

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF THE
INTERJURISDICTIONAL SUPPORT ORDERS ACT
S.N.W.T. 2002, c.19

BETWEEN

STANISLAVA PENEVA KANEVA

Applicant

- and -

KRASIMIR NEDKOV KANEV

Respondent

MEMORANDUM OF JUDGMENT

[1] This matter appeared before me in regular Family Chambers on June 14, 2012.

[2] The Applicant, Stanislava Peneva Kaneva who now goes by the last name Peneva (“Peneva”), and the Respondent, Krasimir Nedkov Kanev (“Kanev”), were divorced in 2010 in British Columbia. At the time of the divorce, Peneva’s applications for spousal support and child support were dismissed. Ms. Peneva has now brought an application pursuant to the *Interjurisdictional Support Orders Act*, S.N.W.T. 2002, c. 19 (the “Act”) for spousal support. Mr. Kanev is opposed to the application.

[3] At the hearing, Counsel on behalf of the Designated Authority and Mr. Kanev appeared. Documents were presented on behalf of Peneva including a letter

which constituted her submissions. Kanev also provided the Court with documents and made submissions. For the reasons that follow, I am of the view that Peneva is entitled to spousal support.

Background

[4] Peneva and Kanev were married in April of 1988 in Varna, Bulgaria. They emigrated from Bulgaria to Canada in 2005, living in British Columbia. They separated on January 1, 2009 and were divorced in 2010. At the time of the divorce, Peneva sought child support and spousal support. Both parties testified at a hearing before Judge Auxier of the Provincial Court of British Columbia. Peneva had worked as a teacher in Bulgaria and Kanev was a civil engineer. They were not able to secure work in their respective professions when they came to Canada. Both returned to school and later secured employment. By the time of the divorce hearing, both were unemployed and receiving employment insurance benefits. Peneva's application for spousal support was dismissed because neither party was working at the time and there was no income disparity.

[5] Subsequently, Kanev secured employment in the Northwest Territories and moved to Yellowknife. In 2010, his total income from Line 150 in his Income Tax Notice of Assessment was \$33,771. His financial statement filed April 18, 2011 indicates that his annual employment income was \$60,500. At the hearing, Kanev advised that his income for 2011 was \$61,000 and that his current income is approximately the same. He explained the difference between his 2010 and 2011 income as resulting from securing employment during 2010 and not working for the full year.

[6] Kanev's monthly expenses include: \$760 for rent, \$900-1000 for his daughter who attends university and \$200-300 for his son who works but does not have a regular job. Kanev also indicated that he sends money to his parents in Bulgaria who live on a pension of approximately \$160 per month. Most recently, he sent them \$2000.

[7] There are two children of the marriage, both of whom are adults. The son works but is not able to support himself on the income he makes. The daughter attends university full-time. There is no child support order in place but Kanev voluntarily provides support to the children.

[8] Since the divorce, Peneva has attended a Special Education Assistant Program, graduating on December 9, 2011. She is now employed as a Casual

Special Education Aide for the North Vancouver School District. According to a letter from Xenia O'Brien, Human Resources Manager for the school district, Peneva is making \$25.99 per hour as a casual aide. She has been actively applying for a permanent position and it takes, on average, between two and four years to achieve a permanent position. Permanent special education aides work 27.5 hours a week from September to June and do not get paid for Christmas, Spring Break or during the summer.

[9] Peneva's total income from Line 150 of her Income Tax Notice of Assessment for 2010 was \$18,435. According to the documents she provided to the court, her income in 2011 was \$15,715.68, which does not include the \$300 per month she has been receiving in interim spousal support. Up to April 2012, she has made \$5907.81 in employment income. She has also received income assistance under the *Employment and Assistance Act*, S.B.C. 2002, c. 40 in British Columbia.

[10] Peneva's monthly expenses, as of March 24, 2011, include: \$903 for rent, \$150-200 for groceries, and \$81 for public transit. In addition, she has chronic back problems and had seen a chiropractor regularly from 2007 to 2009, although there is no indication that she has continued to see a chiropractor.

[11] Peneva's plans are to work towards getting her teaching certificate in British Columbia. This will require attending Simon Fraser University for up to 2 years. If she obtains a permanent position as a Special Education Assistant and works the maximum 27.5 hours per week during the school year, she claims that her projected salary would be \$22,269.57. Presumably, if she were to obtain her teaching certificate and employment as a teacher, her income would be higher. She indicates that she is also currently seeking additional employment at after-school care centers.

[12] Peneva's application under the *Act* was filed March 24, 2011. This matter was first in court on April 21, 2011. Kanev appeared on his own behalf and the matter was adjourned to June 30, 2011 to allow Peneva to provide further information regarding the divorce proceedings in British Columbia and a house that she allegedly owns in Bulgaria which was not included in her application.

[13] On June 30, 2011, the matter was before Justice Vertes. By that time, Peneva had provided the court with further information and Kanev had filed his financial information. Kanev objected to paying spousal support on the basis of Peneva's ownership of a property in Bulgaria with a purported value of

CDN\$500,000. The situation regarding this property was, and remains, unclear. Peneva's materials indicate that she had the property in her name but that the transfer agreement required her to care for an elderly lady for the rest of her life. As she had not fulfilled her part of the agreement, the lady had refused to transfer the property to her. Kanev's position was that the property had already been transferred. The original documents were in, what I assume is, Bulgarian and the translation does little to clear up the status of the property.

[14] Justice Vertes found that there had been a change in circumstances since the parties' divorce in 2010. Kanev had found employment and was making \$60,500 per year. Peneva, at that time, was still a student and relying on student loans. He found that there was a disparity in income and a need, on one hand, and a limited ability to pay, on the other. Vertes J. noted that there were still a number of unanswered questions regarding Peneva's future plans for her education and employment and also with respect to the property in Bulgaria. A short term spousal support order was made, of \$300 per month, to be reviewable in six months. The matter was adjourned to December 8, 2011 with the expectation that further information would be filed by Peneva.

[15] On December 8, 2011, the matter was before Justice Shaner. Peneva had provided further information regarding her financial situation, the property in Bulgaria and her employment. Unfortunately, the situation regarding the property in Bulgaria was no clearer. After hearing from Counsel for the Designated Authority and Kanev, Shaner J. found that Peneva's economic circumstances and need for assistance had not changed significantly since June. While Peneva had taken some steps towards self-sufficiency, by pursuing a new career path, she was not yet economically self-sufficient. A further interim order was made, of \$300 per month, to last until June 2012. The matter was adjourned to June to allow Peneva to provide information on her income from all sources and her employment.

[16] Prior to the hearing before me Peneva provided further information, which I have summarized above.

The Parties' Positions

[17] Peneva has provided a 6 page letter summarizing the information she has provided, advising of her future plans and making submissions regarding spousal support. Peneva claims spousal support on the basis of need and says that she has made every attempt to become self-sufficient. She has gone to school to upgrade

her education and has applied for every job posting within the North Vancouver School Board. Her future plans are to return to school to obtain her teaching certificate.

[18] In the meantime, she hopes to become a full-time Special Education Aide and projects her income would be approximately \$22,000 per year. She would also have to take ongoing courses for career development which would be at her own expense. She is also seeking a second job with after-school care centers.

[19] Peneva notes that Kanev makes a significantly higher income than she does. She alleges that this has historically been the case during their marriage. She worked as a teacher in Bulgaria and Kanev was an engineer making 2-3 times her income. When they came to Canada, Kanev's upgrading of his qualifications was made a priority at the expense of her upgrading.

[20] According to Peneva, Kanev's 2008 income was \$67,491 and her income was \$16,159. These amounts should entitle her to between \$1283 and \$1711 per month in spousal support. She claims that Kanev, as an engineer, could make between \$75,000 and \$110,000 per year while she, as a full-time special education aide, will only make \$22,269.57 per year.

[21] Kanev's position is that Peneva does not need spousal support. His argument appears to have three aspects to it: the property in Bulgaria, his limited resources, and Peneva's failure to become self-sufficient.

[22] Kanev, as previously mentioned, claims that Peneva is the owner of the property in Bulgaria which has a value, in his estimation, of CDN\$500,000. His view is that Peneva could mortgage or sell the property to meet her needs.

[23] Additionally, Kanev claims that his resources are limited. He makes \$60,500 per year but has significant expenses because of the amounts he spends to maintain his household as well as the voluntary support he pays to his children and parents in Bulgaria. His view is that their needs are more pressing than Peneva's as she has the ability to work and become self-sufficient.

[24] Kanev also claim that Peneva has made little effort to become self-sufficient in the last few years. She attended school and secured employment as an esthetician. This did not last and she was unemployed for a time. Her efforts to upgrade her education and secure new employment are recent. Essentially, her current situation is of her own making.

The Law

[25] This application is made pursuant to the *Act* which provides in section 12(2) that:

12(2) In determining the entitlement to and the amount of support for a party other than a child, the Northwest Territories court shall first apply the law of the Northwest Territories, but if under that law the party is not entitled to support, the Northwest Territories court shall apply the law of the jurisdiction in which the claimant and the respondent last maintained a common habitual residence.

[26] Section 16 of the *Family Law Act*, S.N.W.T. 1997, c. 18, allows a court to make an order for “a person to provide support for his or her spouse.” However, the definition of spouse in the *Family Law Act* does not recognize former spouses. As the parties have been divorced since 2010, Peneva is not eligible for spousal support under the *Family Law Act* of the Northwest Territories.

[27] As such, I turn to the *Family Relations Act*, RSBC 1996, c. 128, which permits spouses to make an application for support within 2 years of the dissolution of the parties’ marriage. Section 89 of the *Family Relations Act* provides that:

89(1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:

- (a) The role of each spouse in their family;
- (b) An express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
- (c) Custodial obligations respecting a child;
- (d) The ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;
- (e) Economic circumstances.

(2) Except as provided in subsection (1), a spouse or former spouse is required to be self-sufficient in relation to the other spouse or former spouse.

[28] Further, section 93(4) of the *Family Relations Act* requires a court to take into account the needs, means, capacities and economic circumstances of each spouse including:

- 93(4) (a) The effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during cohabitation;
- (b) Any other source of support and maintenance for the applicant spouse;

- (c) The desirability of the applicant spouse having special assistance to achieve financial independence from the spouse against whom the application is made;
- (d) The obligation of the spouse against whom application is made to support another person;
- (e) The capacity and reasonable prospects of a spouse obtaining education and training.

[29] There are three bases for entitlement to spousal support: contractual, compensatory and non-compensatory, or what is commonly referred to as needs-based support. A court considering a spousal support application is required to consider all of the relevant factors and objectives of the relevant legislation. *Moge v. Moge*, [1992] 3 S.C.R. 813; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

Limitations

[30] Applications under the *Act*, because of their inter-jurisdictional nature and the purpose of the *Act*, are subject to inherent limitations such as: the applicant is not present to make submissions or answer questions regarding the evidence; the determination is made partly on the basis of the documentary evidence presented, which may be conflicting; and not all issues that arise in the dissolution of a relationship may be before the Court.

[31] In this case, there are a number of issues which have arisen, some of which cannot be resolved and questions remain. The property in Bulgaria is one of those issues. Kanev's submissions focus heavily on Peneva's ownership of this property. Many questions remain about the status of the property which, in any event, is outside the jurisdiction of Canadian courts.

[32] The role and income of the parties during the marriage is another issue. Peneva claims that Kanev made 2-3 times her salary during the course of the marriage. While there is some information regarding the later years of their marriage, there is little information about the years they lived in Bulgaria.

[33] These issues are ones that would typically be addressed in an application for spousal support. In the circumstances, I have considered the information that is before the Court in this application while recognizing the gaps in information.

Entitlement to Support

Role of each spouse in their family

[34] Both Peneva and Kanev are well-educated and were employed full-time while they lived in Bulgaria. According to Peneva, Kanev earned significantly more than her throughout their marriage. After the parties immigrated to Canada, neither were able to gain employment in their respective professions. Kanev returned to school and secured employment. Peneva also sought a new career by attending school to be an esthetician. For a time, she worked as an esthetician after completing her schooling. By the time of the divorce, both parties had been laid off and were unemployed.

[35] There are two adult children of the marriage and there is no indication that Kanev's or Peneva's roles in raising their children were unequal.

Express or Implied Agreement for Support

[36] Peneva's documentation refers to Kanev's education being a priority for the family when they immigrated to Canada. According to Peneva, she and Kanev eventually agreed that she would take an esthetics program and Kanev would pay for her to establish her own spa business. This did not occur and Peneva instead worked for others as an esthetician. By the time of the divorce, Peneva was no longer employed as an esthetician and had been working for the school district on an on-call basis.

[37] Kanev's position is that he does not agree with paying Peneva spousal support. He did not acknowledge any agreement for spousal support and stated in court that if Peneva had asked, he would have tried to help her out if he was able to but instead she had gone to court. On the basis of the limited evidence before me, I do not find that there was an implied or express agreement for spousal support.

Custodial Obligations

[38] The parties have two children, one of whom is living on his own and working, although not regularly. There is also a daughter who attends the University of Victoria. Both are adults and the issue of custody is not a factor that was raised before me.

Ability, Capacity and Reasonable Efforts to Support Themselves

[39] Both parties are well-educated and have worked full-time for much of their marriage. Upon their arrival in Canada, they had difficulties securing employment in their chosen professions. This is, sadly, not an unusual situation for educated immigrants and both parties have had to pursue further education to secure employment.

[40] Kanev attended school to become a draftsman and was able to secure employment. He was subsequently laid off but has since secured employment as an engineer. He is still in the process of completing his certification in Canada. He has worked regularly since 2010 and has continued to pursue his engineering credentials. He is able to support himself and provides financial support for his children and parents in Bulgaria.

[41] Peneva attended school to become an esthetician and secured employment as an esthetician. She was eventually laid off and began to seek employment with the school system as an aide. She has since attended school to become a Special Education Aide and is working at gaining a full-time position. She works on a casual basis and works as many hours as she can secure. Her income is not sufficient to meet her needs and she has received social assistance in the past. Peneva has plans to obtain her teaching certificate and estimates that it will take up to 2 years to do so. She has also applied for after-school care jobs.

[42] Overall, I am satisfied that both parties have the ability to support themselves. Kanev has the ability, capacity and has made reasonable efforts to support himself. Peneva also has the ability and capacity but has only recently made reasonable efforts to fully support herself. Her efforts will take some additional time before she is able to be fully self-sufficient.

Economic Circumstances

[43] As stated above, Kanev's income is \$60,500 and he has the ability to support himself. He is also voluntarily providing support to his adult children and parents. His income is certainly higher than Peneva's but I am also mindful that his employment is relatively recent and he is still working to obtain his engineering certification in Canada. As noted by Justice Vertes on June 30, 2011, there is a limited ability to pay.

[44] Peneva's income is significantly less than Kanev's, earning approximately \$15,700 in 2011. Should she secure full-time employment as a Special Education Aide, her income will only increase to \$22,269.57 per year. Full-time employment as a Special Education Aide is limited to 27.5 hours a week and does not include Christmas vacation, Spring Break or summer holidays. The opportunity is there for Peneva to increase her income by securing a second job or a summer job.

[45] Overall, Peneva's claim is essentially a needs-based one arising from the circumstances which followed the parties' move to Canada. Both parties needed further education in order to secure employment in Canada. Kanev's education was given priority and he has been successful in securing employment. Peneva has pursued education but has been less successful to date in becoming self-sufficient. During this process, the parties' marriage ended and Peneva was no longer able to rely upon the financial support of Kanev in pursuing her education and career. I am satisfied that there exists a non-compensatory basis for support to allow Peneva to continue along this path.

Quantum and Duration of Support

[46] Peneva is seeking between \$1283 and \$1711 per month based upon spousal support calculations she completed using an online calculator. This calculation is based upon the parties' information in 2009. Since then, both parties income has changed and Kanev has relocated to the Northwest Territories.

[47] Kanev is opposed to any further spousal support.

[48] The factors which I have referred to above are also applicable to determinations of quantum and duration of support. *Bracklow v. Bracklow, supra*. The factors and objectives require a balancing of each party's circumstances, including considering the length of the marriage, their ages, their incomes and prospective incomes, their financial obligations, the parties' reasonable expectations, the applicant's plans for self-sufficiency, and her future prospects for employment.

[49] I am also mindful that "it does not follow from the fact that needs serves as the predicate for support that the quantum of the support must always be equal to that need." *Gross v. Gross*, 2006 NWTSC 66 at para. 100

[50] This is not a situation where Peneva is relying upon a marital standard of living which she is no longer able to enjoy. The parties have had a difficult time

since moving to Canada and have attempted to improve their education and employment prospects. Both have been unemployed. Kanev has worked hard to improve his situation. His securing of full-time employment as an engineer occurred after the parties divorced.

[51] Peneva has also struggled with her career path. She has not had as much success as Kanev but is making gains. In the circumstances, I do not believe that an indefinite spousal support order is required. Peneva needs assistance in the form of transitional support, allowing her to complete her education and secure full-time employment.

[52] With respect to quantum, Peneva's expenses were \$1495 per month in 2011. At that time, she was not required to make any payments on her student loan. She has not provided any further information regarding her monthly expenses. Her income (including spousal support) in 2011 was \$17,215.68 or \$1434.64 per month, resulting in a small shortfall every month.

[53] Her income for 2012 (excluding social assistance and spousal support) was \$5176.52 up to April 2012 showing that her monthly income was \$1294.13. Inclusion of her \$300 per month spousal support raises her monthly income to \$1594.13, approximately \$100 more than her monthly expenses in 2011.

[54] Using the *Spousal Support Advisory Guidelines* ("*Guidelines*"), an amount between \$1082 and \$1443 per month would be payable.

[55] The *Guidelines* are advisory and have increasingly been found by courts to be of assistance in determining the appropriate quantum for spousal support. *Fisher v. Fisher*, [2008] O.J. No. 38. However, there are a number of exceptions which can affect the appropriateness of using the *Guidelines*. For example, using the *Guidelines* where illness or disability or property division are factors is problematic.

[56] In this case, there are two circumstances which cause me some concern with applying the *Guidelines*. Firstly, the status of the house in Bulgaria is uncertain. Peneva claims she is not the owner of the property because she did not fulfil the terms of the agreement which either transferred the property to her or would eventually transfer the property to her. Kanev claims the property was transferred, is in Peneva's name and that she has paid taxes on it. I am not able to determine the status of this property. The property in Bulgaria is outside of my jurisdiction

but the possibility that Peneva has this asset which has not been accounted for in the divorce to date makes me hesitant to apply the *Guidelines*.

[57] In addition, Kanev is also paying support to the children. The children are adults and there is no child support order but he is voluntarily paying support to his son who is not fully employed and his daughter who attends university full-time. I am hesitant to order the *Guidelines* amount when that would impact upon Kanev's ability to provide support to his children when it is apparently needed.

[58] In the circumstances, an appropriate amount is \$500 per month. This amount will be payable, commencing July 1, 2012 and be payable for the next 3 years, the last payment being June 1, 2015.

[59] Costs were not addressed before me but in the circumstances, each party will bear their own costs of the proceedings.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
19th day of June 2012

Counsel for the Designated Authority:
Respondent, self-represented:

Erin Delaney
Krasimir Kanev

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MEMORANDUM OF JUDGMENT OF
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