

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

F (SL)

Petitioner/Respondent

-and-

F (JT)

Respondent/Applicant

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] This is JT's application to vary spousal support under the *Divorce Act*, RSC 1985 c 3 (2nd supp). Specifically, he seeks:

- a. A declaration that there has been a material change in circumstances as of June 1, 2020;
- b. A declaration that spousal support will continue at \$4,754.00 a month until December 31, 2020;
- c. Retroactive variation of spousal support to \$1,557.00 a month as at January 1, 2021; and
- d. An order directing that spousal support payments will terminate as of September 1, 2022.

[2] This application was filed on June 10, 2020. It was served on SL shortly after that.

[3] The Corollary Relief Order, granted August 27, 2019, contains a review clause which provides that the amount and duration of spousal support may be

reviewed by the Court on the application of either party, three years from its date and the review would be limited to SL's efforts to become self-sufficient. It also provides that either party may bring an application to vary spousal support on the basis of a material change in circumstances. It is on the latter basis that this application comes before the Court.

BACKGROUND AND FACTS

Previous Proceedings

[4] Details of the parties' marital history can be found at *F(SL) v F(JT)*, 2019 NWTSC 34. Briefly, they were married for 18 years with SL, the wife, in a traditional role which included being at home with the parties' child. The child reached adulthood shortly before the parties divorced. SL worked intermittently in various retail, clerical and other similar positions throughout the marriage. She ran a day home for four years. JT was a senior manager with a financial institution and the primary breadwinner. The parties relocated often as a result of his career.

[5] There was a trial in 2019 on spousal support and property division. After trial, SL received \$347,736.57 from JT, representing an equalization payment, a gross-up for income tax, and pre-judgment interest. This, combined with the assets in her name, amounted to approximately \$650,000.00.

[6] Entitlement to spousal support was not in issue at the trial, but the parties were unable to agree on the amount. SL was awarded spousal support in the amount \$4,754.00 per month, for an indefinite duration. The amount was based on JT's annual income, which was found to be \$211,124.00 annually, including a Northern Allowance of \$28,920.00. Income was imputed to SL by agreement, in the amount of \$30,000.00 a year. The amount of spousal support reflects the mid-point range calculated using the *Spousal Support Advisory Guidelines*.

[7] At the time of trial in 2019 JT was still living and working in Yellowknife. SL had moved to Saskatchewan.

[8] JT testified at the trial that he wanted to retire the following year, at age 55, presumably with a reduction in support to reflect his own reduced income. The Court deemed that unrealistic, given that SL had very few employment skills and she would need sufficient time to get to a point where she could support herself without payments from JT.

[9] SL's plans were uncertain in 2019. In the short-term, she planned to find a regular job in Saskatoon and spend her weekends helping her father on his farm. Her

longer term plan was to start a green-house business on her father's farm to grow vegetables for summertime markets. She hoped to work with a business partner. She was also exploring the idea of returning to school to take business management courses.

Current Proceedings

a. Evidence about JT's Circumstances

[10] As noted, JT worked for a large financial institution for most of his career. He was a vice-president at the time of the trial and when the Corollary Relief Order was made in August of 2019.

[11] The following year, JT was laid off from his position, effective May of 2020. He was able to negotiate an extension of his housing benefits for a few months, but left Yellowknife in the summer of 2020. He relocated to Manitoba.

[12] JT's employer provided notice of the layoff in a meeting on February 28, 2020. JT's position was being eliminated as part of a restructuring. The employer followed up with a letter confirming the layoff and setting out and explaining two compensation options available to JT. The letter and its appendices were tendered into evidence.

[13] The first option was called the "Income Protection Option". Under this option, the employer would continue to pay JT's yearly base salary of \$121,750.00 and a bonus based on an average of the bonuses paid in previous three years, for a period of two years starting May 30, 2020. The amount of the bonuses is unknown, but based on the information from the trial in 2019, I would expect this to be approximately \$50,000.00 a year. The employer would extend its benefit package to JT for the two-year period. Presumably, JT would not be entitled to the Northern Allowance, in the amount of \$28,920.00 a year and which was included for income purposes in setting spousal support in 2019.

[14] Under the Income Protection Option JT would be required to remain actively engaged in a job search and the employer would provide assistance in career transition. Specifically, it would provide JT with access to a professional service to assist with employment transitioning and "reskilling". Alternatively, it would pay JT a lump sum so he could hire someone directly. During the two-year period, JT would be able to earn up to 30% of the value of his monthly income protection amount without penalty. If JT obtained a position with the employer within that period, the income protection would be discontinued; however, if he obtained

employment with another employer during the income protection period, he would be eligible for a “departure payment” in an amount equal to 50% of any remaining income protection. Finally, JT would remain a member of the employer’s defined benefit pension plan and service would continue to be credited in accordance with the plan.

[15] The second option was called the “Retirement Payment Option”. Under this option, the employer would pay JT a lump sum equivalent to 75% of two years’ salary, a total of \$182,125.00, and 75% of the bonus payments he would be entitled to under the Income Protection Option. JT would retire as of May 31, 2020 and he would be eligible to collect his pension immediately, subject to a reduction due to early retirement. He would be eligible to enroll in a retiree benefits plan.

[16] Before relaying his choice, JT applied for another position with his employer, which he felt was equivalent to the position he had held to that point. He was unsuccessful in securing it. He testified he was told that he did not get the job because he did not have the required qualifications and experience. Upon following up with his supervisor, he had the impression that he was no longer wanted as an employee.

[17] JT chose the Retirement Payment Option.

[18] JT testified that he decided the Retirement Payment Option was the best one in the long-term. He said it would allow him to retain his pension and maintain health benefits, while providing cash so he could pay down debt. JT stated that he felt he would be able to maintain support payments to SL for a period of time if he chose the Retirement Payment Option.

[19] During cross-examination, JT seemed uncertain as to how his pension would be affected if he chose the Income Protection Option or if he took a lower-paying position with his employer. As noted, however, the documentary evidence he tendered shows that the pension would be protected.

[20] JT’s income is now significantly less than what he earned while employed, going from \$211,107.00 to a pension of \$44,354.00 annually. He began receiving the pension on June 30, 2020.

[21] JT testified about his efforts to try and find work since retiring and relocating to Winnipeg. He has taken a course on updating his résumé; he has joined online networking sites, including Facebook and Linked-In. He looked into working for Amazon in Winnipeg, but his qualifications did not match the requirements for the

job. He also contacted another financial institution, but was told that it was not hiring. JT has volunteered with his condominium board as a means of networking.

[22] As of the date of the hearing, JT had not obtained employment. He attributes this to a variety of things. First, his lay-off coincided with the beginning of the Covid-19 pandemic, limiting his ability to network in person and limiting job opportunities. Second, despite having significant experience in his area, he lacks formal credentials. Finding an equivalent position would require him to take training to upgrade his skills. Third, JT says he developed irritable bowel syndrome beginning in February 2020. He said it has worsened and shortly before this hearing he was waiting for a colonoscopy.

[23] JT did not tender any medical evidence about his condition or his prognosis.

b. Evidence about SL's Circumstances

[24] SL remains in Saskatchewan.

[25] SL grew up on a farm. After the trial she decided to try farming herself as a means of becoming self-sufficient. In 2020 she met JN. They decided to try raising livestock together. They were involved romantically for a period of time as well.

[26] SL said she arranged to rent 40 acres of land from JN for just over \$14,000.00. SL used money from an RRSP for this expense, withdrawing approximately \$21,000.00 to net what she needed. On February 25, 2020 she and JN became registered as joint owners of the property. She said he insisted her name be on the property for her security.

[27] SL moved onto the farm with JN. They purchased 23 piglets, some of which they intended to butcher and sell and some of which they would raise and breed. The amount of profit she realized from this endeavor was very small. She estimated it was approximately \$1,500.00.

[28] In March of 2021, JN ended his business relationship with SL and he made her leave the farm. She testified that JN is in the process of removing her name from the title. At the time of the hearing, she was supporting herself with housekeeping jobs, as well as the spousal support she receives from JT.

[29] SL said she plans to apply to take a course which could lead to work as a health care aid. The course is eight months long. If successful, she would have full time work that would pay \$16.00 to \$21.00 an hour.

[30] SL used some of her assets from the property settlement to pay down debts and for the investment in the farming operation. As of the hearing, she still had assets of approximately \$620,000.00, which she has invested. SL's 2020 income included RIF income of \$14,678.45.00, RSP income of \$21,428.57 and dividend income of \$1,077.10.

ISSUES AND LEGAL FRAMEWORK

[31] A variation application for spousal support under the *Divorce Act* contemplates a threshold question: the applicant must demonstrate that there has been a change in circumstances not contemplated at the time of the initial application. This is codified in the *Divorce Act*, as follows:

17. (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[32] The focus in analyzing the change in circumstances must be the prior order and the circumstances which led to it. There is also a temporal element: the change in circumstances must have some degree of continuity or permanence. It cannot be fleeting. *Droit de la famille – 091889*, 2011 SCC 64 paras 29-36, 2011 CarswellQue 13698.

[33] The Court must consider the following objectives in making a variation order:

17. (7) A variation order varying a spousal support order should

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

(b) apportion between the former 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 former spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[34] There are three issues in this case. The first is whether JT's job loss and subsequent unemployment is a material change in circumstances. This necessarily

requires an analysis of whether JT acted prudently in choosing the compensation package that he did, whether he has acted reasonably in looking for work and whether his new circumstances have an element of permanence or continuity.

[35] Assuming the threshold test is met, the second issue is the extent of the variation. This requires an assessment of the means and needs of both parties.

[36] The third issue is whether JT's request that spousal support terminates at a certain date should be granted.

ANALYSIS

[37] I accept that JT did not anticipate he would be laid off; however, the evidence overall does not support a finding of a material change in his circumstances.

[38] The dramatic and fairly immediate drop in JT's income was due to his choice of the Retirement Payment Option, rather than the Income Protection Option. The former gave him an immediate payout and a reduced pension. The latter would have protected his base salary of \$121,750.00 a year and bonus income of approximately \$50,000.00 for two years. On its face, the Retirement Payment Option was less valuable and offered less flexibility and protection than the Income Protection Option.

[39] I cannot ignore the fact that JT expressed a wish to retire in May of 2020, at age 55, when he testified at the trial in 2019. As noted, the order that was ultimately made was premised on him working for longer. The Court found it was not reasonable to assume that SL would be able to achieve self-sufficiency within that time, nor was it likely she would be able to grow the capital from property settlement sufficiently to support herself within that time. *F(SL) v (F(JT))* at paras 76 and 79. While I do not suggest that JT orchestrated the layoff itself, when he was faced with his options he made a deliberate choice that lined up with his desire to retire within the year, rather than collecting a full salary for two years and continuing to look for work. JT made this choice knowing his spousal support obligations.

[40] I do not accept JT's evidence that the value or form of his pension would be adversely affected if he had chosen the Income Protection Option, nor do I accept that he was unsure about how it would be affected. This is wholly contradicted by the documentary evidence that he tendered regarding the two options.

[41] JT has made minimal efforts to find employment since being laid off. His evidence was that his credentials are lacking and that the pandemic has limited his ability to network. Neither of these hurdles were unforeseen or unknown when JT

chose the Retirement Payment Option. He made his choice in the early stages of the pandemic, a time of great economic – and other – uncertainty. The Income Protection Option would have provided JT with a high, stable and reliable income until May of 2022, allowing him to meet his obligations with little difficulty until at least then. Further, JT chose the Retirement Payment Option knowing the shortcomings in his formal credentials. The Income Protection Option would have allowed him to improve his qualifications and likely would have improved his chances of securing another position.

[42] While I accept JT's evidence that he has certain health issues, he also testified that they did not prevent him from seeking employment or working.

[43] I have considered the fact that if JT had chosen the Income Protection Option, he would nevertheless have lost his Northern Allowance, which amounted to \$28,920.00 annually. In my view, this is not a material change in circumstances that would justify a variation. The purpose of the Northern Allowance was to offset the cost of living in the Northwest Territories, relative to living in southern Canada. JT has left the Northwest Territories and moved to Winnipeg, Manitoba. Presumably, there is no longer a need to account for the higher cost of living.

[44] I have also considered the evidence that SL's income in 2020, exclusive of spousal support was \$37,184.12, slightly higher than the \$30,000.00 imputed to her when the spousal support order was made. That difference is not significant. Further, much of the \$37,184.12 that shows as income for SL was the result of her encroaching on the capital from the property equalization to fund her unsuccessful business venture. It does not represent a steady and reliable stream of income. There also remains a significant disparity between SL's income and what JT's income would have been had he chosen the Income Protection Option.

[45] JT had an opportunity to choose a compensation package that would have protected the lion's share of his income and which would improve his chances of finding other work through "reskilling". Instead, he chose an option that narrowed these opportunities, reduced his income and ultimately allowed him to retire at 55. As noted, his efforts to find work have been minimal. This is not a permanent situation that has arisen out of circumstances beyond JT's control. It is, rather, a situation largely of his own making.

[46] Finally, there is no basis for varying the spousal support order from being indefinite to being time-limited. The current spousal support order, including its duration, was made after considering, among other things, the economic consequences of the role SL played during the marriage. In short, she left the

marriage lacking in marketable skills and with a need for financial support. She continues to require spousal support and there is no evidence to suggest this need will terminate by September of 2022. In any event, the current order permits the parties to ask for a review of SL's efforts to become self-sufficient after August of 2022.

CONCLUSION

[47] On a balance of probabilities, I find that JT has not discharged the onus of proving there has been a material change in circumstances. His situation is one which he created himself, through deliberate choices. Accordingly, the application is dismissed.

[48] If the parties wish to speak to costs they should contact the Supreme Court Registry within the next ten business days to make arrangements to do so.

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
29th day of September 2021

Counsel for JT:

Paul Parker

Counsel for SL:

Gabriel Byatt

**IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES**

BETWEEN:

F. (S.L.)

Petitioner/Respondent

-and-

F. (J.T.)

Respondent/Applicant

**MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE K. M. SHANER**
