

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Peraud v. Peraud, 2011 NSSC 1

Date: 20110106
Docket: 1201-064299
Registry: Halifax

Between:

Shelly Anne Peraud

Petitioner

v.

Pascal Michel Peraud

Respondent

Judge:

The Honourable Justice Elizabeth Jollimore

Heard:

December 15, 2010

Counsel:

Angela Walker for Shelly Peraud
Judith Schoen for Pascal Peraud

By the Court:

Introduction

[1] Shelly and Pascal Peraud separated in 2006 after cohabiting for seventeen years. In the spring of 2007 they negotiated and signed a separation agreement. The business which employed both of them stopped operating in 2009. Since then, their separation agreement has come under scrutiny because Ms. Peraud is claiming spousal support while Mr. Peraud says her claim is defeated by their agreement.

The couple's history

[2] The couple's early life together took place in Germany. Ms. Peraud lived there from 1986 to 1993. Throughout that time, she worked at Canex. She worked part-time for the first five years and full time for the last two years. For the first twelve to eighteen months, she worked at the package store which she described as "physical work". She then did clerical and shipping work which involved processing paper work and helping the shipper when he was busy.

[3] In 1987, Shelly Peraud injured her back and was treated with pain medication at a hospital emergency room. That same year, she met Pascal Peraud. They began to live together in 1989 and they married in 1993.

[4] Mr. Peraud worked driving a truck. This kept him away from home two nights each week. While the couple never had children of their own, one of Mr. Peraud's sons lived with them for almost six years and Ms. Peraud was responsible for the boy while Mr. Peraud was away for his work.

[5] In 1993, the Perauds moved to Canada, bringing Mr. Peraud's son with them. Within a year of this move, Ms. Peraud consulted with a physician about her back pain. She worked as a cashier at Zellers for one year, packing and checking out customers' purchases. She left this job when her husband incorporated Peraud Transport Limited in late 1996. Mr. Peraud was the company's long distance driver, while Ms. Peraud managed all the paperwork and finances from their home, preparing deposits, paying bills and taking financial papers to the accountant when the company's financial statements were to be prepared. She had complete access to the company's financial information and was aware that, from 2005 to 2009, the company's expenses exceeded its revenues - just as its debts exceeded its assets.

[6] Ms. Peraud says that her back pain "impacts [her] life significantly", limiting the time she can stand or sit. She takes a muscle relaxant before and after a long car trip, she breaks up computer work at hourly intervals to change her position. She says that when her back "goes out", it will be a week, on average, before she is back to normal and a particularly bad episode will take several weeks to resolve itself.

[7] Ms. Peraud didn't say how often her back "goes out". I have no evidence that she regularly sees her personal physician or any other doctor for treatment of this problem. She described no pain management treatment other than pacing her activities and taking muscle relaxants before and after long car trips. She has not applied for Canada Pension Plan disability benefits. Ms. Peraud did say that when she left Zellers in 1996, her work was getting harder to do because of her back pain.

[8] Since her 1987 back injury, Ms. Peraud was employed almost constantly on a part-time or full-time basis until Peraud Transport Limited went out of business in 2009.

[9] Prior to the Perauds' separation, the mortgage on the matrimonial home was renegotiated to obtain money for investment into Peraud Transport Limited. The refinancing doubled the amount of the mortgage, increasing it from \$45,820.00 to \$91,800.00. The only document relating to the refinancing provided to me was a letter dated November 1, 2006 confirming the transfer of mortgage funds. November 1, 2006 is also the date the couple separated, according to Ms. Peraud, though she says the mortgage was refinanced one to two months prior to the separation. Mr. Peraud testified that he had mentioned separation "a few times" and he and his wife talked about it before they actually separated. He agrees that the mortgage was refinanced prior to the separation.

[10] After the separation, Mr. Peraud moved to Moncton while Ms. Peraud stayed in Lawrencetown. Peraud Transport Limited continued to operate until June 2009. Before it stopped operating, both Ms. Peraud and Mr. Peraud declared bankruptcy. It is unclear whether the company declared bankruptcy: in response to cross-examination Mr. Peraud testified that it didn't, but in his affidavits he said that the company did declare bankruptcy. The company's registration was revoked for non-payment in January 2010.

[11] Mr. Peraud says he had to close the company because "our economic [sic] worsened" and "I could no longer cover the [company's] expenses personally." Company expenses were being paid on a personal credit card, according to Mr. Peraud. When the company was closed, Ms. Peraud's salary and expenses were paid first, before expenses were reimbursed to Mr. Peraud. Ms. Peraud also received her vacation pay and a severance payment of \$1,500.00. Ms. Peraud says that Mr. Peraud made unwise financial decisions which caused the business to close.

[12] Following the closure of the company, Ms. Peraud filed her divorce petition. In it, she stated that all matrimonial property had been divided. She claimed spousal support, relying on the terms of the agreement, saying that the separation agreement provides "that I am to be paid spousal support in the event that the Respondent terminates my employment with his company. I was so terminated on ____ [she didn't specify a date]; however, the Respondent has not paid spousal support as required by the agreement."

The agreement

[13] The Perauds divided their property and debts pursuant to the separation agreement. Mr. Peraud was to keep all the assets and liabilities of Peraud Transport Limited and he would obtain releases for Ms. Peraud from all liability for the debts he was assuming, whether her liability was as "sole debtor, co-signor [sic], guarantor or otherwise." He agreed to indemnify Ms. Peraud with respect to these debts. In the context of Peraud Transport Limited, the agreement provided that Ms. Peraud "shall be entitled to continue working for the business, failing which the parties shall review the provisions [sic] dealing with spousal support." That provision stated:

Neither Shelly nor Pascal shall make a claim for the payment of spousal support from the other at this time. It is agreed that Shelly shall continue to be employed by Pascal's company, Peraud Transport Limited, for as long as the company is owned and operated by Pascal. Should Pascal terminate Shelly's employment with Peraud Transport Limited, the parties agree that Shelly shall have a claim for spousal support at an amount comparable to her current rate of pay. However, the entitlement to spousal support shall not be automatic if Shelly chooses to leave her employment with Peraud Transport Limited voluntarily. The parties agree that there shall be no further requirement to pay spousal support if Peraud Transport Limited goes out of business. Any payment of spousal support shall be taxable income in the hands of Shelly and shall be tax deductible for Pascal.

[14] The spousal support provision identified four different scenarios where Ms. Peraud's employment might stop: if her husband no longer owned and operated the company; if she ended her employment; if her husband ended her employment; and if the company went out of business. It's clear that Ms. Peraud didn't choose to leave her employment. No one else is operating the company. Mr. Peraud says that the company went out of business and there's no further requirement on him to pay spousal support. Ms. Peraud argues that Mr. Peraud's poor decision-making forced the business to close - in effect, he constructively terminated her employment and she has a claim for spousal support at an amount comparable to her then-current rate of pay.

[15] The agreement stated that there would be no claim for spousal support "at this time". At the material time, there was no claim for spousal support because the company was owned and operated by Mr. Peraud and it continued to employ Ms. Peraud. The company is no longer operating and it hasn't operated for more than eighteen months. Mr. Peraud has found employment by another company. Ms. Peraud works sporadically for a fledgling enterprise being started by her common law husband. She earns very little money from this work.

[16] The agreement contains a provision which states it is a "full and final settlement of all matters outstanding between the parties arising from cohabitation prior to marriage, the marriage and the breakdown of the marriage". The agreement states that it is intended to resolve all corollary matters in any divorce.

[17] Attached to the agreement are affidavits from each spouse confirming that: each was advised to obtain independent legal advice and neither wanted this. In the affidavits each acknowledged signing the agreement "willingly and with sufficient understanding after having read it in its entirety", "without undue stress, fear, duress, improper understanding, undue influence or false inducement" and each swore to signing the agreement because he or she "felt it was fair and in my best interests to do so."

Analytic context

[18] Ms. Peraud's application for spousal support is pursuant to section 15.2 of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3. Section 15.2(4)(c) of the *Divorce Act* dictates that I consider any agreement relating to the support of either spouse in deciding a support application. Mr. Peraud asserts that consideration of the parties' separation agreement will compel me to the conclusion that he has no further requirement to pay spousal support.

[19] How I consider the parties' separation agreement is guided by the Supreme Court of Canada's decision in *Miglin*, 2003 SCC 24. In that decision, the Supreme Court outlined the proper approach to determining a spousal support application where spouses have signed an agreement that includes a final release of future spousal support claims. Justices Bastarache and Arbour outlined a two-stage approach for these applications. With the exception of Justices LeBel and Deschamps, the remainder of the Court concurred with their reasons.

[20] I am mindful that in exercising my discretion to award spousal support, I am to strike a balance between the *Divorce Act's* objective of equitably sharing the consequences of marriage and its breakdown with the parties' freedom to arrange their own affairs, as the Supreme Court directed in paragraph 46 of *Miglin*, 2003 SCC 24, where I was also instructed not to interfere with a pre-existing agreement unless I am convinced that it doesn't comply substantially with the *Divorce Act's* overall objectives.

Stage one - the circumstances of the agreement's negotiation and execution

[21] The two-stage analysis in *Miglin*, 2003 SCC 24 requires that I look first at the circumstances of the agreement's negotiation and execution. This means nothing more than being aware of each party's condition during the negotiation, including the length of the spouses' cohabitation and the functions they performed during cohabitation, and the conditions of the negotiations, including their duration and whether there was professional assistance. When I look at these circumstances I am looking for something which would warrant my finding that the agreement shouldn't stand because there was a fundamental flaw in the negotiation process, as was noted in paragraph 82 of *Miglin*, 2003 SCC 24.

[22] The Perauds were married for thirteen years. They cohabited for four years before they married. Mr. Peraud was the primary income earner during their relationship. While Ms. Peraud worked through their relationship, she was less often employed on a full-time basis. During the five years that one of Mr. Peraud's sons lived with them, she was solely responsible for the child

while Mr. Peraud travelled for work. She was also deeply involved when the boy experienced social and legal problems as a teen-ager.

[23] When the relationship ended, both spouses were employed by Peraud Transport. The company was the means by which Mr. Peraud's earnings were divided between the spouses: Ms. Peraud earned no income independent of her husband's efforts. According to Ms. Peraud, her husband received gross income of at least \$50,000.00 in each of 2006 and 2007, while her own gross income was \$25,000.00 in each of those years. According to Mr. Peraud, his wife was overpaid for her efforts. Working for Peraud Transport let Ms. Peraud control her hours and conditions of work. Ms. Peraud had worked for Peraud Transport for slightly more than a decade when the separation agreement was negotiated. Her financial well-being was entirely dependent on her employment by Peraud Transport - which is to say that it was entirely dependent upon her husband's efforts.

[24] Ms. Peraud says she was "emotionally devastated" about the marriage breakdown at the time she was discussing the separation agreement with her husband. She explained this by saying it meant the separation "bothered" her. She saw a doctor once and was offered something she didn't want to take, so she turned it down. Ms. Peraud explained that she isn't averse to taking medication if it's necessary. The implication is that she didn't believe medication was necessary for her.

[25] Regardless of her reaction to the separation, Ms. Peraud and her husband maintained a good relationship for a few years after they separated. They were certainly still getting along well in the spring of 2007 when they negotiated and finalized a separation agreement.

[26] According to Ms. Peraud, she and her husband had one meeting at Tim Horton's to talk about the terms of their separation agreement. She says she prepared "a piece of paper" outlining the basic terms on which they agreed and then she made an appointment with a lawyer who was given the paper as the basis for drafting the separation agreement. Neither Mr. Peraud nor Ms. Peraud has a clear recollection of the circumstances surrounding the preparation of their separation agreement in the spring of 2007.

[27] Ms. Peraud contacted a lawyer on March 22, 2007. The separation agreement was signed fourteen days later. The lawyer she first contacted referred her to a second lawyer who prepared the separation agreement. This lawyer says two versions of the agreement were prepared. The lawyer was unsure whether the first version was provided to Ms. Peraud before the meeting where both spouses signed the agreement. At some point, someone told the lawyer to modify the first draft of the agreement: the lawyer recalls these instructions came from Ms. Peraud and the instructions left the lawyer with the understanding that Mr. Peraud wouldn't sign the agreement unless the requested changes were made. Mr. Peraud says that he doesn't recall disagreeing with any of the agreement's contents. The lawyer's limited notes record a conversation with Ms. Peraud about the spousal support clause in which Ms. Peraud made clear her comfort with the clause dealing with spousal support because she felt her income was guaranteed.

[28] The lawyer's file didn't contain any version of the agreement other than the one which was signed. It didn't contain any notes indicating when instructions to revise this first draft were received. The lawyer kept no time records, so it wasn't possible to look to these for a description of how events unfolded.

[29] When the spouses negotiated their agreement neither had legal advice. According to Ms. Peraud, when she and her husband met with the lawyer to sign the agreement, the lawyer "mentioned that most people get independent legal advice when they sign a separation agreement". In response to this suggestion, Ms. Peraud said she and her husband "were getting along really well". Ms. Peraud says she believes the meeting with the lawyer to sign the separation agreement and the quit claim deed for the matrimonial home took "approximately 20 - 30 minutes". Ms. Peraud says she read the agreement while Mr. Peraud says he did not read it fully. He says he is not educated and the agreement contained terms he didn't understand. He said that he now understands the technical terms of the agreement. At the time, he says he trusted his wife since they were in business together.

[30] In paragraph 82 of *Miglin*, 2003 SCC 24, the Supreme Court says I cannot presume that a power imbalance or vulnerability requires my interference with an agreement that parties have freely negotiated. Instead there must be evidence to warrant a finding that the agreement shouldn't stand based on a fundamental flaw in the negotiation process.

[31] There is a power imbalance between Ms. Peraud and Mr. Peraud. Ms. Peraud was completely financially dependent upon her husband. Her employment and her income were entirely dependent on him. Ms. Peraud testified that she and her husband "never discussed 'spousal support' per se": they discussed her continued employment by the company. The business was viable and she expressed no concerns that it would ever be shut down.

[32] To be sure, in *Miglin*, 2003 SCC 24 at paragraph 82, the Court stressed that "the mere presence of vulnerabilities" doesn't justify my interference with parties' agreement, noting that "[t]he degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties." Of course, there was no professional assistance in negotiating the Perauds' separation agreement. The lawyer represented and advised neither of them. The lawyer drafted an agreement to reflect the terms presented by the parties. Each party was left to read the agreement and there was no discussion of the meaning of its terms. Both Ms. Peraud and the lawyer were consistent in reflecting Ms. Peraud's confidence that her financial well-being was secure. The lawyer's notes reflected that Ms. Peraud felt "ok" with the changes proposed to the support clause because she felt her income was guaranteed. The notes said "S. to maintain business employment income. OK. Guaranteed." Of course, this is absolutely at odds with the terms of the agreement which specifically state that Ms. Peraud would have no entitlement to receive spousal support if Peraud Transport went out of business.

[33] In these circumstances, the party's power imbalance was not compensated by the assistance of counsel. This is not a case where the agreement should be read as expressing the Perauds' notion of equitably sharing their current and future circumstances. For Ms. Peraud to

lose any entitlement to spousal support when the business closed was not an equitable sharing of their circumstances. This is a case where, as the Supreme Court said at paragraph 83 in *Miglin*, 2003 SCC 24, "the agreement will merit little weight."

Stage one - the substance of the agreement

[34] According to the Supreme Court at paragraph 84 of *Miglin*, 2003 SCC 24, where I'm persuaded that an agreement was negotiated in satisfactory conditions, I am to consider the agreement's substance to determine whether it is in substantial compliance with the factors and objectives of the *Divorce Act*. Here, because I am not persuaded that the agreement was negotiated in such conditions, I do not believe that I am required to consider the agreement's substance, but I do want to comment on the substance of the agreement.

[35] The factors and objectives of the *Divorce Act* relating to spousal support are outlined in section 15.2(4) and 15.2(6) and relate to the nature and duration of the couple's marriage, the economic consequences of the marriage and its breakdown, and, to the extent practicable, the promotion of each spouse's economic self-sufficiency.

[36] The Perauds' relationship was seventeen years long during which Mr. Peraud was the breadwinner while Ms. Peraud was at home and, for a period of time, she supported Mr. Peraud by parenting his son. For the final decade of the relationship, Ms. Peraud earned no income independent of her husband's efforts. When the marriage ended, Mr. Peraud's financial self-sufficiency was intact. However, Ms. Peraud's financial self-sufficiency remained tied to her husband's continued operation of Peraud Transport Limited.

[37] According to the separation agreement, when the company ceased to operate, Ms. Peraud would have no claim for spousal support. This would happen regardless of how long the company continued to operate after the agreement was signed. This term of the agreement failed to recognize, in any way, Ms. Peraud's long-term financial dependency. It similarly failed to appreciate whether Ms. Peraud could achieve self-sufficiency and how long this would require. The Perauds' separation agreement was not in substantial compliance with the factors and objectives of the *Divorce Act*.

Ms. Peraud's spousal support claim

[38] As a consequence of my determination that Ms. Peraud's claim for spousal support is not barred by the parties' separation agreement, I must resolve her application.

[39] Ms. Peraud is fifty-six years old. She completed grade ten and one year of a two year secretarial course. From late 1996 until June 2009, she was wholly dependent on her husband's enterprise for her income. Other than her employment by Peraud Transport Limited, she has worked in the retail sector. She last worked in that industry at least fourteen years ago. Her back injury has had some impact on her: Mr. Peraud admits that, once in a while, Ms. Peraud has a back problem, but notes that Ms. Peraud is able to participate in activities of her own choosing,

such as travel. Ms. Peraud has made very limited efforts to find employment since Peraud Transport closed. She has worked, making vests for search and rescue dogs. This work is done for a business being started by Doug Teeft, her common law partner. She earned less than \$500.00 from this work in 2010.

[40] Mr. Peraud is fifty years old. Aside from some work in the construction industry, he has been primarily employed as a long distance truck driver. He did this work in Germany and he continued in this work when the couple moved to Canada. He maintains this career as a long distance truck driver: when Peraud Transport Limited closed, Mr. Peraud immediately moved to employment by another company, maintaining the same route he had driven while he lived in Lawrencetown. He says his income decreased because his move to Moncton reduced the mileage he was being paid to drive.

[41] This was a seventeen year relationship where Mr. Peraud was the primary income earner and Ms. Peraud was financially dependent upon him. She was absolutely dependent upon him during those years when she was employment by Peraud Transport. She maintained the home and cared for Mr. Peraud's son while his work kept him away from their home. The economic disadvantages of the marriage and its breakdown have weighed more heavily on Ms. Peraud. She has lost her employment, she was unable to secure employment insurance benefits when the company went out of business, her home is so heavily encumbered by a mortgage that it might result in a deficiency if it was sold. She cannot afford a car which might assist her in finding a job.

[42] In contrast, Mr. Peraud barely missed a step when the company closed. His income level is virtually unchanged.

[43] I find that Ms. Peraud is entitled to receive spousal support.

[44] Ms. Peraud's monthly expenses were modestly stated at \$1,145.00. This includes no amount for clothing or discretionary spending on gifts, holidays, entertainment or savings. Mr. Teeft has an annual income of approximately \$44,000.00. It is unclear whether and how his expenses mesh with Ms. Peraud's, since their Statements of Income (his was prepared in 2009 as part of his divorce) do not disclose the total amount of any expense or how the expenses are allocated between the two of them.

[45] Mr. Peraud rents the basement in the home of a woman he describes as his former girlfriend. He says their relationship ended two to three months ago because of arguments relating to this divorce. He pays \$560.00 per month in rent and as a contribution to utilities. He chose this amount which is \$100.00 less than the amount he paid when he rented an apartment.

[46] Mr. Peraud provided his paystubs for the period from January 1, 2010 to May 15, 2010. He is paid bi-weekly and, over these nine and one-half pay periods Mr. Peraud earned \$20,078.87. Extrapolating this income over a full year, Mr. Peraud has an annual income of

\$54,950.00. This translates to a monthly income of \$4,579.00. It is consistent with the income Mr. Peraud earned from Peraud Transport Limited.

[47] My calculation of Mr. Peraud's monthly income is \$865.00 more than Mr. Peraud's calculation. One reason my calculation is higher is because I have based it on twenty-six bi-weekly pay periods. Mr. Peraud has calculated his income as if he is only paid twice each month. He is not. Mr. Peraud has also calculated his income as if he is paid \$1,857.00 on each of his pay periods. It's unclear how this amount was determined. It isn't representative of the earnings he disclosed for 2010.

[48] It's necessary to adjust Mr. Peraud's Statement of Expenses based on my determination of his income: a greater income means he pays more income taxes, a higher Canada Pension Plan premium and a higher Employment Insurance premium. Estimating his annual income taxes, calculated based on New Brunswick tax rates, at \$12,550.00 and attributing maximum CPP and EI premiums to him, Mr. Peraud would have a net income of \$39,489.49 after paying these statutory deductions. This means his monthly disposable income would be \$3,290.79, as calculated below:

Annual income	54,950.00
Less income taxes	(12,550.00)
Less maximum CPP premium	(2,163.15)
Less maximum EI premium	(747.36)
Annual net disposable income	39,489.49
Monthly net disposable income (annual net disposable income divided by twelve)	3,290.79

[49] I've overestimated Mr. Peraud's income taxes, if only slightly, because I have not given him credit for the tax reduction that results from his charitable contributions.

[50] As I've noted earlier, Mr. Peraud's Statement of Expenses attests to monthly discretionary costs of \$2,723.83. This is slightly higher than the amount he claims. Again, he has made the error of confusing bi-monthly expenses with bi-weekly ones. He underestimated his monthly expense for medical insurance by calculating twenty-four payments of \$77.00 rather than twenty-six. As a result of this calculation, I conclude that Mr. Peraud has a monthly surplus of \$566.96. This surplus is after he has made all his budgeted payments, including those discretionary expenses for gift-giving, charity, entertainment and storage of his personal belongings.

[51] At Mr. Peraud's greatest marginal tax rate, his income taxes would be reduced by thirty-seven percent of every spousal support dollar paid.

[52] Having regard to Ms. Peraud's need, which is modest, and Mr. Peraud's ability to pay, I conclude that Mr. Peraud shall pay spousal support of \$1,100.00 each month. These payments shall begin immediately and shall be due on the first of each month.

[53] Ms. Walker shall prepare the divorce and corollary relief orders.

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

Halifax, Nova Scotia