SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *RMAF v. PAM,* 2018 NSSC 167

Date: 2018-07-09
Docket: SFHMCA 104553
Registry: Halifax

Between:

R.M.A.F.

Applicant

v.

P.A.M.

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Elizabeth Jollimore

Heard: June 25, 2018

Summary: Application to vary child and spousal support where recipient argued parties' agreement meant payor should bear the burden of changed circumstances. Application allowed. Spousal support varied. Child support to be addressed when evidence of the child's circumstances is provided.

Key words: Family, Child support, Table amount, Special or extraordinary expenses, Child's circumstances, Variation, Material change in circumstances, Spousal support, Arrears

Legislation: *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3
Parenting and Support Act, R.S.N.S. 1989, c. 160
Provincial Child Support Guidelines, NS Reg. 53/98

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Counsel: Kenzie MacKinnon, Q.C., counsel for R.M.A.F.
Jennifer M. Kooren, counsel for P.A.M.

Introduction

[1] Mr. M asks me to vary an order for child and spousal support. The order is an agreement registered under the now-*Parenting and Support Act*, RSNS 1989, c 160, section 52.

[2] Ms. F and Mr. M never married. They separated after living together for 21 years. Their son is 23 and their daughter is 20. With lawyers, Mr. M and Ms. F negotiated a comprehensive separation agreement. They signed the agreement in mid-September 2015 and Ms. F registered it as a court order in April 2017. Two months later, Mr. M filed his variation application.

[3] Pending this hearing, Justice Dellapinna made two orders. First, he reduced Mr. M's child and spousal support payments. Child support was reduced from $1,532.00 to $1,000.00 each month and spousal support was reduced from $3,804.00 to $1,000.00 each month. Second, he ordered the Maintenance Enforcement Program suspend enforcement of arrears that accumulated before October 17, 2017. MEP could enforce any arrears that accumulated under the Justice Dellapinna's order reducing Mr. M's payments. Both orders were made on a without prejudice basis. I may change them.

Issues

[4] There are three issues for me to decide:

A. Has there been a material change in circumstances?

B. If I find there has been a change in circumstances,
   i what variation should be made to child support, and
   ii what variation should be made to spousal support?

[5] Counsel for each party presented its case on the basis that jurisprudence under the *Divorce Act* was applicable and I accept this premise.

[6] The relevant terms of the agreement are at Schedule A.

Has there been a material change in circumstances?

Mr. M's position

[7] Mr. M says that the reduction in his income since the agreement was signed in September 2015 is a material change.

Ms. F's position

[8] Ms. F acknowledges that the agreement's multiple references to being "full and final" don't prohibit me responding to Mr. M's variation application if I find there's been a change in circumstances. She says the agreement went further: she and Mr. M "explicitly agreed that no change in circumstances, regardless of how radical or unforeseen such a change may be, could

be sufficient to serve as a material change in circumstances concerning the spousal support terms of that Separation Agreement Order".

Evidence

[9] When the agreement was signed in September 2015, Mr. M was ending his employment at one company and beginning his employment at another. His old company was re-structuring, so he would work short term contracts and he would no longer be working with a familiar crew, there would be no health plan or RRSP. While the new job had no health plan or RRSP either, Mr. M felt it was a better job because he would have a one-year contract and would work with more experienced crews.

[10] Mr. M began consulting for his new employer one month before signing the separation agreement. He received a severance package from his old employer two months after signing it. Ms. F didn't know about these changes to Mr. M's employment.

[11] When the agreement was signed, Ms. F was not working as the result of a workplace injury.

[12] Mr. M's average annual income at his old company was $191,000.00. He said this was the average of his "day rates": he was paid for the days he worked. His annual salary at the new company was $210,000.00.

[13] Mr. M lost the new job in late 2016. His "day bank" had 40 days in it, which meant he got his final pay cheque in February 2017. There was no severance package. Mr. M began to look for work after his layoff, sending emails to various employers. He received Employment Insurance benefits for a while.

[14] In mid-September 2017, Mr. M started his current job. He has a one-year contract which pays him $120,000.00. He has health and dental, life and AD&D insurance. There is no pension or other benefits. He anticipates his contract will be renewed.

[15] Mr. M's income in recent years is outlined below.

Year	Income	Comments
2015	$223,430.00	Earnings, exclusive of his taxable severance package
2016	$215,429.00	Earnings
2017	$71,325.00	EI and earnings
2018	$120,000.00	Anticipated, assuming his contract is renewed

The law

[16] A material change is one that, if known at the time, would likely have resulted in different terms. "[I]f the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation": *Willick*, 1994 CanLII 28 (SCC) at

20. A material change has a degree of continuity and cannot merely be a temporary set of circumstances: *LMP v. LS*, 2011 SCC 64 at 35.

[17] The requirement of a material change is the same whether an order incorporates an agreement or not: *LMP v. LS*, 2011 SCC 64 at 36. However, where an agreement is incorporated into an order it's "necessary to consider what additional effect is to be accorded to this fact": *Willick*, 1994 CanLII 28 at 17. The agreement may answer the question of whether there's been a material change and "predetermine who will bear the risk of any changes that might occur": *LMP v. LS*, 2011 SCC 64 at 38.

[18] An agreement may specify that a particular event is - or is not - a material change for the purpose of a variation. Where a change is described in detail, this is evidence that the parties contemplated the situation, and I should give effect to their agreement on how this change should be addressed. Where the "order is general, or simply purports to be final, these less specific terms provide less assistance in answering" the question of whether a material change has occurred: *LMP v. LS*, 2011 SCC 64 at 39-42.

Findings

[19] In only one place did the agreement describe a change in detail, demonstrating that the parties contemplated this change (the end of their daughter's post-secondary education) and how this change would be addressed (spousal support would increase).

[20] Where an agreement is general or "simply purports to be final", this provides me with less assistance in determining whether a change is material. Ms. F says the agreement is not general or simply purporting to be final. Quoting again from her written submissions, Ms. F says she and Mr. M "explicitly agreed that no change in circumstances, regardless of how radical or unforeseen such a change may be, could be sufficient to serve as a material change in circumstances concerning the spousal support terms of that Separation Agreement Order".

[21] Ms. F's position hinges on two sentences in paragraph 2:

> Both parties recognize that there may be changes in circumstances in the future. These changes (no matter how radical or unforeseen) will not have the effect of setting aside the terms of this Agreement as the terms relate to division of property and debt and any and all spousal support obligations.

[22] Ms. F's argument relies on these sentences because the agreement specifically acknowledges one circumstance when a variation will occur, and she admits that the language of finality doesn't oust my jurisdiction to respond to a variation application.

[23] I reject Ms. F's position that no change of circumstances would be sufficient to merit varying the agreement for four reasons.

[24] First, paragraph 2's reference to radical and unforeseen circumstances is in the context of setting aside the agreement's terms relating to the division of property and debt and spousal support obligations, not varying them.

[25] At the close of the hearing, I offered Ms. F an additional opportunity to provide me with judicial authority for interpreting the words "setting aside" to mean "varying". Her submissions offered no judicial authority for her position.

[26] Second, Ms. F argued that the phrase "setting aside the terms of this Agreement as they relate to division of property and debt and any and all spousal support obligations" must be interpreted to invoke my limited jurisdiction under section 37 of the *Parenting and Support Act* because that's the provision of the Act which governs variation applications. I may "vary, rescind or suspend, prospectively or retroactively" under section 37. Section 37 makes no reference to setting aside.

[27] If I accept this argument it makes part of the sentence meaningless. Paragraph 2 refers to setting aside the agreement's terms for "the division of property and debt and spousal support obligations". Only agreements "respecting custody, parenting arrangements, parenting time, contact time or interaction or respecting support" can be registered as orders under section 52 of the *Parenting and Support Act*. Only orders for "custody, parenting arrangements, parenting time, contact time or interaction" are the subject of section 37 of the *Act*.

[28] If "setting aside" means my jurisdiction under section 37, then the reference to the division of property and debt is meaningless because the *Parenting and Support Act* contains no power to deal with orders for the division of property and debt: they cannot be registered under section 52 or addressed under section 37.

[28] An interpretation which renders words meaningless cannot be correct.

[29] Third, a cardinal rule of drafting is do not use different words or expressions to denote the same thing: Robert C. Dick, *Legal Drafting in Plain Language*, 3rd ed (Scarborough: Carswell, 1995), at 86. The corollary rule is don't use the same word or expressions to mean different things. Paragraph 2 contains the only reference to setting aside. When the drafter used the phrase "setting aside" she must have meant something different from vary or variation (words used in clauses 12(b)(i) and 12(b)(iii) of the agreement), or she would have used those words.

[30] Fourth, I accept Mr. M's submission that "setting aside" means annulling or vacating: *Black's Law Dictionary*, 8th ed, *sub verbo* "setting aside".

[31] I conclude that the agreement is "general, or simply purports to be final", to borrow the words of *LMP v. LS*, 2011 SCC 64 at 42, and I must look to the parties' circumstances.

[32] The Supreme Court offered the helpful example of a young couple who were married only a few months and ended their marriage on essentially equal terms, saying that a statement of finality in their agreement/order should be given weight. This example is the antithesis of the

relationship between Ms. F and Mr. M who cohabited for 21 years. They were in their late 40s when they separated and are in their early 50s now. They had two children and Ms. F's employment was secondary to Mr. M's, because of her child-care responsibilities. The parties' circumstances have been entwined since 1993.

[33] Finality ignores the parties' long-shared history. Their circumstances continue, for better or worse, to be connected.

[34] Ms. F says that Mr. M should bear the risk of any changes that have occurred. The terms of the agreement do not support this allocation of risk. It doesn't "predetermine who will bear the risk of any changes that may occur": *Willick*, 1994 CanLII 28 at 38. The circumstances of the parties' relationship are such that the risk of changes should be shared.

[35] There was no anticipation that Mr. M's income would decrease as it has. Mr. M took steps in August and September 2015 to ensure that his income wouldn't decrease. The reduction in his income has persisted for 17 months.

How should child support be varied?

[36] Mr. M wants to reduce monthly child support from $1,532.00 to $1,000.00, which is $10.00 less than the *Guidelines* amount for his annual income of $120,000.00.

[37] Child support payments in the agreement were based on the table amount for a payor with an annual income of $191,000.00.

[38] The couple's daughter is 20. She goes to university and has a job in a clothing store. She lives with neither of her parents. Ms. F helps her daughter with some expenses, like her car. The daughter's over the age of majority and her circumstances, to the extent I have evidence of them, are unlike those of a child under the age of majority. Because her circumstances aren't like those of a child under the age of majority, I find that I should determine her child support under clause 3(2)(ii) of the *Guidelines*, looking at her condition, means, needs and other circumstances and the financial ability of each parent to contribute to her support: *Wesemann*, 1999 CanLII 5873 (BCSC).

[39] Here, no information about the daughter's condition, means, need and other circumstances has been admitted into evidence. I don't know her expenses or her income. I don't know what her means are to contribute to her costs.

[40] Without this evidence I cannot decide an appropriate amount of child support. I adjourn this aspect of Mr. M's application to receive evidence of the daughter's condition, means, needs and other circumstances. Time already scheduled for August 9, 2018 may be used for this purpose. Until this is resolved, Justice Dellapinna's order will continue.

How should spousal support be varied?

[41] Mr. M asks me to reduce his monthly spousal support of $3,804.00, effective February 2, 2017. Implicit in this is a request that I rescind arrears that accumulated before Justice Dellapinna granted his variation order.

[42] Ms. F testified that she "requested the middle range of spousal support" during negotiations. She was referring to the Spousal Support Advisory Guidelines.

[43] Mr. M says I should impute an annual income of $40,000.00 to Ms. F. He doesn't explain what this income represents, in the context of Ms. F's employment history, skills, education or experience.

[44] Ms. F says her ability to work is affected by her need to care for (and the stress of caring for) the couple's son, who lives with her. She says he has problems with his mental health, abuses substances and has had episodes of being suicidal since 2014. She said that several times in the last year she has found evidence of her son researching how to commit suicide on his laptop. The son's circumstances are serious and worrying. Ms. F has called the Mental Health Mobile Crisis Team. She and Mr. M have recently discussed how to address the son's needs.

[45] Mr. M urged me to discount Ms. F's claim that her ability to work is impaired by the son's needs. He noted that she left the son to take a trip to Ontario to visit her long-distance boyfriend. While there, she electronically transferred money to the son when he called, occasionally, asking for money, saying he would be injured if he did not pay the money. Ms. F suspected the money was for drugs.

[46] Ms. F's tax returns show that she has not earned more than $19,243.00 in any year since 2008. In the last ten years, she earned more than $15,000.00 only twice – in 2013 and 2014. Most years in the past decade, she earned less than $10,000.00. I have no evidence what she earned before 2008. Even if the son's circumstances don't impair Ms. F's ability to work, there is no evidence that Ms. F has the skills, experience, or education to earn $40,000.00 annually.

[47] The amount of income imputed is to reflect what the person could or should earn. The amount shouldn't be arbitrary. There is no evidentiary basis to impute an annual income of $40,000.00 or even $30,000.00 to Ms. F, based on her skills, experience or education and I decline to do so.

[48] It is difficult to consider varying spousal support where I don't know what Mr. M will pay in child support. Child support has priority over spousal support where both are claimed: subsection 3A(1), *Parenting and Support Act*.

[49] Reviewing the Expense Statements of Mr. M and Ms. F, their basic expenditures for housing, food and clothing are similar. Mr. M's discretionary spending (for gifts, entertainment, holidays, sports club membership) is more than double Ms. F's, though she has some spending for the children which is questionable: activities and car costs. I do understand that the son no

longer has his car. The daughter's car seems unnecessary. She lives near her university and her job can be reached by bus. As a university student, she has a UPass for the transit system.

[50] While Ms. F is working eight hours each week and Mr. M's income is reduced, both parties are required to reduce their expenses. Reducing Ms. F's expenses by $1,000.00 each month (removing expenses for gifts, entertainment and children's activities, halving the cost for phone, cable and wifi, reducing transportation costs by one-third) leaves her with a deficit of $2,573.00 before tax.

[51] Imposing similar restrictions on Mr. M (removing expenses for gifts, entertainment, an annual trip to Indonesia, weekly restaurant dining with the children, and the sports club membership) adds $1,170.00 to his monthly surplus of $1,454.62. From this he will pay his child support, currently set at $1,000.00. This leaves $1,624.00 which, if paid to Ms. F, creates a tax saving of approximately $8,500.00 annually.

[52] I order Mr. M to pay spousal support of $2,300.00 each month to Ms. F beginning on January 1, 2018. For 2017, when Mr. M had an annual income of $71,325.00, I order him to pay monthly spousal support of $1,400.00. His arrears shall be adjusted accordingly.

[53] Ms. Kooren will prepare the order.

[54] Any submissions on costs will be addressed after the portion of the application dealing with child support has been resolved.

_____

Elizabeth Jollimore, J.S.C.(F.D.)

Halifax, Nova Scotia

Schedule A

Paragraph 2

Both parties covenant and agree that this Agreement complies with all applicable relevant legislation. Both parties recognize that there may be changes in circumstances in the future. These changes (no matter how radical or unforeseen) will not have the effect of setting aside the terms of this Agreement as the terms relate to division of property and debt and any and all spousal support obligations.

Both parties agree that the intention of this Agreement is to recognize the contribution of each of them to the relationship and provide an equitable resolution on a full and final basis of all matters relating to the relationship and provide an equitable resolution on a full and final basis of all matters relating to the relationship and its breakdown, including but not limited to their parenting responsibilities, financial support and division of property or debt.

Paragraph 9:

(a) Peter agrees to pay Rhonda spousal support in the sum of $3,804 per month commencing September 1, 2015 and continuing on the 1st day of the month thereafter until further Agreement or Court Order, or otherwise outlined herein.

(b) Once child support terminates, Peter shall commence paying spousal support in the amount of $4,320 per month.

(c) Both parties acknowledge and confirm the factors set out in the Maintenance and Custody Act as it relates to spousal support.

Paragraph 12:

(b) Each of the parties hereto agrees that this Agreement and Minutes of Settlement may be pleaded by either party as an estoppel in respect of any claim or application whatsoever which may be made pursuant to the provisions of the legislation in Nova Scotia or any other jurisdiction by the other party in respect of any matter dealt with by this Agreement which is a full and final settlement between the parties and may be pleaded as a complete defence to any action brought by either party to assert a claim in respect of ay matter dealt with by this Agreement, except where:

(i) this Agreement expressly provides for review or variation of a particular term or condition; or

(ii) [. . .]

(iii) the matter deals with support or parenting of or access to a child, in which case the Agreement cannot be considered final and authority to vary the terms of this Agreement is retained by a court of competent jurisdiction.

(d) All rights and obligations of Peter and Rhonda, whether arising during the cohabitation, either before or after separation, including the rights and obligation of each of them with respect to

[. . .]

(iv) spousal maintenance or support are governed by this Agreement which prevails over all provisions of legislation thereto, whether in existence or in force on the date of execution of this Agreement.