SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Deveaux v. Nearing*, 2017 NSSC 164

Date: 2017-06-14
Docket: *Sydney* No. 1206-006469
Registry: Sydney

Between:

Frederick Deveaux

Applicant

v.

Wendy Nearing

Respondent

Judge:	The Honourable Justice Theresa M. Forgeron
Heard:	May 15, 2017, in Sydney, Nova Scotia
Oral Decision:	June 14, 2017
Written Decision:	June 16, 2017
Counsel:	Frederick Deveaux, on his own behalf Wendy Nearing, on her own behalf

By the Court:

Introduction

[1] Good afternoon. This decision involves Fred Deveaux and Wendy Nearing.

[2] Mr. Deveaux and Ms. Nearing are divorced spouses and the parents of two children, Morgan who is 19 and Jordan who is 15 years old. The parties' separation and divorce was acrimonious. Unfortunately, the acrimony continued after the divorce order issued in July 2013. The current dispute concerns Mr. Deveaux' application to vary child support and to review and terminate spousal support.

[3] Despite the acrimony, the parties reached settlement on the issue of prospective child support. They agreed that on a go forward basis, Mr. Deveaux will pay the table amount of $1,102 per month for the support of the two children, which would be directed as follows:

- $400 per month will be paid directly to Morgan; and

- $702 will be paid directly to Ms. Nearing for the support of Jordan.

[4] The parties did not agree on the claim involving retroactive child support. Mr. Deveaux wants all arrears forgiven as part of his retroactive variation application. In contrast, Ms. Nearing wants the arrears collected and child support increased during the retroactive period.

[5] Further, the spousal support claim was contested. Mr. Deveaux wants to terminate spousal support because Ms. Nearing did not make a genuine effort to achieve financial independence. He notes that Ms. Nearing left the massage therapy program, enrolled in a completely different field and course, and then failed to secure any meaningful employment. Mr. Deveaux disputes Ms. Nearings' attempt to blame her financial difficulties on the state of her health, noting the absence of medical information.

[6] For her part, Ms. Nearing opposes the termination and reduction of spousal support. Ms. Nearing states that she encountered serious health difficulties and was unable to complete the massage therapy program. She further states that she cannot

obtain employment out west because of the downturn in the economy. Ms. Nearing states that she tried to secure meaningful employment, but was unable to do so.

[7] The variation and review hearing was held on May 15, 2017. Each of the parties testified as did Ms. Nearing's mother. I considered their evidence and have reviewed all exhibits and submissions which were presented on behalf of each of the parties. I did not place any weight on inadmissible hearsay evidence.

Issues

[8] To resolve the parties' dispute, I will analyze the following two questions:

- Should a retroactive child support order issue?
- Should the spousal support order be terminated or reduced?

Analysis

[9] In examining these questions, I will first review the position of each of the parties, and I then will review the applicable law. Finally, I will provide my decision by applying the evidence to the legal principles.

[10] **Should a retroactive child support order issue?**

Position of Mr. Deveaux

[11] Mr. Deveaux wishes to retroactively vary child support for the following six reasons:

- Morgan stopped living permanently with Ms. Nearing in 2013. She lived with her maternal grandparents until September 2013 and then moved in with Mr. Deveaux for two months. Morgan then returned to live with her grandparents where she remained until she moved to Halifax in September 2016.

- Morgan now lives in Halifax where she is enrolled in university. Morgan does not return home in the summer months.

- In October 2016, Mr. Deveaux began to send some of the child support money directly to Morgan after Ms. Nearing refused to send Morgan any

money. Morgan needed money to continue with her university studies. Mr. Deveaux sent $6,000 to Morgan between September 2016 and May 2017.

- Jordan stopped living with Ms. Nearing for significant periods of time after the divorce order issued including from August to December 2015 when Ms. Nearing was employed out west and after December 2015 when Ms. Nearing moved to Halifax.

- Ms. Nearing used the child support to pay for her own expenses and not to meet those of the children.

- In addition to the child support, Mr. Deveaux provides Jordan with a weekly allowance of $25 and a cell phone at a cost of about $104 per month.

Position of Ms. Nearing

[12] Ms. Nearing disputes Mr. Deveaux' application to retroactively reduce child support. Although she acknowledges periods when the children lived with her parents, Ms. Nearing states that she nonetheless was financially supportive of the children. When she lived out west and in Halifax, it was for work purposes; she remained financially responsible for the children. Ms. Nearing notes that Mr. Deveaux' income increased after the separation and child support should also have increased.

Law

[13] This variation application involves a request for a retroactive increase in child support and a retroactive decrease and forgiveness of arrears. Each of these requests involves a different legal test.

[14] The test for a retroactive decrease in child support is set out in **Smith v. Helppi**, 2011 NSCA 65, wherein Oland, J.A. approved the decision of the New Brunswick Court of Appeal, in **Brown v. Brown**, 2010 NBCA 5 which provides as follows at para 21:

> 21 In summary, the jurisdiction to order a partial or full remission of support arrears is dependent on the answer to two discrete questions: Was there a material change in circumstances during the period of retroactivity and, having regard to all other relevant circumstances during this period, would the applicant have been granted a reduction in his or her support obligation but for his or her untimely application? As a general

> proposition, the court will be asking whether the change was significant and long lasting; whether it was real and not one of choice.

[15] The test for a retroactive increase in child support is set out by the Supreme Court of Canada **S. (D.B.) v. G. (S.R.)**, 2006 SCC 37. Bastarache J., for the majority, states as follows:

- The court must examine and balance four factors when determining the issue of retroactivity [para 99].

- The first factor concerns the reasonableness of the custodial parent's excuse for failing to make a timely application in the face of the nonpayment or insufficient payment of child support [paras 101 and 104].

- The second factor relates to the conduct of the non-custodial parent. If the non-custodial parent engages in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The determination of blameworthy conduct is a subjective one based on objective indicators [para 108] and the court should take an expansive view as to what constitutes blameworthy conduct in the face of the nonpayment or insufficient payment of child support [paras106 and 107].

- The third factor to be balanced focuses on the circumstances, past and present [para 110] of the child, and not of the parent [para 113], and includes an examination of the child's standard of living [para 111].

- The fourth factor requires the court to examine the hardship which may accrue to the non-custodial parent as a result of the non-custodial parent's current financial circumstances and financial obligations [para 115], although hardship factors are less significant if the non-custodial parent engaged in blameworthy conduct [para 116].

Decision

[16] I am granting Mr. Deveaux' application to retroactively forgive the outstanding arrears of about $1,240 and I am dismissing Ms. Nearing's application to retroactively increase child support based on my findings and for the following reasons:

- Morgan permanently stopped living with Ms. Nearing in February 2015. Ms. Nearing collected child support for two children even though Morgan was living with the maternal grandparents, and then independently after September 2016. Child support is the right of the child; it is not a financial windfall for a parent who no longer supports a child for whom the support is paid.

- Jordan did not live with Ms. Nearing for significant periods of time when Ms. Nearing worked out west and in Halifax. Ms. Nearing collected child support during this time and used the majority of the child support for her own purposes. Child support was not primarily used for the support of Jordan during this time.

- Mr. Deveaux assigned priority to his children. He faithfully paid child support until October 2016 when Ms. Nearing confirmed that she would not be sending any money to Morgan. Mr. Deveaux also provided Jordan with an allowance and a cell phone. He paid for family coverage on his health plan. Mr. Deveaux did not act in a blameworthy fashion.

- Ms. Nearing's complaint that Mr. Deveaux sometimes paid child support earlier than required does not paint Mr. Deveaux in a negative light.

- When Morgan started university, Mr. Deveaux directed a portion of the child support to Morgan. If he did not do so, Morgan would not have received the requisite funds to continue with her university education. Mr. Deveaux paid about $6,000 directly to Morgan to assist in the payment of her university expenses between September 2016 and May 2017.

- Had Mr. Deveaux filed an application earlier than he did in September 2016, he would have been successful given the changed living arrangements of the children.

- Ms. Nearing would not use a retroactive payment to meet the needs of the children. I infer that Ms. Nearing would use a retroactive award for her own purposes as she has in the past.

- Mr. Deveaux' income increased in September 2014 because he started a new job. Mr. Deveaux provided Ms. Nearing with proof of his income yearly as

was required. Ms. Nearing did not file an application to vary despite her knowledge of the increase.

- A retroactive award will negatively impact on Mr. Deveaux' ability to pay ongoing support for the children.

[17] **Should the spousal support order be terminated or reduced?**

Position of the Parties

[18] Mr. Deveaux seeks to terminate spousal support because Ms. Nearing is not making good faith efforts to be independent. He states that Ms. Nearing has not followed the provisions of the Corollary Relief Order.

[19] Ms. Nearing disputes Mr. Deveaux' application. She states that she was not able to finish the massage therapy course for health reasons. Ms. Nearing notes that she was not penalized by Skills Development Canada. To the contrary, she states that Skills Development Canada provided two options. They offered to fund her for another two years so she could retake the massage therapy program or they offered to fund a different program.

[20] Ms. Nearing states that she opted for funding for a new program - the METI program because the oil and gas industry was booming out west. Ms. Nearing felt that this program would lead to a lucrative career and financial independence. Ms. Nearing states that she should not be penalized for the unexpected collapse of the oil and gas industry.

[21] Ms. Nearing states that she still requires spousal support. She notes that her financial circumstances are desperate and that Mr. Deveaux' circumstances are significantly brighter. She states that he can continue to pay her spousal support.

2013 Divorce Decision

[22] In **Deveaux v. Deveaux**, 2013 NSSC 246, I held that Ms. Nearing's spousal support entitlement was based on compensatory and non-compensatory factors at para 15, which provides as follows:

> [15] Ms. Deveaux has proven entitlement given the legislation, case law and evidence presented. Entitlement is based upon both compensatory and non-compensatory factors including the following:

- Although Ms. Deveaux was employed outside the home on a part time basis, she performed traditional functions within the marriage. She was generally responsible for the care of the children and household management, although she was substantially assisted in these tasks by Mr. Deveaux. It must be remembered, however, that Ms. Deveaux's employment was part time during the marriage while Mr. Deveaux's employment was permanent, full time.

- There is a significant disparity in the incomes of the parties. Ms. Deveaux earned between $12,000 and $19,000 annually, through employment and EI earnings. Mr. Deveaux earns in excess of $60,000. As a result, Ms. Deveaux's ability to become financially independent at this stage is restricted. Despite the child support she receives, Ms. Deveaux requires spousal support.

[23] In addition, before calculating the quantum of spousal support which should be payable, I imputed $17,400 in income to Ms. Nearing at para 16 of the Decision wherein I noted in part as follows:

- In past years, Ms. Deveaux worked with Statistics Canada and collected EI. In 2011 her income was $15,585 from both sources; in 2010 her income was $19,264 from both sources; and 2009 it was $11,856.

- Ms. Deveaux quit her employment because of stress arising from the separation. She has since been cleared to return to work. Ms. Deveaux has not made any convincing efforts to obtain full time employment, or indeed any employment, since she quit her job.

- No credible medical information was lead establishing that Ms. Deveaux was disabled or that she was diagnosed with any illness that limited or prevented her from working: **MacGillivary** v. **Ross**, 2008 NSSC 339, paras. 27-33, although in **MacGillivary** v. **Ross** supra, child support was the outstanding issue, the principle is nonetheless applicable in the spousal support context.

- The medical particulars which were submitted were basically one line, hand written notes placed on a prescription pad. These notes lack details or medical reasons in support of their conclusions. The medical note dated 9/11/2012 stated that "Wendy is capable of working full time in any job situation except at her present job." There is no explanation as to why Ms. Deveaux was restricted from returning to work at Statistics Canada, and no evidence was lead of a credible nature which would support such an opinion.

[24] In the Decision, and to establish quantum, I examined the *SSAG* calculations that were presented and each of the parties' Financial Statements of Expenses. I determined that a monthly spousal support payment of $300 was in keeping with

the *Divorce Act* given the nature of the compensatory and non-compensatory claims, as well as the length of the marriage and the reasonable expenses of both parties. I also considered the income tax implications of a spousal support order.

[25] In respect of duration, I noted as follows in paras 20 and 21 of the Decision:

> [20] Duration of the spousal support order is also in contest. A termination date is not appropriate. Ms. Deveaux will be undertaking a two year course of study and then will require time to settle into an employment environment. The successful completion of the course will likely allow Ms. Deveaux to return to the workforce and earn a salary which will promote financial independence. Ms. Deveaux stated that her extensive research indicated viable employment opportunities in the massage therapy field.
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> [21] Although I will not set a termination date, Ms. Deveaux must recognize that spousal support will not likely be paid indefinitely. A review date is set for three years hence. This review, however, does not limit the ability of either party to advance an application to vary based upon a material change in circumstances, if one arises.

Review Hearing

[26] Mr. Deveaux' termination request comes before me as a review hearing and not as an application to vary. No change in circumstance is required. The applicable law is set out in the 2013 Decision, which I applied to the reasoning of this decision.

Decision

[27] I have determined that Mr. Deveaux must pay $200 a month in spousal support effective June 2017 and that such payment will continue for an additional two years at which time the obligation upon Mr. Deveaux to pay spousal support to Ms. Nearing will terminate as of June 1, 2019. I reached this decision based on my findings and for the following reasons:

- Ms. Nearing did not make any significant effort to achieve financial independence.

- Ms. Nearing failed to produce any credible evidence to support the assertion that health difficulties negatively affected her ability to complete the massage therapy course or that health difficulties prevent or compromise her ability to work or to study.

- Child care responsibilities have not impeded Ms. Nearing's ability to study or to work. Ms. Nearing was able to leave Jordan with her grandmother so that she could study and work outside of the area.

- Ms. Nearing is bitter. She continues to blame Mr. Deveaux. Ms. Nearing choses to do little to become financially independent because of her bitterness.

- Ms. Nearing should be earning a good income by this time, given her opportunity to retrain in her chosen field of massage therapy. Ms. Nearing previously testified of the employment opportunities that abounded in that field. Mr. Deveaux should not be penalized because Ms. Nearing chose a different career.

- The parties had a 10-year marriage. Ms. Nearing worked part time throughout most of the marriage. Mr. Deveaux paid spousal support since separation, if the retroactive spousal maintenance that I previously ordered is considered. Mr. Deveaux has thus paid spousal support for about five years. A further two-year payment will result in Mr. Deveaux paying spousal support for about seven years, which payment meets the compensatory and non-compensatory provisions of the *Divorce Act* and is in keeping with the incomes, income earning capacity and reasonable needs of each of the parties. I have also considered the tax deductibility of the spousal support payment. *SSAG* calculations were neither submitted nor considered.

Conclusion

[28] The Corollary Relief Order is varied as follows:

- Morgan will no longer be in the primary care of either parent and her independent living status is affirmed.

- Any outstanding child support arrears are forgiven.

- Prospective child support of $1,102 per month is ordered, with the sum of $400 to be paid to Morgan, and the balance to be paid to Ms. Nearing, all of which will be enforced through the Maintenance Enforcement Program.

- To continue to be eligible for the child of the marriage status, Morgan must supply each parent with a copy of her university transcript in January and June of each year.

- Spousal support is reduced to $200 a month effective June 1, 2017 and continuing on the 1st day of every month thereafter until June 1, 2019 when the obligation upon Mr. Deveaux to pay spousal support will terminate.

[29] Neither party seeks costs; none are ordered.

[30] The court will draft and circulate the order.

Forgeron, J.