**SUPREME COURT OF NOVA SCOTIA**
**(FAMILY DIVISION)**
**Citation:** *Richards v. Mader,* 2023 NSSC 260

**Date:** 20230817
**Docket:** 1203-003189
**Registry:** Halifax

**Between:**

Robert Richards

Applicant

v.

Sandra Mader

Defendant

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| **Judge:** | The Honourable Justice Samuel Moreau |
| **Heard:** | February 6, 7, 8, 2023, in Halifax, Nova Scotia |
| **Written Decision:** | August 17, 2023 |
| **Subject:** | Spousal support, change in circumstances, nontraditional marriage, compensatory spousal support, self-sufficiency, remarriage, section 17(7) *Divorce Act*. |
| **Summary:** | The Applicant, Mr. Richards requested that his spousal support obligation to Ms. Mader terminate as of the date of his Variation Application or a date prior. Ms. Mader requested that Mr. Richard's spousal support obligation be maintained at the same or a higher level. Ms. Mader asserted that Mr. Richard earned more income than disclosed. Both parties provided expert opinion evidence. |

**Issues:** Has there been a change in circumstances? If so, should Mr. Richards' spousal support obligation be varied or terminated?

**Result:** The Court found that there has been a change in circumstances. Mr. Richards' spousal support obligation is varied to the nominal amount of $1.00 per month for 4 years and if no change in circumstances during that period, terminated.

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| Counsel: | Jessica Chapman and Vanja Mitrovic, for the Applicant<br>Rubin Dexter for the Respondent |

**By the Court:**

**Overview**

[1] Mr. Richards and Ms. Mader were divorced by a Divorce Order issued March 27, 2014, following a 4 day trial before Justice Wood, as he then was. The sole issue heard at trial were the parties competing claims for spousal support.

[2] Following the trial Mr. Richards was ordered to pay spousal support to Ms. Mader in the amount of $36,000.00 (arrears of spousal support for the period up to and including March 31st, 2014) and commencing April 1st, 2014, ongoing payments in the amount of $1500.00 per month. Justice Wood's written decision is cited as *Richards v. Richards,* 2014 NSSC 270.

[3] Mr. Richards now requests that his spousal support obligation terminate as of April, 2019, or in the alternative August 23rd, 2021, the date his Variation Application was filed.

[4] Should I determine that Mr. Richards' spousal support obligation continue, he requests that the quantum be reduced to $365.00 per month based on imputed incomes of $65,000.00 to himself and $55,000.00 to Ms. Mader. Ms. Mader objects to Mr. Richards' variation application and in addition to the ongoing monthly payments, she seeks retroactive spousal support from April, 2019.

[5] This was a 34 year non traditional marriage. The parties built the family business, Jaylynn Enterprises Limited (JEL) into a profitable company. Initially the company bought, sold and repaired mobile homes. Over time the business expanded into selling new mobile homes and also the purchase of a mobile home park.

[6] Both parties have remarried. Mr. Richards is 76 years old and says he wishes to retire. Ms. Mader is 66 years old and has not held outside employment since leaving the family business(es) in 2010.

**The Trial**

[7] The trial commenced on February 6, 2023 and was 2.5 days in duration. During the preliminary stage on February 6th, the parties mutually consented to portions of their Affidavit evidence being struck. They also agreed to the striking of portions of Duane Richards' Affidavit sworn December 21st, 2021, and the entirety of his January 3rd, 2023 Affidavit.

[8] In addition to the parties, the Court heard viva voce evidence by way of cross examination from Elaine Richards (Mr. Richards' spouse), Nikki Robar (qualified as an expert in the area of accounting by consent), Cody Lohnes (Chartered Accountant), Peter Mader (Ms. Mader's spouse), Stacey Mailman (Accountant) and Jamie Ernst (qualified as an expert in the area of accounting by consent). Mr. Ernst was retained by Ms. Mader and Ms. Robar by Mr. Richards.

[9] Mr. Ernst was retained to address the following:

1. To provide his opinion on the differences, if any, between the 2013 redemption of Ms. Mader's preferred shares in Jaylynn Enterprises Limited (JEL) and the 2018 redemption of Mr. Richards' preferred shares in same, as well as any advantages or disadvantages arising from such differences.

2. To provide his opinion on which, if any, of the payments made by 3273094 Nova Scotia Limited (327) to Mr. Richards during the period from 2018 to 2022 should be attributed to Mr. Richards' actual income available to him during said period.

3. To provide his opinion on which of the expenses claimed by 327 during the period from 2018 to 2022 should be added back to its before tax net income.

[10] Ms. Robar was retained to provide a rebuttal report to Mr. Ernst's report.

[11] Immediately prior to Ms. Mailman being called as a witness, Counsel for Ms. Mader informed the Court that he had/has a longstanding business relationship with her. Ms. Mailman provides bookkeeping services for him. Counsel for Mr. Richards informed she had been made aware of this relationship the day before. I voiced my concerns on the record, in particular the perception that could potentially result from Ms. Mailman being questioned by Mr. Dexter, given their longstanding business relationship. Counsel for Mr. Richards did not object to Ms. Mailman providing evidence. I permitted Ms. Mailman to be called as a witness. Her evidence is unremarkable as to the outcome of this trial. Ms. Mailman was identified as a potential witness several months prior to the trial and imposition of the filing deadlines. As per my comments on February 7, 2023, regrettably, Mr. Dexter did not inform the Court and the opposing party of his business relationship with Ms. Mailman upon her first being identified as a potential witness.

**Issues**

[12] This issues are as follows:

1. Has there been a material change in circumstances since the making of the October 16th, 2014, Corollary Relief Order? If so,
2. Should Mr. Richards spousal support obligation to Ms. Mader be terminated?

## Change in Circumstances

[13] Before considering the merits of Mr. Richards' Variation Application, I must first be satisfied that there has been a change in circumstances as required by the *Divorce Act*:

> 17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively,
>
> (a) a support order or any provision of one, on application by either or both former spouses;
>
> **Factors for spousal support order**
>
> (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.

[14] In *Marsh v. Manuel*, 2015 NSSC 315, Justice MacLeod-Archer considered a change in circumstances pursuant to section 37 of the *Parenting and Support Act.* The requirements to demonstrate a change in circumstances under the *Divorce Act* and *Parenting and Support Act* are congruent. At paragraphs 33 and 34 of *Marsh v. Manuel* supra, Justice MacLeod-Archer writes:

> [33] As Justice Forgeron stated in ***Clarke v. Gale,*** 2009 NSSC 170:
>
> > **16** An application to vary is not an appeal of an original order, nor is it an opportunity to retry a prior proceeding. The existing order must be treated as correct as of the time the order was made. The existing order can only be varied if a party proves that a material change in the circumstances exist, and as a result of that change, the current order no longer meets Adrianna's best interests: **Gordon v. Goertz,** 1996 CanLii 191 (SCC), [1996] 2 S.C.R. 27.
> >
> > **17** A material change has been described as one where, had the facts existed at the time the order was made, the judge likely would have made a different order. A material change includes circumstances where something unexpected happens or where something that was expected to

> happen does not. A material change must be more than a minor or temporary change. The change must be a substantial, continuing change which impacts upon the foundation upon which the existing order was made and which affects the child or the ability of the parents to meet the needs of the child.
>
> [34] The burden is on the party seeking variation to prove that circumstances have changed. The onus is not on the support recipient to prove that circumstances have **not** changed.

[15] For the reasons that follow, I find there has been a material change in circumstances since the making of the October 16, 2014, Corollary Relief Order:

- Both parties have remarried, thereby causing their respective financial circumstance(s) to change as they share expenses with their spouses;
- Ms. Mader is now eligible to receive Canada Pension Plan and Old Age Security benefits; and
- Ms. Mader not attempting to achieve self-sufficiency. (*Breed v. Breed*, 2016 NSSC 42). I shall provide additional commentary on this issue later in this decision.

## The Parties

*Mr. Richards*

[16] Mr. Richards is 76 years old. He testified that he has been "attempting to retire" since 2018. From the time of the issuing of the Corollary Relief Order to August, 2018, he continued as President of JEL. He believes his direct involvement regarding management of JEL ended in 2018 when he became ill. Mr. Richards says that since then he has been trying to extricate himself from the day to day duties of JEL. The parties son, Jay, has assumed many of the management duties of the business.

[17] Mr. Richards intended to redeem his shares in JEL however the company could not afford the redemption. As a result he transferred his preferred shares in JEL for common shares of his company, 3273094 Nova Scotia Limited (327) and subsequently redeemed the preferred shares of JEL transferred to 327 in exchange for a promissory note of $700,788.90. JEL also provided Mr. Richards with several assets.

[18] A Master Agreement between JEL and 327 became effective on August 1st,

2018. The Master Agreement confirms certain agreements between JEL and 327. The Master Agreement was of significant focus during Mr. Richards' cross examination.

[19] Paragraph 119 of Ms. Robar's report indicates Mr. Richards' Line 150 Income for the years 2018 to 2021 as follows:

- 2018 - $88,333
- 2019 - $91,711
- 2020 - $52,045
- 2021 - $81,955

[20] Mr. Richards' Statement of Income sworn January 5, 2023, states his total annual income in the amount of $36,960.84.

[21] Mr. Richards and Elaine Richards were married in September, 2014. Ms. Richards is 66 years old, and seemingly retired. As per her Affidavit evidence, she has provided limited services of an administrative nature to 327 over the past number of years.

*Ms. Mader*

[22] Subsequent to the parties separation in 2010, Ms. Mader's involvement with JEL and its affiliated business(es) ended. In June, 2013, Ms. Mader's preference shares in JEL were redeemed resulting in a payment to her in the amount of $1,532,789.90. Using funds from the proceeds, Ms. Mader paid off the mortgage on the former matrimonial home and after payment of other debts, was left with approximately $900,000.00. Ms. Mader sold the former matrimonial home in June, 2019.

[23] Ms. Mader's award of spousal support in 2014 was based on her entitlement to same on compensatory grounds. At paragraph 90 of *Richards v. Richards*, supra, Justice Wood states:

> [90] Taking into account Ms. Richards' entitlement to compensatory spousal support in order to assist in her transition to economic self-sufficiency, as well as the parties' needs and Mr. Richards' ability to access income from JEL and VAIL, I will order payment of spousal support as follows:
>
> 1) Up until March 31, 2014, Mr. Richards shall pay Ms. Richards support in the amount of $6,000.00 per month. With interim support payments that have been made this leaves arrears as of trial of $36,000.00.
>
> 2) From April 1, 2014 Mr. Richards shall pay Ms. Richards support in

> the amount of $1500.00 per month. This is based on their imputed incomes of $80,000.00 and $35,000.00.

[24] Since the making of the Corollary Relief Order, Ms. Mader has not been employed in the traditional sense. From 2013 to 2019 she was "an active trader of stocks" as well as "maintaining one managed account". In 2013 Ms. Mader obtained a Master's degree in Health Administration. She testified that between 2013 and 2017, she applied for several Executive level or Upper Management positions within the field of Health Administration, but was unsuccessful in her attempts. She also testified that she applied "for a few" non health related positions. When questioned as to why she did not seek business related employment, Ms. Mader indicated she was interested in a "management position" not a "clerical position".

[25] Ms. Mader says that in 2017 she lost mobility due to hip problems which lasted for approximately 1.5 years. Currently she is able to hold employment. During cross-examination Ms. Mader confirmed that in 2013 she still held a real estate brokerage license but allowed it to lapse. After leaving the family business(es) she never sought employment in that field.

[26] Ms. Mader's spouse, Peter Mader is 66 years old. He retired at age 62. They were married in 2019 and reside primarily in Bridgewater.

[27] Ms. Mader's Statement of Income sworn October 25, 2021, indicates a total annual income of $49,751.00.

**The Experts' Reports**

[28] Save for my comments in the following paragraphs, I shall not provide an exhaustive review of the experts' reports. In my view the quantum of Mr. Richards' income for the purpose of his spousal support obligation to Ms. Mader is not a pivotal factor in this case.

[29] Ms. Robar's rebuttal report is comprehensive in its analysis. Ms. Robar identified several deficiencies in Mr. Ernst's report including no reference made to the spousal support advisory guidelines when discussing Mr. Richards' available income for spousal support purposes. Ms. Robar also indicated that there are a number of errors in Mr. Ernst's report, including formula errors.

[30] Mr. Ernst commented on the tax liability incurred by Ms. Mader after the redemption of her preferred shares. I fail to see the relevance of that issue in this proceeding. As highlighted by the case authorities, a variation hearing is not meant as a retrial of prior issues. At paragraph 38 of his decision Justice Wood acknowledged Ms. Mader's tax liability in reference to the redemption of

her preferred shares.

[31] Mr. Ernst's report prepared for this trial is the first report he has authored with respect to the imputation of income for spousal support purposes and likewise the first report he has prepared for a Supreme Court (Family Division) matter.

[32] Mr. Ernst testified that he previously worked for Ms. Mader in a professional capacity. Currently he continues to provide accounting services to Ms. Mader and Mr. Mader.

[33] *Civil Procedure Rule* 55.04(1)(a) states:

> **(1)** An expert's report must be signed by the expert and state all of the following as representations by the expert to the court:
>
> > (a) the expert is providing an objective opinion for the assistance of the court, even if the expert is retained by a party;

[34] In *Keresturi v. Keresturi*, 2015 ONSC 3565 (CanLii) the Court addressed the objectivity of an expert witness and provides a helpful synopsis of case authorities in this area:

> [21] I have serious concerns about Mr. Baxter's neutrality. Mr. Baxter admitted that he was engaged by the RBC at the time that the bank was pursuing collecting on their judgment against Lewis. Although he stated that his former role with the bank did not affect his opinions as to values, I do not agree. The perception of bias is one factor that I consider when assessing his evidence along with the other issues. Another concern relative to objectivity Mr. Baxter's objectivity is his partnership with a man named Al Davidson. Mr. Davidson is Linda's brother-in-law. His wife, Linda's sister, is Linda's litigation guardian in these proceedings.
>
> [22] It is my view that neutrality and objectivity of expert witnesses is extremely important in assessing the weight to be given expert testimony, *Berta v. Berta,* (2014) ONSC 3919.
>
> [23] The Supreme Court of Canada provided an extremely helpful review of the law relative to the importance of experts being objective, neutral and impartial. In *White Burgess Langille Inmanv and Haliburton v Abbot and Haliburton,* 2015 S.C.C., Cromwell J. stated commencing at para 12:
>
> > [12] Recent experience has only exacerbated these concerns; we are now all too aware that an expert's lack of independence and impartiality can result in egregious miscarriages of justice: *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, at para. 52. As observed by Beveridge J.A. in this case, *The Commission on Proceedings Involving Guy Paul Morin: Report* (1998) authored by the Honourable Fred Kaufman and the *Inquiry into Pediatric Forensic Pathology in Ontario: Report* (2008) conducted by

> the Honourable Stephen T. Goudge provide two striking examples where "[s]eemingly solid and impartial, but flawed, forensic scientific opinion has played a prominent role in miscarriages of justice" : para. 105. Other reports outline the critical need for impartial and independent expert evidence in civil litigation: *ibid.*, at para. 106; see the Right Honourable Lord Woolf, *Access to Justice: Final Report (*1996); the Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (2007).
>
> [13] To decide how our law of evidence should best respond to these concerns, we must confront several questions: Should concerns about potentially biased expert opinion go to admissibility or only to weight?; If to admissibility, should these concerns be addressed by a threshold requirement for admissibility, by a judicial discretion to exclude, or both?; At what point do these concerns justify exclusion of the evidence?; And finally, how is our response to these concerns integrated into the existing legal framework governing the admissibility of expert opinion evidence? To answer these questions, we must first consider the existing legal framework governing admissibility, identify the duties that an expert witness has to the court and then turn to how those duties are best reflected in that legal framework and objective assistance.

[24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.*, Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

> [1] [40] I conclude that the dominant approach in Canadian common law is to treat independence and impartiality as bearing not just on the weight but also on the admissibility of the evidence. I note that while the shareholders submit that issues regarding expert independence should go only to weight, they rely on cases such as *INCO* that specifically accept that a finding of lack of independence or impartiality can lead to inadmissibility in certain circumstances: R.F., at paras. 52-53.
>
> [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render

> the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
>
> [50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court In my opinion, concerns related to the expert's duty to the court and his or her willingness and capacity to comply with it are best addressed initially in the "qualified expert" element of the *Mohan* framework: S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. (loose-leaf)), vol. 2, at s. 12:30.20.50; see also *Deemar v. College of Veterinarians of Ontario*, 2008 ONCA 600, 92 O.R. (3d) 97, at para. 21; Lederman, Bryant and Fuerst, at pp. 826-27; *Halsbury's Laws of Canada: Evidence*, at para. HEV-152 "Partiality"; *The Canadian Encyclopedic Digest* (Ont. 4th ed. (loose-leaf)), vol. 24, Title 62 — Evidence, at §469. A proposed expert witness who is unable or unwilling to fulfill this duty to the court is not properly qualified to perform the role of an expert. Situating this concern in the "properly qualified expert" ensures that the courts will focus expressly on the important risks associated with biased experts: Hill, Tanovich and Strezos, at s. 12:30.20.50; Paciocco, "Jukebox"

[35] Mr. Ernst's involvement(s) with Ms. Mader and Mr. Mader outside of his retainer for this matter came to light comprehensively during his cross examination. I consider his other involvements with the Maders to be neither trifling nor superficial. The evidence substantiates a long standing professional relationship with Ms. Mader. I conclude it is reasonable to question Mr. Ernst's ability to maintain an objective stance in this matter.

[36] The onus is on the parties to prove, on a balance of probabilities, that their respective reports are sufficiently reliable for Court purposes. *Nova Scotia (Community Services) v. C.R.* 2016 NSSC 46. I am satisfied Ms. Mader has not discharged that burden. As such I assign no weight to Mr. Ernst's report.

[37] I am without any cogent evidence with which to question the findings of Ms. Robar's report.

**Ms. Mader's remarriage and the factor of self sufficiency**

*Ms. Mader's marriage to Mr. Mader*

[38] In considering the economic ramifications of Ms. Mader's marriage to Mr. Mader, I take authority from *Boland v. Boland,* 2012 ONCJ 102, in particular the criteria set out in paragraph 107, addressing a repartnered spouse:

> **[106]** A former spouse who is in receipt of spousal support is not automatically disentitled from receipt of support because she or he repartners: *B.G. v. G. L*., 1995 CanLii 65 (SCC), 15 RFL (4th) 201 S.C.J. Repartnering is simply a factor to be taken into account in the assessment of entitlement to and quantum of support.
>
> **[107]** The caselaw indicates that the significance of the repartnering will vary, depending on a number of factors, such as:
>
> - the duration and stability of the new relationship; *Balazsy v. Balazsy*, 2009 CarswellOnt 5982 (S.C.J.); *M. (K.A.) v/ M. (P.K.),* 2008 BCSC 93
> - the value to the support recipient of any benefits she or he receives by reason of this new relationship; *Juvatopolos v. Juvatopolos*, 2004 O.J. 4381 (S.C.J.)
> - the existence of any legal obligation of the new partner to provide support; *Stenhouse v. Stenhouse*, 2011 ABQB 530; *Juvatopollos v. Juvatopolos, supra*
> - the economic circumstances of support recipient's new partner, sometimes in comparison to his or her former partner: *M. (C.L.) v. M.* (R.A.), 2008 BCSC 217; *Kelly v. Kelly*, 2007 BCSC 227 (CanLii), 2007CarswellBC 342 (S.C.)

[39] Ms. Mader's remarriage has been for a relatively short period of time. The evidence demonstrates that the Maders enjoy a lifestyle which can be described as upper middle class. They are frequent travellers. Typically they "winter" in Jamaica, departing Canada during the month of January. During the 2022-2023 winter season, they departed Canada on December 6th, 2022, travelling back for this trial. Their return flight to Jamaica was scheduled to depart during the evening of February 8, 2023. They are able to travel internationally and spend the majority of each winter season in a warm climate, housed in rental accommodations. Mr. Mader's attempt to downplay the quality of their

accommodations in Jamaica is of no consequence to my conclusion(s) here. He was able to retire at age 62 and the evidence does not disclose any legal obligation requiring him to provide support to any person. The Maders own a house and cottage in the Bridgewater area, both mortgage free, and have the ability to live overseas for at least approximately 3 months each year.

[40] I conclude Ms. Mader's marriage to Mr. Mader has been and continues to be economically beneficial to her circumstances.

[41] Further, I submit it is reasonable to conclude Ms. Mader is in a more favourable financial position than at the time the Corollary Relief Order was made. I am satisfied the sum of the evidence substantiates that Ms. Mader's standard of living and lifestyle is comparable to that of Mr. Richards.

*Self Sufficiency*

[42] In *Volcko v. Volcko,* 2019 NSSC 203, Justice Beaton considered an Applicant spouse's request to increase the quantum of her monthly spousal support award. At paragraphs 25 to 33, inclusive, the issue of self sufficiency is addressed, including several case authorities. The following principles can be deduced from Justice Beaton's analysis on this issue:

- Self sufficiency is to be considered within the context of the standard of living enjoyed by the parties during the marriage;

- Self sufficiency is a factor to be considered in the overall analysis, not a duty on the recipient spouse;

- Quoting from *Bethune v. Bethune,* 2015 NSSC 95 at paragraphs 63, 65, 67 and 68:

> [63] Spousal support payments are not meant to be a blank cheque, in the sense that there must be some nexus between the payee's legitimate needs and the payor's ability to pay, while trying to achieve as much as possible an equalization of the parties' lifestyles…
>
> [65] There is also the matter of the Wife's obligation to make all reasonable efforts at self-sufficiency. The Wife was age 49 at separation; she is now 58 years of age. She has a university education and a solid employment record to the date of marriage…
>
> [67] While the notion of self-sufficiency does not necessarily hold the Wife to a requirement to secure highly lucrative employment, a goal which may not be possible, surely there has to be some nexus between her chosen field of training and a realistic prospect of a modest income, even if the lifestyle gap referred to earlier is never closed…
>
> [68] While the Wife has established a claim for both compensatory and

> non-compensatory support, spousal support is not to be seen as a lifetime pension…

- A recipient spouse's "lack of effort to explore self-sufficiency negatively impacts her compensatory entitlement to spousal support."

[43] When reviewing the case authorities considered in *Volcko v. Volcko,* supra the primary distinguishing feature in contrast to the present case is that the former cases largely involved traditional marriages. Mr. Richards and Ms. Mader's marriage was non traditional and correspondingly did not have the hallmarks typically present in cases involving compensatory claims, such as the sacrifice of a spouse's career goals for the other spouse and/or maintenance of the home and children.

[44] Justice Wood's wording in paragraph 90 of his decision ("Taking into account Ms. Richards' entitlement to compensatory spousal support <u>in order to assist in her transition to economic self-sufficiency</u>") in my view accentuates the non traditional nature of the parties' marriage and highlights the court's comment in *Bethune v. Bethune,* supra; spousal support payments are not meant to be a blank cheque….

[45] In the decision cited as *Walsh v. Walsh,* 2006 Can LII 20857 (ONSC) the Court considered a recipient spouse's request for an increase in her award of spousal support. The payor spouse cross motioned to terminate his spousal support obligation. The payor spouse maintained that the recipient failed to make reasonable efforts to achieve self sufficiency. At paragraphs 40 to 46, inclusive, the Court states:

> [40] In my opinion, JoAnne has had a very lengthy period of time to secure meaningful full-time employment that is commensurate with her abilities. See *C.J.A. v. L.R.G.*, [2004] O.J. No. 1769 (Ont. S.C.J.)
>
> [41] Instead, JoAnne has chosen not to return to a career for which she is professionally qualified and not to obtain other gainful full-time employment. I agree with Michael that in these flagrant circumstances, he should not be required to pay for the financial choices JoAnne has made. I agree with him JoAnne should bear the consequences of her own decisions. See Bradley (supra)
>
> [42] The jurisprudence clearly establishes that where a spouse makes no attempt to become self-sufficient or to contribute to his or her support, he or she should not be entitled to increased spousal support. It is appropriate in such cases for a court to place limits on quantum and duration of support as an effective way of emphasizing his or her self-support obligations under section 17(7)(d) of the Divorce Act. See *Talbot v. Talbot*, [1996] O.J. No. 3191 (Gen.Div.); *Bildy* (supra); *Bergeron* (supra), *Cavanagh v. Cassidy* (2000), 2000 CanLII 22514 (ON SC), 7 R.F.L. (5th) 282 (Ont. S.C.J.); *Purcell v.Purcell* (1996), 26 R.F.L. (4th 267 (Ont. C.A.)

> [43] It was JoAnne's evidence that she does not intend to get a job. She acknowledged having a plan in 2003, over three years ago, to start her own photography business and she also acknowledges not doing this or pursuing any alternative employment.
> [44] In the annotation to *Read v. Read*, 2000 NSCA 33 (CanLII), 4 R.F.L. (5th) 126 (N.S.C.A.), the late Professor James McLeod observed that "although a Court should not over-emphasize a dependent's duty to make reasonable efforts at self-support, neither should it ignore such a duty by making an order that reinforces a dependent's refusal to make any effort to contribute to his or her needs." In my opinion, this is a case where an order increasing spousal support would reinforce JoAnne's refusal to take steps to contribute to her own support. Further, JoAnne has produced no explanatory or vitiating evidence concerning her failure to fulfill her statutory obligations. She has referred to being "treated for depression and anxiety reactions", but there is no medical report in support of this. It was Michael's submission, on the authority of Sopinka and Lederman, The Law of Evidence in Canada, page 297, that an adverse inference should be drawn by JoAnne's failure to produce this evidence.
>
> [45] I agree with Michael that this is an appropriate case to draw such an adverse inference. Quite simply, JoAnne's presentation to this Court, not only on her need for increased spousal support, but also on her alleged medical inability to obtain work, lacks credibility.
> [46] For all of the foregoing reasons, I agree that the time has come where Michael's spousal support obligations of JoAnne must terminate. Happily, Michael's success in his career has created the economic wherewithal that permits his children to enjoy child support in amounts that most Canadian families can barely conceive of. To permit JoAnne to either have increased spousal support, in addition to that child support, or even to continue with the existing spousal support, in the face of her continuing legal persecution of Michael and her self-acknowledged refusal to take steps to contribute in any way to her own economic self-sufficiency, would, in my view, be quite unconscionable. Accordingly, JoAnne's motion for increased spousal support is dismissed. Michael's cross-claim for a termination of JoAnne's spousal support will succeed. However, consistent with the approach taken by this court in other similar cases, it will be terminated over a relatively brief phase out period to permit JoAnne to adjust to providing for herself. Accordingly, Joanne's spousal support of $2,800 per month shall be reduced to $1,400 per month effective July 1, 2006 and it shall terminate on December 31, 2006.

[46] J.E.L. would not have evolved into the profitable entity it became without the considerable efforts of both Ms. Mader and Mr. Richards. Ms. Mader's business acumen is unassailable. She left me with the impression of being a formidable and intelligent individual. She testified as to having a "34 year career in land and community development". Prior to separation she never held a position in the field of Health Administration or in the health care sector. Despite her many successful years in business and experience as a broker she sought high level positions in Health Administration such as Chief Executive Officer of the I.W.K. Hospital. In 2016-2017, she had two interviews with the South Shore

Health Authority for executive level positions and within the 2014- 2018 period applied for the position as Executive Director of the Occupational Therapists Association of Nova Scotia.

[47] Ms. Mader's attempts (or lack thereof) to pursue realistic employment opportunities (since the making of the Corollary Relief Order issued October 16, 2014) given her vast work experience in the business sector underscores Justice Woods' comments at paragraphs 56, 83 and 85 of *Richards v. Richards*, Supra:

> [56] Ms. Richards claimed to have no income other than what she expected to earn from the investments in her managed account which was roughly equivalent to the mortgage payment for the money in which she borrowed to invest. She does not include any anticipated revenue in her sworn income statement for the apartment which she was on the verge of renting. She does not suggest that she will earn any income from her real estate business but claims thousands of dollars in annual fees. Despite the fact that she had many years of experience as a broker, she has generated no sales and her only listing is the matrimonial home. It is difficult to believe that someone with her business and real estate experience could be so unsuccessful if they had made reasonable efforts.
>
> [83] Because of the economic disadvantage suffered by Ms. Richards in losing her source of employment, I believe she is entitled to spousal support on a compensatory basis. In order to consider the nature of the support required to achieve the equitable distribution contemplated by the jurisprudence, I need to consider a number of factors. First, I must recognize that Ms. Richards developed important management and employment skills through JEL and Holm Realty. During the marriage, she was able to complete her university degree and shortly after separation obtained her MHA degree. Her time with Holm Realty gave her experience in real estate, including as a registered broker. Although her age will work to her disadvantage to some extent, Ms. Richards is equipped to return to the job market and, in my view, will be successful in securing beneficial employment provided she is diligent in her efforts.
>
> [85] It is very difficult to assess the financial position of the parties because of concerns over the reliability and credibility of their evidence. I have concluded that Ms. Richards has not made reasonable attempts to seek employment and that her budgeted income is probably understated. Her expenses seem unreasonably high in a few areas, such as entertainment, travel and gifts, mortgage and automobile expenses. In addition, claiming $350.00 a month for real estate fees when no income is being generated is questionable.

[48] During cross examination Ms. Mader testified that upon having her first surgery (2017-2018), she considered herself retired. She also testified that her last job application submitted was in 2017 as Chief Executive Officer of a seniors home. She says currently, she is able to hold employment.

[49] Little has changed since 2014 regarding Ms. Mader's efforts to obtain

employment. I am satisfied Ms. Mader has no intention of returning to the work force. For all intents and purposes she has retired.

[50] Since the making of the current Order, I find Ms. Mader has not made reasonable efforts to obtain employment so as to increase her prospects for earned income. Ultimately the choice to pursue realistic employment opportunities is hers. Consequently, (as enunciated by the jurisprudence) Mr. Richards should not be made to maintain his spousal support obligation at its current level because of Ms. Mader's choices.

**Conclusion**

[51] The focus of Ms. Mader's argument centered on the quantum of Mr. Richards' income. Essentially, Ms. Mader argues that Mr. Richards' income is higher than he discloses and he should be made to pay retroactive spousal support and maintain his obligation at the current or a higher level. Ms. Mader also argues that Mr. Richards engaged in blameworthy conduct by not disclosing his increases in income (from her perspective) to her.

[52] Notwithstanding the quantum of Mr. Richards' income, I am guided by the legislation and case authorities in determining whether Mr. Richards' spousal support obligation should continue and if so at what level.

[53] Throughout my analysis of the evidence, I have contemplated the four factors set out in Section 17(7) of the *Divorce Act:*

> **Objectives of variation order varying spousal support order**
>
> (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.

[54] I am satisfied any economic disadvantage or hardship experienced by Ms. Mader as a result of the dissolution of her marriage to Mr. Richards has elapsed. I was not provided with any evidence which would lead me to conclude that Ms. Mader's standard of living and lifestyle is not comparable to that of Mr.

Richards. I am also satisfied Ms. Mader has had a reasonable period of time to attempt to earn additional income and to enhance her self sufficiency.

[55] Mr. Richards' aspiration to retire is reasonable given his age and stated health concerns. I note both parties reference various health concerns/ailments, however neither provided substantive medical evidence in corroboration.

[56] I find Ms. Mader's entitlement to spousal support from Mr. Richards on a compensatory basis has diminished to the extent where the singular factor to be considered when analyzing her ongoing entitlement is the length of their marriage.

[57] I find Ms. Mader does not have a need for spousal support in all the circumstances present and Mr. Richards should not have to pay spousal support to Ms. Mader at this time. Considering the length of the parties' marriage, and the fact that Ms. Mader's current relationship has been ongoing for only 6 years, (being married for approximately 4 years) relatively speaking, I am not prepared to terminate Mr. Richards' spousal support obligation altogether.

[58] Mr. Richards' spousal support obligation to Ms. Mader shall be reduced to the nominal amount of $1.00 per month for a period of 4 years (4 years subsequent to February 24, 2023), after which it shall terminate unless varied as a result of a material change in circumstances occurring in the intervening period.

[59] The effective date of the change to Mr. Richards' spousal support obligation is the date of the filing of his variation application, August 23rd, 2021.

[60] In my discretion I shall not order Ms. Mader to repay Mr. Richards any spousal support monies paid to her during the period August 23rd, 2021, to February 24th, 2023. Any monies paid to Ms. Mader by Mr. Richards subsequent to February 24th, 2023, consistent with paragraph 2 of the Corollary Relief Order issued October 16, 2014, shall be repaid to him forthwith.

[61] Counsel for Mr. Richards shall draft the Varied Order.

[62] The parties may file written submissions on costs within 30 days of the Varied Order being issued.

Samuel C. G. Moreau J.