

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Coolen v. Coolen, 2005 NSSC 78

Date: 20050414

Docket: 1204-003456

Registry: Kentville

Between:

Robert Brian Coolen

Applicant

v.

Brenda Louise Coolen

Respondent

Judge:

The Honourable Justice Gregory M. Warner

Heard:

March 3, 2005, in Kentville, Nova Scotia

Counsel:

Robert Brian Coolen - representing self

Donald Urquhart, Esq., counsel for Brenda Coolen

By the Court:

[1] This is a review of spousal support awarded to Ms. Coolen at the divorce trial on December 19, 2003. The basis of the review, as expressed by this Court's decision reported in 2004NSSC1, was the unsatisfactory evidence of Ms. Coolen's claimed disability and of Mr. Coolen's current income. Since December, 2003, there has also been some change in Ms. Coolen's circumstances.

MS. COOLEN'S MEDICAL CONDITION

[2] At paragraphs 32 - 50 of the trial decision, this Court accepted Ms. Coolen's evidence that she suffered from multiple sclerosis and other ailments that prevented her from ever attaining self-sufficiency. The evidence was entirely that of herself, without any independent verification; the Court was left with some concern because of her evidence that her condition was in remission and that she had not obtained medical attention for her condition for a number of years. The onus is on the party claiming disability to prove it; therefore, the Court authorized a review for the purpose of receiving better evidence as to her condition.

[3] In August, 2004, Ms. Coolen became the patient of Dr. Kimberley Powell, a local family physician. Dr. Powell reviewed Ms. Coolen's medical history and apparently interviewed her on five occasions. Dr. Powell was not called to give evidence but her two page letter dated January 16, 2005, is attached as Tab 1 to Ms. Coolen's affidavit and some of the prior medical records, dating back to 1986, are attached at Tab 2 to Ms. Coolen's affidavit. There is no evidence of what treatment Ms. Coolen has received from Dr. Powell with respect to her claim that she has multiple sclerosis.

[4] Much of Dr. Powell's letter appears to be a recital of disclosures made to her by Ms. Coolen and accepted by Dr. Powell. Dr. Powell's letter confirms that in the late 1980s, a Calgary neurologist, Dr. Keith Brownell, examined Ms. Coolen with respect to several symptoms that caused him to suspect Ms. Coolen might have multiple sclerosis. He arranged for extensive testing including an MRI which did not confirm the diagnosis. In a letter dated December 17, 1986, Dr. Brownell says in part:

. . . as a result of this investigation, no specific positive diagnosis can be made, however, I think we can feel quite confident that no significant spinal cord pathology for which some type of operative treatment is indicated has been overlooked. Most likely the diagnosis will turn out to be a demyelinating disease, however, one cannot say that with any degree of certainty at this point in time.

[5] In a June 11, 1987 letter he writes:

Today her examination looks better than it was previously. Unfortunately, she continues to have a lot of symptoms and often times in patients with multiple sclerosis the symptoms don't necessarily correlate well with the sign. This lady is still concerned about the lack of a definite diagnosis, and, once again, I reviewed the whole problem of diagnosis of multiple sclerosis with her and her husband. . .

The patient and her husband talked about disability insurance today. I told them that I felt that there was not enough abnormal on examination to support an application for disability at this time. I did point out, however, that many patients with multiple sclerosis have the kind of symptoms that she has which are disabling, but since they are not associated with any significant physical findings it is hard to get agencies to support application for disability for them.

- [6] In 1988, the Coolens moved to Halifax where Ms. Coolen was under the care of Dr. Bahn, a neurologist. There are no medical records before the Court for the period 1988 to the year 2002. Mr. Coolen says that Ms. Coolen had a further MRI which again proved negative; at this hearing, Ms. Coolen had no recollection of a second MRI when she lived in Halifax. The parties agree that Ms. Coolen's condition deteriorated so that between 1990 and 1992 she was confined to a wheelchair, and further agree that she appears to have made a very significant recovery from that condition so as to be without a wheelchair or any other aid thereafter. In her appearances in Court in December, 2003 and March, 2004, no physical disability, in terms of her mobility, was apparent. It is acknowledged that no MRIs exist to

confirm the statements that Ms. Coolen made to the Court and to doctors to the effect that the MRIs confirm a diagnosis of multiple sclerosis. The Court notes the report of Dr. Marsters dated September 2, 2004 attached to Ms. Coolen's affidavit in which she claimed that the MRI confirmed a diagnosis of multiple sclerosis.

[7] In terms of a significant long term disability, it appears that the most that her medical reports show is that she has suffered a long time from "extreme fatigue".

[8] It was difficult for the Court to assess the weight and reliability of Dr. Powell's letter as she was not called as a witness. Her letter does state that a MS diagnosis was not confirmed in the late 1980s. Much of the rest of her letter appears to be a retelling of events that could only have been described to her by Ms. Coolen, as opposed to being independently determined.

[9] Dr. Powell's observation was that Ms. Coolen suffers from extreme fatigue and requires several naps a day:

She is able to perform activities of daily living and some household chores (i.e. washing dishes), but she has to perform tasks slowly and take several breaks.

She concludes that Ms. Coolen is not employable on a full time or part time basis.

- [10] The Court had several concerns about the inconsistency between this statement and other evidence - oral and contained in Ms. Coolen's affidavit.
- [11] At trial and at this hearing considerable evidence and argument centred around Ms. Coolen's involvement with "First Memories Daycare Inc.", a daycare centre in Lower Sackville near where the parties lived. Until 1987, Ms. Coolen had been actively involved as a babysitter for many children. In the late 1990's (the time was not clear), Ms. Coolen volunteered her services at the First Memories Daycare. Mr. Coolen stated that Ms. Coolen worked regular and long hours and performed all of the functions of a worker at a daycare, including playing with the children, changing the children and preparing their meals. He says that part of the reason she stopped working for the proprietor (Carol Purdy) was that Ms. Purdy failed to pay her about \$4,000.00 in wages. Ms. Coolen disagreed with Mr. Coolen's evidence as to the extent of her services at the daycare; she also denied that she was paid (nor entitled to be paid) and says that she was solely a volunteer. Tab 7 of her affidavit was a memorandum dated February 10, 2005, signed by Carol Purdy, that states that Ms. Coolen was a volunteer; it does not provide any information about the extent of her time and services at the daycare.

- [12] While the parties spent considerable time arguing about whether Ms. Coolen was paid or had volunteered with First Memories Daycare, the relevant point, as this Court pointed out in the trial decision, is not whether she was paid, but whether her activities were such as to demonstrate an ability to perform part time employment. The assessment of this Court, from observing the demeanour of Ms. Coolen and Mr. Coolen during their evidence and particularly during his cross-examination of her, was that she put in regular and long hours and performed all of the functions that a worker at a daycare would perform and that on some occasions she would stay so late that Mr. Coolen, who worked in the City, would be home and have prepared supper for her.
- [13] Ms. Coolen says in paragraph 12 of her affidavit: “I am currently unable to do household chores such as vacuuming or cleaning or painting.”
- [14] The evidence is that: (a) she recently drove herself to Maine and back to attend an Elton John rock concert; (b) she recently drove herself to Ontario for a vacation; (c) the medical records associated with the shoulder injury she suffered at Canadian Tire on or about February, 2004 (attached to her affidavit) show that her shoulder pain was improving but that it still aches on the right forearm and is “worsened with snow shovelling”; (d) the

consultation report with Dr. D.W. Marsters dated September 2, 2004,
second paragraph, states:

She does have occasional episodes of similar discomfort when she's mowing her lawn vigorously." . . . It's usually relieved by rest within 20 minutes. She can vacuum clean and do other housework without major difficulties.

[15] These statements and the involvement in the daycare contradict her statement that she is unable to do household chores; it lessens the weight that the Court gives to Dr. Powell's statement that she can not perform any work - full or part time.

[16] These inconsistencies, and the conflicting statements she made about the MRI confirming her MS diagnosis, caused the Court to have concern as to the credibility of Ms. Coolen.

MS. COOLEN'S NEEDS ASSESSMENT

[17] Tab 3 of Ms. Coolen's affidavit sets out her income and expenses. Her monthly income consists of \$491.00 as a CPP disability pension and \$900.00 in spousal support for a total of \$1,391.00 per month. Her expenses, including income tax on spousal support, total \$1,388.00. The budget is not extravagant. It is based on a significant change in her

circumstances since the trial. From her share of the proceeds of the sale of the matrimonial home, Ms. Coolen purchased a house with Linda Gerritts at 1007 Catherine Crescent, New Minas. While Ms. Coolen's evidence with respect to this was somewhat confusing (her final evidence was that the house was purchased by her and Ms. Gerritts in November, 2004), it appears from her medical records that she was living there at least from March, 2004. Her budget shows that she shared some expenses with Ms. Gerritts. Ms. Coolen's expenses are almost identical to those which this Court found to be reasonable (\$1,400.00 per month) at trial.

[18] At trial, Ms. Coolen's evidence was that she had left her husband when he refused to stop drinking in September, 2002 and she moved in with her friends, James and Linda Gerritts, at Sheffield Mills, Kings County, Nova Scotia. Initially she had no income and they supported her. In the spring of 2004 she applied for, and was awarded, interim spousal support in the amount of \$507.00 per month; at trial, she testified that thereafter she paid board to the Gerritts of \$350.00 per month.

[19] The significant change in her circumstances is that, in 2004, she and Ms. Gerritts purchased a home together; the house is mortgaged; they appear to have made a long term commitment to co-own the house and live together.

While Ms. Gerritts is employed at Dr. Powell's medical office, the Court was not provided with any evidence as to Ms. Gerritts income or what the household budget is.

MR. COOLEN'S ABILITY TO PAY

[20] At trial, this Court determined that Mr. Coolen's income, inclusive of both his salary from the City of Halifax and his small DVA disability pension, was \$42,900.00. His expenses at that time, including spousal support and income tax, were approximately \$48,900.00.

[21] Mr. Coolen's T4 slip from Halifax Regional Municipality showed total income in 2004 of \$39,935.00. His DVA pension income appears to have been split between him and his present partner, such that he now receives \$203.00 per month and his partner receives \$50.00 per month. His 2004 total income is \$42,371.00 or, if one includes the portion of his DVA pension now paid to his partner, \$42,971.00. In other words, his income is the same as at trial.

[22] Since the trial, Mr. Coolen and his partner (with whom he was living at the time of the December, 2003 trial) have purchased a home; Mr. Coolen

testified that most of the down payment was provided by his new partner and the balance from a high ratio mortgage.

ANALYSIS

[23] At trial this Court found that Ms. Coolen had established entitlement to spousal support by reason of subsections 15.2(6) (c) and (d) of the **Divorce Act**. This entitlement was based on the **Moge** compensatory model (a long term marriage) and on the **Bracklow** non-compensatory model (an inability to become self-sufficient because of age and medical condition).

[24] At trial the Court found that Ms. Coolen had a serious disability that had been in remission for many years but which might support her claim that she could not contribute anything towards her own support. The absence of direct medical evidence at that time led to this review.

[25] Despite Ms. Coolen telling her doctors and this Court that she has multiple sclerosis and that the MRIs confirm this, the MRI (s) do not confirm it. It does appear that she suffers from extreme fatigue and other multiple sclerosis related symptoms, but the only MRI that she refers to in her records does not confirm her diagnosis of her condition.

- [26] There is no doubt that Ms. Coolen suffers many ailments, but the Court is not satisfied that her description of her symptoms and her physical condition and her limitations (only doing a little home work slowly and with several breaks) is true. The evidence with regards to her recent trips to a rock concert in Maine and on a vacation to Ontario, and to shovelling snow (after her Canadian Tire shoulder accident), and to mowing the lawn vigorously, and her active role as a “volunteer” with First Memories Daycare, leads the Court to believe that she has both the ability and the capacity to work part time as a babysitter or for a daycare.
- [27] Her disability pension permits her to earn \$3,900.00 per year without losing any of her pension.
- [28] While the Court accepts that her entitlement to spousal support has not been exhausted, the quantum of such support can be affected by the failure of Ms. Coolen to taken reasonable steps to assist herself financially
- [29] Ms. Coolen's budget shows that she is at a break-even point with spousal support of \$900.00 and with no part time employment.
- [30] If she were to work part time and earn \$3,900.00 gross, she would have at least \$3,000.00 (\$250.00 per month) after tax.

- [31] Mr. Coolen continues to be in a deficit position. He has, by reason of the length of his marriage to Ms. Coolen an ongoing spousal support obligation which, on the one hand is not permanent but, on the other hand, should not be found to have been exhausted three years after the date of the separation of himself and his wife. The entitlement of Ms. Coolen to support arises out of the length of her marriage, not her role in it, and because her physical disability appear to prevent her from attaining complete self-sufficiency.
- [32] In January, 2005, the Federal Department of Justice released Spousal Support Advisory Guidelines: A Draft Proposal (called “Guidelines”) prepared by Carol Rogerson and Rollie Thompson. The Guidelines are not law but a study of spousal support awards in Canada under the present law.. The Guidelines do not deal with entitlement and the writers have said in the introduction that any formula will have its limits and there will always be exceptions. The writers of the Guidelines suggest that the formulas may be used as a starting point.
- [33] Even though this is a review, I requested the parties to brief the Court on the application of the “Without Children” support formula to the facts in this case. Because Ms. Coolen’s entitlement is at the lower end of possible

entitlements, I have calculated what the application of the formula to the facts of the case may show. It produces the following result:

- (1) Mr. Coolen's gross income - \$42,400.00 (actual 2004, estimate 2005)
- (2) Ms. Coolen's total income - \$9,800.00 (pension \$5900.; imputed income \$3900.)
- (3) Gross income differential - \$32,600.00
- (4) 1.5% of \$32,600.00 equals \$489. x 25 years equals \$12,225.00, or \$1,018.00 per month.

CONCLUSION

[34] It appears that spousal support will continue for some extended period of time (possibly until the divided military pension comes into pay); the length of time of payment is a factor in determining the quantum.

[35] Mr. Coolen is clearly entering into a new partnership and moving on with his life. It is not clear exactly what the relationship is between Ms. Gerritts and Ms. Coolen; they have made a long term investment, and commitment, to live with each other. The Court notes that in prior affidavits and Court evidence, Ms. Coolen had led the Court to believe that she had been a guest or boarder with James and Linda Gerritts. At this hearing it became

apparent that this was either a misunderstanding or misinformation, as Ms. Coolen now says that Ms. Gerritts had been separated from Mr. Gerritts before Ms. Coolen moved in with her in September, 2002. Their arrangement may affect future applications to vary or review.

[36] Based on Ms. Coolen's budget (adjusted for imputed income), her deficit is \$575.00 per month. Based on the Guidelines (low end of range), spousal support would be \$1018.00 per month for an indefinite (but not permanent) period.

[37] An order for the payment of \$750.00 per month spousal support will give Ms. Coolen approximately 36% of the gross income (including the imputed income) of both Mr. and Ms. Coolen.

[38] The Court orders Mr. Coolen to pay Ms. Coolen effective April 1, 2005, spousal support in the amount of \$750.00 per month. This is for an indefinite (not permanent) duration. This is based on the consequences of the budget (needs/ability to pay) or non-compensatory approach, and the compensatory approach reflected on the advisory Guidelines.