SUPREME COURT OF NOVA SCOTIA
Citation: Smith v. Rand, 2013 NSSC 369

Date: 20131114
Docket: No. 1204-005525
SKD 0077451
Registry: Kentville

Between:

William Adam Smith

Applicant

v.

Elizabeth Ann Rand

Respondent

Judge:	The Honourable Justice Michael J. Wood
Heard:	November 4, 2013, in Kentville, Nova Scotia
Decision:	November 14 , 2013 (Orally)
Release of Written Decision:	November 26, 2013
Counsel:	William Adam Smith, self-represented, applicant Elizabeth Ann Rand, self-represented, respondent

By the Court: (Orally)

[1] This is an application by William Adam Smith, to vary the spousal support provisions of a corollary relief order which was issued on November 7, 2011. Both Mr. Smith and the respondent, Elizabeth Ann Rand, represented themselves on the variation application. I gave Ms. Rand permission to be assisted by Mr. Stephen Shaw at the hearing.

[2] Since neither party had legal representation, I will briefly review the criteria to be applied on a variation application such as this. The first step is to examine the corollary relief order and the circumstances of the parties which existed at the time it was granted. It is then necessary to consider whether there has been a material change in those circumstances. If not, then the application must be dismissed. If there is a material change, the Court must then consider whether a variation is appropriate in light of the changed circumstances, keeping in mind the objectives set out in s. 17(7) of the *Divorce Act*.

[3] There is a burden on the party seeking variation, in this case Mr. Smith, to provide evidence which establishes a material change in circumstances. Failure to provide sufficient evidence on this issue will result in dismissal of the application.

[4] The corollary relief order resulted from an Application for Divorce by Agreement filed by Mr. Smith in September, 2011. In that application, Mr. Smith said that the parties had resolved all issues relating to corollary relief, including spousal support, in a separation agreement dated January 12, 2011. He requested that the terms and conditions of the agreement be incorporated into the corollary relief judgment. The order which issued on November 7, 2011 attached a copy of that separation agreement.

[5] The separation agreement indicates that both Mr. Smith and Ms. Rand had independent legal advice prior to signing the document. It set out provisions related to custody and access to the children of the marriage, as well as the amount of child support payable. The agreement also provided for a division of assets and liabilities between the parties. The provisions with respect to spousal support were as follows:

> 3. Subject to paragraphs 4, 5 and 6 herein the parties agree that commencing on January 1, 2011, and continuing every two weeks thereafter until

> December 31, 2021, the Husband shall pay to the Wife spousal support in the amount of $1580.31 which amount shall paid directly into the wife's account at Royal Bank of Canada.
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> 4. Subject to paragraph 5, herein, the parties agree that there shall be no variation in the amount of spousal support payable for a period of five years from January 1, 2011, regardless of any change in circumstance by either party.
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> 5. The Husband and the Wife agree that the Husband shall seek a variation in either or both of the amount of spousal support payable and the duration for which spousal support is payable should the Wife cohabit with another as "husband and wife" irrespective of whether the Wife should marry.
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> 6. The parties agree that commencing on January 1, 2016, and continuing each year thereafter the monthly payment of spousal support shall be reduced annually by 10 percent of the original spousal support amount as calculated from the original spousal support provided for in paragraph 4 herein. The Husband reserves the privilege of applying for an additional reduction in spousal support should the income of the Wife exceed by a factor of two or more the non-cumulative annual amount of the reduction which shall accrue to the benefit of the Husband by virtue of this clause.

[6] The corollary relief order which was granted in November, 2011 required Mr. Smith to pay spousal support to Ms. Rand in the amount of $3,160.62 each month.

[7] The reason advanced by Mr. Smith for his variation application is a reduction in his income. As a result, it will be necessary to examine his income since the time of the corollary relief order.

[8] Mr. Smith has been essentially self-employed in the financial services business where his compensation is based upon commissions earned for the sale of various products. His financial picture is somewhat complicated by the fact that commission income is initially paid to a company owned by Mr. Smith, known as 3C Wealth Partners Inc.

[9] Mr. Smith has provided his Notice of Assessment issued by the Canada Revenue Agency for the 2010 tax year. According to that, his income was $176,350.00. He did not provide any later Notices of Assessment despite being

asked to do so through a Demand for Disclosure served by Ms. Rand on October 1, 2013. Mr. Smith did, however, provide copies of his 2011 and 2012 tax returns. According to these documents, Mr. Smith's income for 2011 was $150,393.00 and for 2012 it was $267,052.00.

[10] The sworn Statement of Income filed by Mr. Smith on September 5, 2013 projects his annual income for this year to be $44,007.00.

[11] According to Mr. Smith's affidavit there are two primary reasons for the decline in his income this year. The first is a reduction in the revenue generated by commissions from his financial services business, and the second is three significant charge backs against that commission income as a result of clients terminating life insurance policies. These totalled $88,000.00. Of this amount Mr. Smith says that $35,000.00 relates to a personal insurance policy on which he was no longer able to pay the premiums.

[12] Mr. Smith filed an affidavit of Mr. Trevor Daigle, the Director of Business Development for Freedom 55 Financial/London Life, who said that as of September 27, 2013 3C Wealth Partners Inc. had earned $389,260.97 from London Life. Of that amount, $89,509.82 was Mr. Smith's personal earnings. He did not know how much of that amount the company may have paid Mr. Smith.

[13] Mr. Smith also filed an affidavit from Ms. Angela Mansfield, who was employed through 3C Wealth Partners Inc. until September, 2013 when she was laid off due to the lack of money to pay her salary. Ms. Mansfield's affidavit responded to various allegations by Ms. Rand of "suspicious" payments made by 3 C Wealth Partners. Mr. Smith attached as an exhibit to his affidavit a letter from Ms. Mansfield dated August 28, 2013 saying that his partial income from the company up to that date was $29,293.77. This letter was not attached to or referred to in Ms. Mansfield's affidavit.

[14] Although the last financial statement for 3C Wealth Partners Inc. provided by Mr. Smith was for the year ended February 28, 2012, he said that the company was in very poor financial shape with a significant deficit. He provided a list of payables for the company, totalling $30,371.71 the majority of which was unremitted payroll deductions owed to CRA . He testified that the company had made a bankruptcy proposal in 2011 and was paying $2,000.00 a month to the

Trustee under the terms of that proposal. Mr. Smith also testified that he had made a consumer proposal in bankruptcy in 2011 and that he defaulted on his payment obligations this year, resulting in him being personally bankrupt. The scheduled date for his discharge hearing is in January, 2014.

[15] In his affidavit and during cross-examination, Mr. Smith said that the large increase in his income for 2012 was as a result of selling a portion of his book of business relating to clients in Yarmouth, Nova Scotia and New Brunswick. Although this generated significant income for that year, over time it will have a negative impact because of the loss of commissions from that business.

[16] Mr. Smith was questioned about his spending decisions and acknowledged that he was probably spending more on his personal lifestyle than he should have over the last couple of years, which has resulted in an increased deficit for 3C Wealth Partners Inc. He also acknowledged going on a honeymoon to the Carribean in January of this year, although the amount spent on that holiday was not in evidence.

[17] According to the statement issued by the Maintenance Enforcement Program on October 10, 2013, Mr. Smith began to fall behind in his spousal support obligations in October, 2012. Although he made some payments since that time, he has never been current over the last year. According to the MEP record of payments, he was $42,506.68 in arrears as of October 10, 2013.

[18] Ms. Rand has complained about the adequacy of the financial disclosure by Mr. Smith in support of his application to vary spousal support. She points out that, despite her request, the Notice of Assessment for 2012 has not been provided. Mr. Smith's response was that he did not think it was needed since he had provided a copy of his tax return and he did not know where the Notice was. I have some difficulty with this position since the sworn Statement of Income filed by Mr. Smith says that copies of the Notice of Assessment issued by Canada Revenue Agency for the previous three tax years are attached, and the only one which was included was for 2010. In addition, Ms. Rand specifically requested the 2012 Notice of Assessment in her demand for production.

[19] Ms. Rand also requested a copy of the corporate tax return for 3C Wealth Partners for the year ended February 28, 2013. Mr. Smith's response was that this

was irrelevant and secondly, that he did not have financial statements prepared because he did not have the money to pay his accountants to do so. He testified that there was no tax owing because the company had no income after payment of expenses. For calendar year 2013, we have the evidence of Mr. Smith with respect to how much income he took out of the company based upon the information provided by Ms. Mansfield.

[20] Mr. Smith was questioned about his prospects for earning income. He said that he was not sure what to expect, but felt that he was "righting the ship with regard to my practice", although he expected that his personal income would be minimal over the next four months. Mr. Daigle testified that Mr. Smith had always been a successful representative and he saw no reason to think that this would not continue. He said that top performers had peaks and valleys in their earnings and he has seen income drops of 60-70% for individuals in bad years. Mr. Daigle was not able to predict what might happen with Mr. Smith's income over the next few months.

[21] It is against this factual background that I must consider the legal principles applicable to an application to vary spousal support. In this case, the corollary relief order incorporated the terms of the separation agreement signed by the parties in January, 2011.

[22] In the case of *L.M.P. v. L.S.*, 2011 SCC 64, the Supreme Court of Canada considered the criteria for variation of a spousal support order which incorporates an agreement.

[23] In *L.M.P.*, the Supreme Court confirmed that prior to considering a variation order, it was necessary for the party seeking the variation to establish a change in circumstances which was material. This means a change that if known at the time, would likely have resulted in different terms. The Court made it clear that the determination of material change will depend upon the actual circumstances of the parties at the time of the initial order. Generally, a material change must have some degree of continuity and not merely be a temporary set of circumstances (see paras. 34 and 35).

[24] The effect that a court should give to the agreement of the parties is discussed in the following passages from the Supreme Court's decision:

> [38] The agreement may address future circumstances and predetermine who will bear the risk of any changes that might occur. And it may well specifically provide that a contemplated future event will or will not amount to a material change.
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> [39] Parties may either contemplate that a specific type of change will or will not give rise to variation. When a given change is specified in the agreement incorporated into the order as giving rise to, or not giving rise to, variation (either expressly or by necessary implication), the answer to the *Willick* question may well be found in the terms of the order itself. That is, the parties, through their agreement, which has already received prior judicial approval, have provided the answer to the *Willick* inquiry required to determine if a material change has occurred under s. 17(4.1). Even significant changes may not be material for the purposes of s. 17(4.1) if they were actually contemplated by the parties by the terms of the order at the time of the order. The degree of specificity with which the terms of the order provide for a particular change is evidence of whether the parties or court contemplated the situation raised on an application for variation, and whether the order was intended to capture the particular changed circumstances. Courts should give effect to these intentions, bearing in mind that the agreement was incorporated into a court order, and that the terms can therefore be presumed, as of that time, to have been in compliance with the objectives of the *Divorce Act* when the order was made.
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> [42] Ultimately, courts are tasked with determining if a material change of circumstances has occurred so as to justify a variation of a s. 15.2 order under s. 17. The analysis is always grounded in the actual circumstances of the parties and the terms of the s. 15.2 order; what meaning a court will give any general statement of finality found in an order will be a question to be resolved on that basis. As we have explained, in some situations, the agreement incorporated into the order may help shape what is meant by a "material change of circumstances".
> ...

[25] As the Supreme Court has indicated, I must first consider whether Mr. Smith has met the burden on him to show a material change in circumstances. The language of the separation agreement which was incorporated in the spousal support order must be considered in that analysis. In my view, a negotiated agreement with both parties represented by legal counsel, should be given significant weight.

[26] In this case, the agreement specifically says that there is to be no variation of spousal support for a period of five years regardless of any change in circumstance for either party. At the end of the five years, the spousal support automatically drops by ten percent each year until it ceases at the end of 2021. The agreement provides an exception so that Mr. Smith can seek variation in the event that Ms. Rand co-habitats with another as husband and wife. I am certain that the negotiation of these spousal support terms involved concessions on both sides. The agreement gives each a high degree of predictability about support payments, particularly in the five years following their divorce.

[27] The clear language of the agreement is that for the first five years variation is not permitted simply because of a change in the income of either Ms. Rand or Mr. Smith. It is clear from the evidence that Mr. Smith's income has the potential to change depending upon fluctuations in commission revenue. It could also change depending upon the financial performance of 3C Wealth Partner Inc. A provision that variation will not be permitted for the first five years could be of benefit to either party. In 2012, Mr. Smith's income increased by approximately $100,000.00 and he was not required to share any of that with Ms. Rand. In 2013, his income has dropped by a similar amount from the baseline set in 2011, and the question is whether Ms. Rand should be expected to bear that burden.

[28] By including the spousal support provisions found in paragraphs 3-6 in the separation agreement, I believe that the parties intended to have Mr. Smith bear the risk of fluctuations in his income. In some years that might work to his benefit and in others to his detriment. Since he should have been aware that his spousal support obligations would not change, it was incumbent on him to adjust his lifestyle to ensure that he was able to meet these obligations. It is apparent from the evidence that he did not do so. Instead of setting aside money for spousal support during his high income year of 2012, he apparently spent every penny and took a vacation to the Carribean this past January.

[29] When I consider the evidentiary record, including the lack of any corporate financial information for 2012, the absence of Mr. Smith's Notice of Assessment for the 2012 tax year and the uncertainty concerning his income for the balance of the calendar year, I am not satisfied that he has met the burden of showing a material change in circumstances from the situation that existed in November,

2011. I put significant weight on the terms of the separation agreement which reflected the intention of the parties that there be no variation in spousal support for five years.

[30] I am also influenced by the uncertainty concerning Mr. Smith's future income. By all reports, he has been a very successful advisor and has generated a significant level of income for many years. The evidence suggests that he will continue to do so, and that his current setback may well be a temporary aberration.

[31] As a result of my conclusion that Mr. Smith has not met the burden of proving a material change in circumstances from the time of the corollary relief order in November, 2011, I must dismiss his application to vary spousal support.

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Wood, J.