

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Russell v. Clayton*, 2020 NSSC 141

Date: 2020-04-17

Docket: SFHPSA 112025

Registry: Halifax

Between:

Charles David Russell

Applicant

v.

Conyer Livingston Clayton

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: January 22, 2020

Decision: April 17, 2020

Counsel: Kenzie MacKinnon, QC for the Applicant, David Russell
Cassandra L Armsworthy for the Respondent, Conyer Clayton

Introduction

[1] Thirty-four year old David Russell and thirty-one year old Conyer Clayton are divorced spouses. Mr. Russell seeks time limited spousal support from Ms. Clayton based on compensatory and non-compensatory factors. Mr. Russell says that throughout their relationship, he sacrificed his career so that Ms. Clayton could pursue hers. As a result, his financial circumstances are difficult while Ms. Clayton is fully employed in a well-paying and satisfying job. Mr. Russell therefore seeks spousal support so he can obtain an education and financial independence.

[2] In contrast, Ms. Clayton disputes Mr. Russell's claims. She says that Mr. Russell was not disadvantaged by the marriage and that his current financial situation arose because of personal lifestyle choices. Ms. Clayton argues that the evidence does not support a finding of entitlement on either compensatory or non-compensatory grounds.

Issues

[3] The following two issues will be addressed in my decision:

- Did Mr. Russell prove entitlement?
- If so, what is the appropriate quantum and duration?

Background

[4] The parties, who were Americans, met in Louisville, Kentucky in the spring of 2010. Ms. Clayton was completing an undergraduate degree and working as a gymnastics coach. For his part, Mr. Russell was pursuing an undergraduate degree in Richmond, Kentucky. He moved to Louisville to work as a waiter during the summer. He planned to travel to California in August before returning to Richmond to resume his studies. His ultimate goal was to obtain a nursing degree.

[5] Ms. Clayton and Mr. Russell were initially involved in a casual relationship. Ms. Clayton asked Mr. Russell to stay in her apartment while she travelled out of country. Once she returned, the parties began to live together¹. To stay in the

¹ In the divorce documents drafted by Ms. Clayton, she states that the parties began to live together on July 1, 2010: Exhibit 1, tab C, p 3.

relationship, Mr. Russell rearranged his plans; he remained in Louisville working as a waiter. He did not travel to California. He did not return to university in Richmond.

[6] In the fall of 2010, Ms. Clayton's mother passed away. Ms. Clayton was working as a gymnastic coach. She decided to pursue a Masters degree at the University of Louisville starting in September 2011. Mr. Russell continued to work as a waiter.

[7] The parties married on December 14, 2011. At the time of the marriage, Mr. Russell had student loan debt of about \$20,000.

[8] Unfortunately, Mr. Russell lost his job. As a result, the parties agreed that Mr. Russell would enroll in a LPN course with an annual cost of \$22,000 and that he would borrow \$11,000 to start the program in April 2012. By October 2012, Ms. Clayton decided to pursue a Fine Arts degree. A Fine Arts degree was not offered in Louisville. Mr. Russell therefore quit the LPN program to avoid incurring additional debt because the parties would soon be leaving Louisville.

[9] In December 2012, Mr. Russell found work as a waiter, eventually being promoted to sommelier/beverage manager earning about \$35,000 per year.

[10] In February 2013, Ms. Clayton deposited \$120,974 into her Swiss bank, UBS account which was composed of \$102,000 in recently received life insurance proceeds, with the balance being comprised of wedding gift money and employment savings. From this account, Ms. Clayton made a lump sum payment of \$11,830 towards Mr. Russell's student loan debt, and thereafter arranged for ongoing payments to be withdrawn from this account. By the time the relationship ended, \$17,921.20 was paid on Mr. Russell's student loan debt, leaving \$3,425 outstanding.

[11] Ms. Clayton was not accepted into a Fine Arts program. As an alternative plan, it was agreed that Ms. Clayton would pursue a coaching career. She received three promising offers - from Seattle Washington, Canmore Alberta, and Halifax. Mr. Russell preferred either Seattle or Canmore because of his own employment prospects. Ms. Clayton, however, chose Halifax because she felt Halifax was best for her career. The parties moved to Halifax.

[12] Mr. Russell hoped to begin a family; Ms. Clayton was not of the same mind.

[13] After arriving in Halifax, Mr. Russell faced employment difficulties. For three years, he was only able to find seasonal employment as a waiter. Further, pursuing a university degree was not a viable option until legal restrictions were lifted after Mr. Russell became a permanent resident in March 2016.

[14] Once a permanent resident, Mr. Russell wanted to return to school for two reasons. First, he realized that he and Ms. Clayton would not be having children. Second, he could not find permanent employment in the restaurant industry in Halifax. His new goal was to enter the pharmacy program at Dalhousie University.

[15] Ms. Clayton objected to Mr. Russell's plan. Instead, Ms. Clayton wanted to change jobs and move. She eventually accepted an offer at the Ottawa Gymnastics Center starting in September 2016 with an anticipated annual income of \$45,000.

[16] After Ms. Clayton decided to move to Ottawa, Mr. Russell was offered full-time employment in the restaurant where he was working. He declined the full-time position because of the anticipated move. He did however continue working at the restaurant in a seasonal capacity.

[17] During the summer, the marriage began to unravel. The parties attended marriage counselling. Despite their marital issues, both continued to prepare for their move to Ottawa. They packed their belongings and together drove to Ottawa to establish their new home. Mr. Russell then returned to Halifax where he would work for another month as this was when his seasonal job was scheduled to end. Once his job ended, Mr. Russell planned to join Ms. Clayton in Ottawa and travel as he often did for a portion of the time that he was laid off.

[18] This plan did not materialize. Ms. Clayton wanted a divorce. Ms. Clayton told Mr. Russell of her decision to end the relationship during the first week of October 2016. Mr. Russell was taken aback; he had difficulty processing the break-up. He decided to travel to Italy to stay with a friend while he sorted things out.

[19] In November 2016, Ms. Clayton transferred \$127,326 USD from her Swiss account to the party's joint account, placing its balance at \$183,045 CAD. Ms. Clayton withdrew \$156,420 of that amount. About a month later, Mr. Russell discovered Ms. Clayton's withdrawal. He withdrew \$24,000 before the account was closed. Mr. Russell did not accept that this division was a fair and appropriate one.

[20] Further, while in Italy, and while awaiting a new credit card, Mr. Russell charged about \$4,076 to Ms. Clayton's credit card which she paid. Mr. Russell decided to extend his travels to New Zealand, Australia and Indonesia. While in Bali, Mr. Russell was robbed. He charged \$1,672 to another credit card held in Ms. Clayton's name which Ms. Clayton also paid.

[21] In May 2017, Mr. Russell returned to Halifax. Once again, he was only able to secure seasonal employment. In the fall, he travelled to the USA to visit family and friends.

[22] In September 2017, Ms. Clayton filed for divorce in Ontario. Mr. Russell was served with the papers in November 2017 while he was visiting friends in Chicago. Mr. Russell did not respond to the proceedings. The Ontario divorce issued on February 12, 2018. The divorce did not deal with maintenance or property division. Further, the order did not preserve the court's jurisdiction on property matters.

[23] In January 2018, Mr. Russell finally returned to school. He completed courses at St. Mary's University to meet the academic requirements of Dalhousie's pharmacy program. He was accepted into the pharmacy program in September 2018 and is expected to graduate in May 2022.

[24] A daughter was born to Mr. Russell in October 2018. Although Mr. Russell and the child's mother do not live together, they do coparent their child and equally share the child's expenses.

[25] On October 25, 2018, Mr. Russell applied for spousal support under the *Parenting and Support Act* and a division of assets under the *Matrimonial Property Act*. He later abandoned the *MPA* claim because he had no standing given that the parties were divorced. He further decided that he would not proceed with a claim for unjust enrichment.

[26] Ms. Clayton filed a Response on January 16, 2019. She asked that spousal support be denied because of a lack of entitlement.

[27] The hearing on the spousal support issue was held on January 22, 2020. Each of the parties testified and were cross-examined. At the conclusion of the hearing, each party provided oral submissions to supplement their written briefs. The matter was adjourned for decision based on the issues as framed by the parties.

Analysis

[28] Did Mr. Russell prove entitlement?

Position of Mr. Russell

[29] Mr. Russell states that he proved he is entitled to spousal support. He relies on the law established in *Moge v. Moge*, [1992] 3 SCR 813; *Bracklow v. Bracklow*, [1999] 1SCR 420; and *Gates v. Gates*, 2016 NSSC 49. Mr. Russell gave examples of compensatory and non-compensatory factors which he states prove his claim including the following:

- In 2010, Mr. Russell stopped attending university in Richmond, Kentucky so that he could continue a relationship with Ms. Clayton who lived in Louisville.
- In 2012, Mr. Russell left the practical nursing program that he was attending in Louisville because Ms. Clayton was moving to advance her career. Ms. Clayton had received three job offers, including an employment offer in Halifax, N.S. Mr. Russell preferred the other two options over Halifax. Ms. Clayton nonetheless chose Halifax. Halifax would do little to advance Mr. Russell's education or career path given that he had no connections and no job prospects in Halifax.
- Mr. Russell was not able to find permanent employment in Halifax. His work was seasonal. Financially he was unable to apply to university until he became a permanent resident in March 2016.
- By the time Mr. Russell was eligible to return to university, Ms. Clayton decided to move to Ottawa so that she could advance her career. Mr. Russell once again forfeited his plans in favour of Ms. Clayton.

Position of Ms. Clayton

[30] In contrast, Ms. Clayton says that Mr. Russell did not prove entitlement on either a compensatory or non-compensatory basis. In respect of the compensatory claim, Ms. Clayton argued that Mr. Russell's circumstances are similar to those found in *Clair v. Clair*, 2007 NSSC 313, wherein the wife was denied spousal support, despite earning less than her husband, because she was gainfully

employed throughout the marriage and because she provided no evidence that her career was disadvantaged as a result of the marriage or its breakdown.

[31] Likewise, Ms. Clayton states that Mr. Russell provided no evidence of disadvantage as confirmed by three examples. First, before the marriage, Mr. Russell was mainly employed in the restaurant industry while living in Kentucky. This pattern continued after the marriage and after their move to Halifax, although Mr. Russell did prefer to travel during the winters while living in Halifax. The travel was funded by Ms. Clayton. Mr. Russell's employment experiences and opportunities remained unchanged before, during and after the marriage.

[32] Second, the parties did not have children. Economic disadvantage typically arises because of responsibilities associated with children. There were no children and no corresponding economic deprivation.

[33] Third, Ms. Clayton states that Mr. Russell's failure to obtain a degree or diploma does not prove disadvantage for the following reasons:

- In *Sheehan v. Sheehan*, 2010 NSSC 428, para 59, the court confirmed that the mere fact that a spouse did not complete an education program was insufficient to establish entitlement.
- Mr. Russell has a history of enrolling in education programs and then dropping out. This pattern repeated itself during the marriage. The decisions to apply and withdraw were solely made by Mr. Russell. Ms. Clayton supported Mr. Russell in all his endeavours, including paying about \$18,000 towards Mr. Russell's student loans. Ms. Clayton states that she should no longer have to bear the financial consequences associated with Mr. Russell's education and employment choices.
- Mr. Russell did not have an education plan; it therefore could not be interrupted.
- Mr. Russell provided no evidence of a settled intention to pursue sommelier training in either Louisville or Halifax.

[34] Ms. Clayton states that Mr. Russell's claim of non-compensatory support also fails for reasons which include the following:

- Although there appears, at first blush, to be a difference in their incomes, mere disparity is insufficient to find entitlement: *Gagnon v. Gagnon*, 2011 NSSC 486, para 69.
- Mr. Russell does not have an actual need of support. He accessed student loans and grants – over \$54,000 in two years. Mr. Russell can also work and in fact earned \$6,500 in employment income in the summer of 2019. He could also work part-time while attending university.
- Ms. Clayton gave Mr. Russell \$24,000 in cash after separation, together with access to another \$6,000 via credit card or account access while Mr. Russell was travelling.
- Ms. Clayton paid down Mr. Russell’s substantial American student loan to \$3,425 as of separation.
- Ms. Clayton should not be responsible for funding Mr. Russell’s personal lifestyle choices, including extensive travel in lieu of working, and the costs associated with his child arising from his relationship with another woman.

[35] In summary, Ms. Clayton states that Mr. Russell’s maintenance claims must be denied because he failed to prove entitlement on either a compensatory or non-compensatory basis. She states that Mr. Russell did not prove a disadvantage arising from the marriage or its breakdown. To the contrary, Ms. Clayton maintains that Mr. Russell consistently took financial advantage of her throughout the marriage. He should not be permitted to do so after their divorce.

Law and Decision

[36] This is a *Parenting and Support Act* application. Mr. Russell’s claim is founded on both compensatory and non-compensatory considerations. These are set out in ss. 4 and 5 of the *Act* which factors are akin to those stipulated in the *Divorce Act*. In fact, both parties relied on the *Divorce Act* provisions and case law in their submissions.

[37] I will now address the relevant entitlement factors that are found in the *PSA*.

Section 4(a) - Division of Function in Relationship

[38] The parties shared an atypical, non-traditional, and at times unhealthy relationship. Despite its nature, the relationship was nevertheless one of emotional and financial interdependence. Financially, Mr. Russell was dependent on Ms. Clayton. Ms. Clayton was the primary breadwinner throughout the relationship. Ms. Clayton contributed more financially than did Mr. Russell because Ms. Clayton earned more money and had more savings than did Mr. Russell.

[39] Mr. Russell's financial dependence was present from the outset of their relationship; it predated the marriage. Ms. Clayton chose to marry Mr. Russell despite this dependence. Mr. Russell remained financially dependent on Ms. Clayton throughout the marriage and after separation.

Section 4(g) – Inability to Obtain Employment

[40] The marriage negatively affected Mr. Russell's ability to find permanent employment. The negative impact became pronounced after the parties moved to Halifax so that Ms. Clayton could pursue her career.

[41] Mr. Russell was not a Canadian citizen. He therefore obtained a work permit. If he wanted to attend university, he would have to transfer the work permit to a student visa, pay tuition based on international student rates, and wait longer to become a Canadian citizen. In the circumstances, attending university was not feasible until after Mr. Russell obtained his residency status, which he did in March 2016.

[42] Mr. Russell was only able to find seasonal employment because there were limited opportunities in Halifax, especially in the restaurant industry. Further, when he finally was offered a full-time position in 2016, he was not able to accept it because Ms. Clayton accepted a job offer in Ottawa. By the time Mr. Russell learned that the marriage was over, the full-time position was no longer available.

[43] Mr. Russell is successfully enrolled in the pharmacy program at Dalhousie University. He is able to work when school is not in session. He is expected to graduate in 2022.

[44] Given these circumstances, I find that the marriage produced significant education and employment challenges for Mr. Russell.

Section 4(h) – Contribution to Education and Career Potential of other Spouse

[45] Mr. Russell contributed to Ms. Clayton's career. Mr. Russell consistently made education and employment sacrifices by giving priority to Ms. Clayton's career. At the end of the relationship, Mr. Russell was employed in a seasonal job with limited future prospects. In contrast, Ms. Clayton was earning over \$45,000 per year, in a job that she loved, while continuing to advance in that career.

Section 5 - Obligation to Assume Own Support

[46] Mr. Russell has an obligation to assume responsibility for his own support. This obligation is not absolute. The mitigating factors are specified in s. 5 of the *PSA* as follows:

5 A supported spouse has an obligation to assume responsibility for his or her own support unless, considering the ages of the spouses, the duration of the relationship, the nature of the needs of the supported spouse and the origin of those needs, it would be unreasonable to require the supported spouse to assume responsibility for his or her own support and it would be reasonable to require the other spouse to continue to bear this responsibility. 2015, c. 44, s. 7. 6 (1) and (2) repealed 2015, c. 44, s. 8.

[47] Given Mr. Russell's education, employment and even residential sacrifices [moving from his home in the USA to a new home in Nova Scotia], I find that it is reasonable for Mr. Russell to return to university for a defined period so that he too can build a career.

Summary of Entitlement Issue

[48] In summary, Mr. Russell proved entitlement to support on both compensatory and non-compensatory grounds. Mr. Russell proved a disadvantage arising from the marriage and its breakdown. Mr. Russell proved that he sacrificed his career so that Ms. Clayton could pursue hers. Mr. Russell proved that the income disparity is not of his own making, but is rather a product of joint decisions made by both parties throughout their marriage. Time limited spousal support is thus payable.

[49] **What is the appropriate quantum and duration?**

Position of the Parties

[50] Mr. Russell states that he is entitled to spousal support of \$1,000 per month for 4.5 years. The time chosen reflects the half year he attended St. Mary's

University to upgrade and the four years required to complete the pharmacy program at Dalhousie University.

[51] Ms. Clayton disagrees. She states that Mr. Russell is entitled to very little in support and for a brief a period of time as possible. She believes that Mr. Russell should be working full time. In the alternative, she also notes that Mr. Russell can work part time while attending university and has other resources available to him such as student grants and loans. Further, Ms. Clayton states that she is not required to support Mr. Russell's child, nor his travel or other discretionary type expenses.

Law and Decision

[52] The *PSA* discusses quantum and duration in s. 4 and assumes factors in keeping with those set out in the *Divorce Act*. Relevant s. 4 factors provide as follows:

4 In determining whether to order a person to pay support to that person's spouse and the amount of any support to be paid, the court shall consider

....

(i) the reasonable needs of the spouse with a right to support;

(j) the reasonable needs of the spouse obliged to pay support;

(k) the separate property of each spouse;

....

(m) the ability of the spouse with the right to support to contribute to the spouse's own support.

[53] I have considered these factors, the evidence and the submissions of the parties. I find that Mr. Russell proved he is entitled to spousal support of \$700 per month for almost four years based on the tax inclusion/tax deduction model and subject to the lump sum payment that I will calculate. In reaching this decision, I note as follows:

- Ms. Clayton's income was \$51,001 in 2018; she anticipated earning \$56,554 in 2019 and 2020.

- Ms. Clayton has \$9,903 in RRSPs accrued while she was working in Halifax and over \$129,000 USD, mainly from savings from her inheritance. She has no long term debt.
- Ms. Clayton states that her monthly expenses total \$2,818, including \$400 budgeted for savings and \$275 in discretionary spending.
- Ms. Clayton has the ability to pay support.
- Mr. Russell earned \$5,608 in 2015; \$6,072 in 2016; and \$4,672 in 2017. He reported no earnings in 2018. In 2019, he earned \$6,500 as a summer student. Mr. Russell's income earning potential was limited before and after separation.
- Mr. Russell should have worked in 2018 but chose not to.
- Mr. Russell can earn about \$7,000 per year while he is attending university. Unfortunately, he was earning less than that amount when he was employed seasonally and not attending university.
- Mr. Russell has access to student loans and grants. Loans have to be repaid and are thus not an income resource. Grants do not have to be repaid and are appropriately considered as an income resource. Mr. Russell received \$24,579 in grants thus far.
- After separation, Mr. Russell spent about \$30,000 which he received from the parties' bank account and from the use of Ms. Clayton's credit cards. Mr. Russell should have saved some of this money. Travel was not necessary even when done on a shoestring budget.
- Ms. Clayton is not responsible for any direct or indirect expenses associated with Mr. Russell's child. Mr. Russell's budget indicates \$798 in direct expenses associated with his child. Indirect expenses include a portion of his shelter expenses.
- Entertainment of \$150 is his noted discretionary expense.
- Mr. Russell has extensive student loans which will need to be repaid. He has no other long term debt.

- Mr. Russell proved a need for spousal support given his income and expenses.

[54] The quantum and duration selected are intertwined. Although the marriage was not lengthy, it did produce a high compensatory component because of the parties' relocation to Halifax. A reduced duration would have resulted in an increase in the quantum of support. The specified quantum and duration meet the legislative mandate and the unique factual circumstances of Mr. Russell and Ms. Clayton.

[55] I must now address the *de facto* retroactive spousal support component. Mr. Russell applied for support in October 2018. The application was not heard until January 2020. Ms. Clayton did not pay interim support. As a result, a lump sum payment will have to be made for the 15 month period between October 2018 and December 2019.

[56] I reduce the lump sum amount to \$8,000 from the \$10,500 otherwise payable. I do so because of the tax implications of a lump sum payment. The \$2,500 discount addresses the tax issue. Ms. Clayton and Mr. Russell are not in the same tax bracket. Ms. Clayton would benefit from paying spousal support on a periodic basis, while Mr. Russell will benefit from the lump sum payment. Mr. Russell asked for support in 2018. Ms. Clayton chose not to pay support. It would be inappropriate to discount the lump sum based exclusively on Ms. Clayton's tax bracket in such circumstances.

[57] In summary, Ms. Clayton will pay Mr. Russell \$8,000 in lump sum spousal support by May 15, 2020. In addition, she will pay monthly spousal support of \$700 commencing January 1, 2020 and every month thereafter until and including May 1, 2022.

Conclusion

[58] Mr. Russell proved entitlement to time-limited spousal support on both a compensatory and non-compensatory basis. Entitlement was proven despite the non-traditional and atypical nature of the marital relationship. Mr. Russell was disadvantaged because of the parties' decision to prioritize Ms. Clayton's career which necessitated a move from Kentucky to Halifax. Mr. Russell's income earning potential was seriously eroded because of this move.

[59] There is a significant disparity in the incomes of the parties. Mr. Russell proved that the income disparity is not of his own making, but is rather a product of joint decisions made by both parties throughout their marriage.

[60] Ms. Clayton has the ability to pay; Mr. Russell has a need. Ms. Clayton will pay Mr. Russell lump sum spousal support of \$8,000 by May 15, 2020. In addition, she will pay monthly spousal support of \$700 commencing January 1, 2020 and every month thereafter until and including May 1, 2022.

[61] The usual provisions respecting MEP and exchanges of income tax returns will be incorporated into the order. Mr. MacKinnon, QC is directed to draft the order.

[62] If the parties wish to be heard on costs, written submissions should be filed. I will not provide a deadline given the current state of emergency. The parties are asked to address this issue as soon as reasonably possible in the event of disagreement.

Forgeron, J.