

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

**Citation: MacKay v. MacLean, 2014 NSSC 127**

**Date:** 2014-04-07

**Docket:** No. 1217-000465

**Registry:** Port Hawkesbury

**Between:**

Alfred Gordon MacKay

Applicant

v.

Patricia Ann MacLean

Respondent

**Judge:** The Honourable Justice Moira C. Legere Sers

**Heard:** February 19, 2014, in Port Hawkesbury, Nova Scotia

**Counsel:** Wayne MacMillan, for the Applicant  
Sam Moreau, for the Respondent

**By the Court:**

[1] Mr. MacKay applied on the 16<sup>th</sup> of November, 2012 to terminate his spousal support obligations contained in a Corollary Relief Judgment dated January 24<sup>th</sup>, 2008.

[2] The parties were married and divorced by Divorce Judgment dated January 24<sup>th</sup>, 2008.

[3] The respondent was 23 at the time of the marriage and 44 at the time of the separation. She is currently 54 years old.

[4] The parties shared interim joint custody of the one child, born July 2<sup>nd</sup>, 1990. Primary care was granted to the mother.

[5] The applicant's declared income at the time was \$40,000.

[6] The applicant agreed to pay child support of \$348 per month commencing December 1<sup>st</sup>, 2007. This continued until July, 2009. Thereafter, he paid spousal support.

[7] The applicant agreed to pay spousal support of \$600 per month under the specific understanding as set out in the Agreement as follow:

5. The petitioner, Alfred Gordon MacKay, shall pay spousal support to the respondent, Patricia Ann MacKay, in the amount of \$600 per month payable on the first day of each month and commencing on December 1<sup>st</sup>, 2007. The spousal support is payable to give the respondent, Patricia Ann MacKay, a reasonable opportunity to become self-sufficient. The payment of this spousal support is subject to review after five years without any requirement to prove a change of circumstances.

[8] By this application Mr. MacKay is seeking a review and termination effective December 11<sup>th</sup>, 2012.

[9] The applicant alleges the following:

- His income has decreased;
- The respondent has failed to take any action to support herself or become self-sufficient; and
- The respondent has been living common law since August of 2009.

## FACTS

[10] The parties were married on July 16<sup>th</sup>, 1982 and separated on June 9<sup>th</sup>, 2003.

[11] On July 2<sup>nd</sup>, 1990, eight years into the marriage, a child was born to Ms. MacKay. Although Mr. MacKay was not the biological father, he accepted the responsibility and provided support for this child within the marriage and well past their divorce.

## RESPONDENT

[12] The respondent was the primary parent of the child during the marriage. She advises that she worked regularly on the boat with her husband and was available to do errands. Her husband evidence is that other than one occasion she did not work on the boat.

[13] In the transcript of proceedings Ms. MacLean testified as follows:

Q: With respect to Mr. MacKay's fishing business, during the marriage, what work, if any, did you do with respect to that business?

Ms. MacLean: Well probably from '82 I did go out do lobster fishing with him and I did do labour and I did work on the boats. I did the decks, I did the...sometimes would run the boat when we were doing the long liner and I would bait the traps, band the lobsters, clean the deck, put...set the traps out. Same as any deck hand..., any deckhand would do, I would do that.

Q: When you say do the decks you mean...?

Ms. MacLean: Out on deck, out on the back of the boat. I would be out there doing that. As a matter of fact Dr. Malick in Sydney, a neurosurgeon, I had to go to see him one time and he told.....

...

Q. I'm just asking you questions regarding the work you did specifically...

Ms. MacLean: I did it, yes.

Q: ...on the boat. Okay?

Ms. MacLean: I did whatever a deck hand would do, that was my thing. Aww... for the crab fishing, yes, I only went out there once but I was always at home 24/7 on call if Mr. MacKay needed anything or if I needed to go down to Sydney to get a part or do anything like that, I was always on hand for that.

[14] Mr. MacKay was asked:

Q: Just have one question...I just recall one thing in the affidavit. Um...there was talk about her working aboard your boat. Can you tell us about that, what work she did aboard your boat at any point in time?

Mr. MacKay : She came out on the crab vessel I had at the time, “Patricia Nicole” for one trip. She didn’t work aboard, she came for one trip...

...

Q: Did she ever work aboard your boat?

Mr. MacKay: No.

[15] The respondent did not complete high school.

[16] When the parties separated in 2003 she worked as a traffic controller. She next worked in a call centre. She subsequently quit this job in 2003 due to what she describes as a “breakdown”.

[17] Shortly after the separation and divorce she moved to New Waterford, Nova Scotia, and rented an apartment. Subsequently, the applicant came to visit her and gave her \$10,000 to buy the place she was renting.

[18] She still owns this home. It is assessed in her Statement of Property at \$16,800. It is mortgage free. She says the home is unlivable and she does not have the funds to maintain it.

[19] In 2005 she moved to Kingston, Nova Scotia to live with her boyfriend. She has remained there since.

[20] She is not currently employed and has not looked for employment since 2003.

[21] She has not taken any retraining program. She suggests this is because of her mental health problems and the stress experienced in her marriage, causing her to be unable to obtain her GED or take educational courses subsequently.

[22] There is no medical evidence to support her mental health conditions other than a brief note from her treating physician dated October 1<sup>st</sup>, 2013 suggesting she has had several episodes of anxiety and depression along with other social issue concerns. There is no indication these concerns relate to her marriage. The doctor referred her for a mental health assessment and opined that she was unable to return to work due to her inability to cope with the stresses of life.

[23] Prior to the hearing, the respondent's counsel requested and received an adjournment to take instructions with respect to presenting evidence regarding this medical state. No further medical evidence was tendered.

[24] The respondent's only source of independent income is the \$600 per month she receives from the applicant.

[25] Her Statement of Income shows no rental expense. She budgets \$325 per month for car expenditures. Her Statement of Property shows a home value of \$16,800, a utility debt and tax debt in the total amount of \$700. There was no further verification of these amounts.

[26] I have no information on what, if any, real or personal property is owned by the respondent's partner with whom she has lived since 2005.

[27] I have no information regarding her household income, the circumstances of her life with her boyfriend other than the fact that she is living in his home. I have no information regarding household income.

[28] The respondent offered her own evidence that in the early years of their marriage, for approximately eight years, the applicant was abusive and was an alcoholic. She advises he submitted to treatment. Since 1991 she advises there was no abuse and his drinking stopped.

[29] The applicant denies any abuse.

[30] The respondent acknowledges that within the marriage she had a child and while not the applicant's child, he accepted full responsibility. He supported this child during her dependency. After separation, the father continued to support her

through the child support payments. This child has a child of her own. As of the date of the application, this grandchild is living with the applicant and his partner and is being supported by the applicant and his partner.

## THE APPLICANT

[31] The applicant was born on May 22<sup>nd</sup>, 1959. He was 24 at the time of marriage. He was 45 at the time of separation and he is currently 56 years old.

[32] The applicant is living in his jointly owned home with his partner. This home is assessed at \$285,000, with a mortgage of \$85,000.

[33] The applicant is a self-employed fisherman. He has a business and personal debt load of \$164,000. He and his partner own a '72 dodge, a 2012 bike, 2006 sled and a 2013 Honda Accord. He has RRSP's in the vicinity of \$24,000 to \$25,000.

[34] In 2008 he was found to be earning \$40,000.

[35] In 2010, his line 150 income was \$33,741.00 made up of EI earnings of \$10,356 and taxable capital gains of \$2,500. His net fishing income was \$20,885.

[36] In 2011, his line 150 income was \$24,628 with a net fishing income of \$12,647 and EI of \$11,981.

[37] In 2012, his line 150 income is \$37,756.

[38] At the request of the court, post hearing he filed his 2013 Notice of Assessment showing gross employment income of \$33,193.33 (net of \$26,914) with an additional \$28,914.63 from his RRSP and employment Insurance Income of \$10,782 for a total gross income of \$66,504.

[39] He began to draw EI benefits as of October 1st, 2013. From these benefits he collects \$2,104.90 monthly.

[40] In 2008, the applicant sold his lobster licence to purchase a dragger to catch red fish and shrimp quota for Premium Seafoods Limited. Mr. Edgar Samson provided \$600,000 to assist in financing the purchase of the dragger. The applicant sold his licence and paid \$300,000 for a 65 foot dragger.

[41] As a result of the transaction in 2009, he was re-assessed and was required to pay \$18,984 in additional income taxes.

[42] He believes his capacity to fish is diminishing due to his diabetes. He has hired a Captain to fish for him on an increasing frequency.

## HEALTH

[43] Neither of the parties offered sufficient evidence of their state of health to allow me to conclude that their medical impairments interfere with their current ability to work and be employed.

[44] The medical evidence tendered by the respondent is neither acceptable nor sufficient to draw any conclusions with respect to her short term or long term employability.

[45] The applicant advises he is diabetic, has high blood pressure and arthritis. Two months ago he was involved in a car accident. He also suffers from degenerating disc disease.

## ARREARS

[46] As of February 5<sup>th</sup>, 2014 there are spousal support arrears in the amount of \$624.

[47] I have insufficient evidence to make a credible finding in relation to her allegations regarding physical and mental abuse and what if any impact this had on her ability to support herself.

[48] This does not explain her failure to achieve some sort of self-sufficiency, to seek retraining or to look for employment from that time forward.

[49] According to the respondent's own evidence, she suffered no abuse or mal-treatment from 1991 forward.

[50] There is insufficient evidence to conclude that the respondent is medically disabled and cannot return to work.

[51] There was but one child of the marriage, born nine years after the marriage started.

[52] The applicant was the main income earner.

[53] The failure of the respondent to contribute to the finances and the reasons for her failure to pursue retraining and employment as the child matured and became independent have not been addressed.

[54] The respondent testified she frequently worked on the fishing boat as a labourer/deckhand and during fishing season was on call to assist her husband; that speaks to her ability to work and perform other tasks other than what she is currently doing.

[55] I have no evidence of any physical disability suffered by the respondent, and further, the evidence regarding her actual participation by working on the fishing vessel is adamantly denied by the applicant who asserted that she was simply informed on one occasion of the tasks to be had because in some way she was listed as working but did not work on the vessel.

[56] The evidence would not be sufficient for me to conclude either way whether she worked or did not work on the vessel in the manner in which she claims.

[57] The applicant's claim that his income has decreased minimally is true if one looks only at his net business income with his employment insurance. The 2013 total would result in an annual income of \$37,696, slightly under the \$40,000 he earned when they entered into the agreement. This is not a significant or material change.

[58] He has re-partnered. This should not affect his ability to pay.

[59] He is no longer paying child support to the respondent although he is supporting his grandchild.

[60] Mr. MacKay and his common law partner were granted primary care of their grandchild. They provide clothing and food for this child as well as day care expenses of approximately \$320 per month.

[61] Ms. MacLean has been living in a common law relationship since 2005. I have no details of her current living arrangements that would allow me to address her needs, means and circumstances.



## THE LAW

[62] This was a review contemplated within the Corollary Relief Judgment and therefore in accordance with **Leskun v. Leskun**, 2006 SCC 25, at para. 39, neither party bears the onus to prove a material change of circumstances.

[63] Review applications are governed by Section 15.2 of the *Divorce Act*. The cases of **Cavanaugh v. Cavanaugh**, [2008] N.B.J 364 2008 NBQB 387 and **Arsenault v. Arsenault**, 2002 Carswell NB 496 (NBCA) are helpful in assessing the burden of proof in review hearings. Neither party bears the threshold burden nor is it necessary to prove a material change in circumstance since the making of the last order.

[64] Some considerations which bind the Court on a review hearing are identical to those which apply on an originating application. They are set out in sections 15.2 (4) and 6 (6) of the Divorce Act

[65] In **Cavanaugh**, Wooder, J. at paragraphs 29 and 30 noted as follows:

30 The Supreme Court of Canada has made it clear that the spousal support provisions of the Divorce Act are intended to address the economic consequences of marriage and its breakdown, as opposed to the social, emotional, or other consequences. See *Moge v. Moge* 1992 CarswellMan 143. That same court dispelled the notion that any one of the objectives was paramount when it held that all four of the objectives must be reflected in a support order. To these principles was added the declaration in *Bracklow v. Bracklow* 1999 CarswellBC 532 (S.C.C.) that need could form the basis for entitlement to support even where there was no compensatory or contractual aspect to an award.

[66] Legislated factors include:

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including:

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[67] This marriage lasted 21 years.

[68] I have competing evidence as to the work history of the respondent for the first eight years of marriage when the couple had no children to support. I have competing evidence as to whether she worked during the child's infancy, although the respondent says she was always on call to assist.

[69] The only reliable evidence of her work history relates to post separation when she worked for a few years and then quit.

[70] She admits she neither worked, applied for work or attempted to retrain after that. They agree the applicant was the primary income earner and what, if anything, she made was supplementary.

[71] The Corollary Relief Judgement explicitly suggests that the spousal support was put in place as a transitional support to give the respondent a reasonable opportunity to become more self-sufficient. She clearly did nothing to pursue this objective.

[72] The objectives of a spousal support order are well known, they include:

- (6) (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the 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 spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[73] In this case, the respondent derived economic advantages from her marriage to the applicant because he was the principle financial provider. The breakdown would have removed the principal financial support. Certainly transitional spousal support was in order.

[74] On breakdown of the marriage the applicant paid child and spousal support assisting in addressing the needs of the child and the circumstances of the mother.

[75] I have no information as to what the applicant did early in the marriage, no information as to her employment or what she did from 1981 forward to 1990 when she became pregnant and stayed at home with her child.

[76] I have no evidence to suggest that Mrs. MacKay's career aspirations were affected adversely or positively by the marriage other than the fact that because Mr. MacKay agreed to support this child within their family, Ms. MacKay was able to care for the child at home

[77] The mother did not pursue any course of retraining or education during the marriage or subsequently since the separation as was contemplated clearly by the agreement between the parties. She admits she has done nothing to move herself towards any self-sufficiency.

[78] Thus, the spousal support did not achieve the objective set out in the agreement, to give the respondent reasonable time to retrain and re-enter the work force.

[79] The respondent has not provided any evidence that she has made any effort to maintain herself by re-entering the workforce. Her failure to diligently seek retraining or employment and her lack of secondary and post-secondary education may assist to explain her unemployment.

[80] Perhaps because she has been living with her common law partner for approximately eight years post separation she has not had sufficient motivation or need to seek retraining or employment.

[81] There is an onus on the respondent to provide sufficient evidence for the Court to look at her needs, means and circumstances. That evidence has not been forthcoming.

[82] This has been a long term marriage. Her role was defined at least for the time of the child's dependency as the primary caretaker.

[83] I have very little evidence that would allow me to conclude that this was what one would consider a traditional marriage other than that, when the child was born eight years into the marriage, the wife benefitted from being in a marriage in which there was one principle financial provider.

[84] The two major factors playing into her need are her lack of formal training and education and the fact she was the primary parent of the one child.

[85] I have no information before me to determine what her standard of living is currently or to compare it to the applicant's standard of living.

[86] The brief submitted on behalf of Mr. MacKay suggests that Ms. MacLean worked throughout the marriage and returned to work shortly after the birth of the child in 1990.

[87] The evidence is not clear as to what she did within or outside the marriage other than that she worked after the separation and then after two different employments situations she quit work and did not pursue anything further.

[88] This was not a situation in which either party was forced to put their work, professional or business life on hold for the purposes of the marriage.

## CONCLUSION

[89] It would have been more helpful to the Court if both parties provided a more complete picture of the respondent's employment history previous to the birth of the child and during the child's dependency.

[90] If health issues are impeding either party's progress, simple unsupported assertions by appropriate objective evidence in accordance with the *Civil Procedure Rules* is not always reliable evidence. It is certainly not enough to found a conclusion of disability.

[91] What I do know is that the respondent has not helped herself to become self-sufficient.

[92] I also know that the applicant has provided spousal support from separation to today's date. He advised that she took most of their personal belongings at separation. He paid to assist her in her move to New Waterford and between June 2003 and December 2003 he gave her a lot of cash.

[93] The respondent gave evidence on her own that the applicant visited her after separation and gave her \$10,000 to buy her home in Cape Breton.

[94] The applicant alleges that the respondent would not give him receipts for the cash which resulted in his decision to have a lawyer set out their obligations in writing leading to the Corollary Relief Judgement.

[95] The respondent also received half of their RRSP in the approximate amount of \$45,000.

[96] I do not know the extent of his support from separation in 2003 to the agreement incorporated into the Corollary Relief Judgement in 2008.

[97] The parties agreed that one of the objectives was to give the respondent a reasonable time to become self-sufficient. That was known and agreed to by both parties.

[98] In light of the above, having provided some level of support for close to 14 years after separation, I continue the current spousal award until December 31<sup>st</sup>, 2014 and terminate the support.

[99] At or after that point, the onus rests with the respondent to bring forward an application to establish her entitlement to support on a continuing basis.

[100] Counsel for the applicant shall draft the order.

Moira C. Legere Sers, J.