal support should Mr. Coles pay?**

**(i) Determining the amount of spousal support**

[23] In determining the amount of spousal support, I must consider each former spouse's condition, means, needs or other circumstances and the change that has occurred: *Divorce Act*, subsection 17(4.1). I must also consider the economic advantages or disadvantages to the former spouses from the marriage or its breakdown; any financial consequences arising from child care beyond child support obligations; relief of economic hardship arising from the marriage's breakdown and, to the extent possible, promote each former spouse's economic self-sufficiency within a reasonable time: *Divorce Act*, subsection 17(7).

[24] The parties cohabited for 22 years. Ms. Coles was left with all 3 children in her home after the separation. When they divorced 4 years later, the oldest child was independent, and the 2 younger children were still at home with Ms. Coles. The younger children live with Ms. Coles.

[25] Under the Corollary Relief Order, Mr. Coles paid child support for the 2 younger children until they finished their first post-secondary program and he was solely responsible for the cost of their post-secondary education. As each younger child became independent, his or her child support stopped, and spousal support payments increased to maintain the parties' income levels.

#### **A. Mr. Coles's condition, means, needs and other circumstances**

[26] Mr. Coles is 65. He remarried in 2015. His wife works in a restaurant.

[27] The parties agreed that Dan Jennings was qualified to give expert evidence about Mr. Coles's income. Mr. Jennings's opinion related to Mr. Coles's income for 2016-2018. He concluded that "the Guidelines Income available to Mr. Coles as at December 31, 2018 is \$69,000."

[28] Mr. Jennings calculated \$69,000 in annual income by deducting the entire amount of the 2018 loan from CBCI to Mr. Coles's company from Mr. Coles's income. Mr. Jennings didn't explain why the loaned money should be deducted exclusively from Mr. Coles's salary. In his report, Mr. Jennings stated that the loans from Mr. Coles's family [sic – the loans were from his brother's company] were "(indirectly) financing a portion of [Mr. Coles's] salary". If the loans indirectly financed only a portion of Mr. Coles's salary, why should they be deducted exclusively from his salary?

[29] According to Mr. Jennings, the company continued to be profitable in 2017, 2018 and 2019 despite a decline in its gross commission revenue in 2017 and 2018. Gross commission revenue was stable in 2018 and 2019.

[30] Mr. Jennings's opinion was not prospective. It didn't address what will happen in September 2020 when Mr. Coles's company will have completed repayment of the Wawanesa loan. The company won't begin repaying the CBCI loan until December 2020, allowing a few months without this monthly expense of approximately \$8,000.

[31] Mr. Coles's business hasn't borrowed any money from CBCI since May 2019. Mr. Coles says his 2020 annual income is \$76,412 without the company borrowing more money.

[32] Though the business has been in decline, only Mr. Coles's salary was reduced over the past few years. Two staff members saw modest increases in their salaries in 2018 and 2019.

[33] Mr. Coles couldn't identify any steps he took to reduce his expenses in response to the decline in his business. He hasn't considered reducing administrative staff hours as a means of cutting costs. He bought himself a new

computer. In January 2019 he replaced his 2017 car with a new car.

[34] The table below shows Mr. Coles's support obligations and his income after the payment of support and taxes after the divorce. In 2015 he supported 2 children until May and in 2016, he supported 1 child until June. I don't have his 2015 and 2019 tax returns, so I've estimated his income taxes at then-current tax rates for these years.

Year	Total income	Child / spousal support	Income taxes	Net income
2015	130,000	15,600 / 26,800	32,044	55,556
2016	128,125	5,500 / 34,250	24,022	64,353
2017	127,760	39,000 (all spousal)	24,349	64,411
2018	117,312	39,000 (all spousal)	20,392	57,920
2019	98,967	39,000 (all spousal)	14,273	45,694

[35] According to his Statement of Expenses, Mr. Coles needs \$53,869 (exclusive of taxes and spousal support) to have a balanced budget. Until 2019, he's managed this.

[36] Based on the annual income of \$76,412 he disclosed on his most recent Statement of Income, Mr. Coles has a monthly surplus of approximately \$180 after paying all his costs, including income tax.

[37] To afford spousal support of \$3,250 and his expenses (including his income taxes), Mr. Coles's annual income would need to be approximately \$111,400: about \$35,000 more than the current income in his most recent Statement of Income.

[38] Mr. Coles's current wife didn't provide a Statement of Income. Mr. Coles' tax return shows she earned \$28,800 in 2017 and \$27,500 in 2018. He had no information about her earnings in 2019. Mr. Coles described his wife's contribution to household costs as "once in a while she'll bring home a jug of milk". She brings home food from the restaurant where she works, as well. Mr. Coles says that his wife has her own account and he doesn't know what goes on there. He feels this is appropriate because she left the Philippines to marry him and he believes this has financially disadvantaged her. Mr. Coles said they need a 2-bedroom apartment because he snores. Mr. Coles has never talked to his wife about contributing to their household costs.

[39] For the purpose of paying spousal support, I determine Mr. Coles's income to be \$98,967 as shown on his 2019 tax return. I make this finding for 2 reasons:

1. The company is able to borrow more money to maintain Mr. Coles's income as the income of other staff members has been maintained. According to Mr. Jennings, no lender has imposed any restrictions on what the company may borrow or any requirements on the amount of net working capital it must maintain.
2. Mr. Coles says he's receiving an income of \$76,412 even while the company is not borrowing.

[40] Together these facts persuade me that while Mr. Coles's income has declined, his circumstances are not as dire as he suggests or Mr. Jennings estimates.

### **B. Ms. Coles's condition, means, needs and other circumstances**

[41] Ms. Coles is 62. She is single. She works part-time, as she did throughout the marriage. The couple's two younger children live with her.

[42] Mr. Coles unilaterally reduced his spousal support payments before his variation application was heard. As a result, Ms. Coles and the children discussed moving because Ms. Coles couldn't afford to keep the home. The children began to contribute more to household costs.

[43] The son works and earns approximately \$44,000 annually. He gives Ms. Coles \$600 each month and pays \$50 toward the monthly cable bill. He pays his own expenses. The daughter was seasonally employed, earning approximately \$26,000 annually. She was laid off in March 2020. Her boyfriend also lives with Ms. Coles. Together, she and her boyfriend contribute \$500 monthly to household costs. They also pay for their own food and personal expenses.

[44] Monthly, Ms. Coles earns \$2,531.68 and receives interest of \$25. The children provide \$1,100 (tax-free): this amount excludes the son's portion of the cable bill and his contribution to it. Her monthly housing cost is \$1,933.42.

[45] Ms. Coles's monthly expenses are \$4,490 – before deductions for CPP, EI, union dues, health insurance, her pension and income taxes. If she doesn't receive spousal support of \$3,250, her monthly deficit is approximately \$750 before she pays her CPP and EI premiums, union dues, health insurance, pension contribution and income taxes.

[46] With spousal support of \$3,250, after Ms. Coles pays all her expenses (including CPP, EI, union dues, health insurance, her pension and income taxes) she still runs a deficit of \$361.

[47] Ms. Coles's income hasn't materially changed since the divorce. With the



help of her children, she maintains the former matrimonial home. It has equity of approximately \$100,000 and will provide tax-free money for her retirement when it's sold.

[48] Given the length of the marriage, the roles adopted during it and its enduring consequences, it's appropriate that spousal support attempt to put the parties in positions of approximate income equality.

[49] I order Mr. Coles pay monthly spousal support of \$2,600 to Ms. Coles beginning July 2019.

[50] Monthly spousal support payments of \$2,600 will, after tax, leave Mr. Coles with a deficit of approximately \$250 and Ms. Coles with a deficit of approximately \$190. I allow Ms. Coles a smaller deficit because she is already taking advantage of other income sources in her home while Mr. Coles has refused to do this and has not economized.

### **3) Should spousal support be varied retroactively to March 1, 2019?**

[51] Mr. Coles asks to reduce his spousal support retroactively as of March 1, 2019 – 4 ½ months before he filed his variation application. I may do this, depending on the answers to 2 questions:

- Was there a material change in circumstances during the period of retroactivity?
- Having regard to all other relevant circumstances during this period, would Mr. Coles have been granted a reduction in his support obligation but for his untimely application?

[52] These questions originated in *PMB v. MLB*, 2010 NBCA 5 at paragraph 2. Our Court of Appeal has adopted this analysis in *Smith v. Helppi*, 2011 NSCA 65.

[53] The New Brunswick Court of Appeal said that “[A]s a general proposition, the court will be asking whether the change was significant and long-lasting; whether it was real and not one of choice”: *PMB v. MLB*, 2010 NBCA 5 at paragraph 2; *Smith v. Helppi*, 2011 NSCA 65 at paragraph 21.

[54] This analysis is particularly relevant where there has been delay before filing the variation application and the historic period is long. In contrast, Mr. Coles applied to vary promptly and wants to vary his payments for 5 months.

[55] Ms. Coles says that the reduction in Mr. Coles's income doesn't meet the requirements of *Smith v. Helppi*:

- The decrease is one of his choice
- The decrease is not significant
- The decrease is not long-lasting

[56] It is appropriate to vary Mr. Coles's spousal support payments retroactively. Mr. Coles's surgery and the changes in the insurance market are not changes which Mr. Coles has chosen. His annual income has decreased. The decrease in Mr. Coles's income began in 2016 and has continued since then. This is long-lasting and significant.

[57] I order that Mr. Coles's spousal support payments be varied retroactively to March 2019 to the monthly amount of \$2,600.

#### **4) Should I impose a termination date?**

[58] Lynn and David Coles were married for 22 years. Ms. Coles worked part-time during the evenings so she was available at home during the day to care for the children so Mr. Coles could develop his business. She was primary caregiver for their 3 children, who were still dependent when the parties separated in 2010. The oldest was a full-time university student and the youngest was 14.

[59] After the separation and before the couple divorced, Ms. Coles found work to increase her income while continuing to provide a home for the children. Since the divorce she's worked to improve her financial circumstances but, at 62, she still works part-time.

[60] Mr. Coles made no reference to any evidence or law to support the request for a termination date in his submissions. There is no evidence to support a termination of her spousal support and I dismiss this request.

#### **5) Should Mr. Coles's obligation to provide life insurance be varied?**

[61] Mr. Coles is obliged to maintain \$600,000 in life insurance until September 2021. The beneficiaries are Lynn Coles (\$300,000) and each of the couple's 3 children (\$100,000 each).

[62] Judges have authority to make orders requiring payors to secure spousal and child support: subsections 15.2(1) and (2) of the *Divorce Act* and section 12 of the *Federal Child Support Guidelines*, SOR/97-175, respectively. Where we have this authority, we can also vary these orders: *Divorce Act*, subsection 17(3).

[63] Mr. Coles's obligation to provide life insurance was not ordered as security for support under the *Divorce Act* and it cannot, as a result, be varied under that *Act*. I reach this conclusion for 3 reasons:

1. The obligation was not identified as security for support.
2. According to the Order, everyone's entitlement to the life insurance ends in September 2021. This date has no identified relevance to any aspect of the children's or Ms. Coles's dependency or entitlement to support:
  - The couple's oldest child, who was not entitled to child support at the time of the divorce, was a beneficiary of the life insurance.
  - The couple's 2 younger children, who the parties agreed would no longer be entitled to child support effective the first month following graduation from university, were named as beneficiaries of the life insurance. Their entitlement to child support ended 5 – 6 years before the life insurance obligation ends.
  - Ms. Coles's life insurance wasn't based on her receipt of spousal support. If spousal support ended before September 2021, the life insurance would continue until September 2021. Even if her spousal support continued after September 2021, the life insurance would end.
3. The parties negotiated a schedule for decreasing child support and increasing spousal support as each of the 2 younger children reached independence. Life insurance was not part of the schedule.

[64] No other statutory or common law basis has been identified as my authority to grant this relief. Without jurisdiction, I must dismiss this request.

## **6) Conclusion**

[65] I grant Mr. Coles's application to reduce his ongoing and retroactive support payments. I order he pay monthly spousal support of \$2,600 beginning March 1, 2019. I dismiss his application to have a termination date imposed and I dismiss his application to vary his obligation to provide life insurance.

[66] Ms. Cornish should prepare the order and send it to Ms. Schoen for review before sending it to me. If the parties wish to be heard on costs, please let me know in writing by August 10, 2020 and we'll discuss filing deadlines.

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

Halifax, Nova Scotia