

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *TM v. RR*, 2021 NSSC 156

Date: 2021-05-12

Docket: 107287

Registry: Sydney

Between:

TM

Applicant

v.

RR

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Pamela Marche

Heard: February 22 and 23, 2021 in Sydney, Nova Scotia

Submissions: Written by Counsel for RR, March 18, 2021
Oral by TM, March 23, 2021

Written Decision: May 12, 2021

Subject: Unjust Enrichment - Claim against Home and Pension;
Parenting and Support Act - Spousal Support, Entitlement,
Conduct (Fiscal Irresponsibility, Drug Use, Criminal
Behaviour), Re-partnering, Disability, Imputation of Income,
Treating Physician Narrative

Summary: TM sought spousal support, prospective and retroactive, from
RR citing lengthy cohabitation, disability and disparity of
income. TM also sought compensation from RR based on
unjust enrichment. RR argued TM not entitled to spousal
support because of her conduct and her inability to prove

disability. RR claimed TM failed to establish any unjust enrichment.

Issues:

1. Was there unjust enrichment? If so, does TM have a claim against the assets held by RR?
2. Is TM entitled to spousal support? If so, how much spousal support is payable and for how long?
3. Is TM entitled to retroactive spousal support? If so, how much?

Result:

TM established a claim of unjust enrichment in relation to the home in which the parties cohabitated and RR ordered to make an equalization payment to TM accordingly. TM did not establish an unjust enrichment claim against RR's pension.

TM entitled to spousal support on a non-compensatory basis reviewable upon RR's retirement. TM's conduct did not disentitle her to spousal support – attacks on personal character have limited basis in modern concepts of spousal support. Proof of disability was established with support of a treating physician narrative. Income imputed to TM equivalent to ten hours of minimum wage work. Spousal support payable at the high range of the *Spousal Support Advisory Guidelines*. TM awarded spousal support retroactive to date of application not date of separation. Retroactive award discounted for tax implications.

<p><i>THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.</i></p>

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Heard: February 22, 23, 2021 in Sydney, Nova Scotia

Written Release: May 12, 2021

Counsel: TM, Self-Represented
Darren Morgan, counsel for the Respondent

Overview

[1] TM is seeking spousal support from RR on a compensatory and non-compensatory basis, citing their lengthy relationship, the fact she is disabled and the disparity between their respective incomes. She is seeking spousal support retroactively and prospectively, without a termination date or until RR retires. TM is also seeking compensation from RR based on unjust enrichment.

[2] RR disputes that TM is entitled to spousal support. He argues TM has engaged in fiscally irresponsible and criminal behaviours that should disentitle her to support. RR also claims TM has not met the burden of proving she is disabled. RR asserts it would be unjust and inequitable for TM to share in his assets, namely his home and pension. He argues that TM has failed to demonstrate unjust enrichment.

Background and Procedural History

- The parties agree they were in a common law relationship from September 1999 to January 2016; a little over 16 years. TM was born in October 1972 and was 44 when the parties separated. RR was born in December 1958 and was 58 when the relationship ended. The parties have no children together.
- TM started her application in January 2018 seeking spousal support, retroactive to January 2016, and coverage on RR's medical insurance. She amended her application in September 2018 to include a claim of "unjust enrichment - division of pension and division of property".
- TM represented herself. She hired a lawyer to prepare affidavits and a pretrial brief on her behalf. RR was represented throughout by legal counsel.
- The parties participated in the conciliation process during the summer of 2018 but were unable to reach an agreement. At the first court appearance in November 2018 the matter was referred to a settlement conference scheduled for February 2019.
- In February 2019, the settlement conference justice directed a detailed list of financial documents to be disclosed by RR prior to the continuation of the settlement conference scheduled for March 2019. RR's request to adjourn the March settlement conference was denied with the settlement conference judge finding that counsel for RR had not exercised due diligence in providing financial disclosure as directed.
- The matter did not settle and the parties appeared for a conference in May 2019. That conference was adjourned to July 2019 to allow both parties an opportunity to exchange additional disclosure. At the conference held in July 2019, disclosure in relation to RR's pension remained outstanding.
- At the Date Assignment Conference held in October 2019, disclosure in relation to RR's pension had still not been filed. An Order for Production in relation to the pension was granted, to be drafted by counsel for RR, and the matter was adjourned to January 2020.
- The January 2020 date was adjourned at the request of counsel for RR and the matter was rescheduled to February 5, 2020.

- Counsel for RR did not file the Order for Production until February 4, 2020 and, as a result, information about RR's pension remained unavailable. The Court contemplated costs against RR, noting yet another delay due to his outstanding disclosure, but deferred the issue of costs to March 2020.
- In March 2020, RR's pension information was finally made available and the parties participated in a second settlement conference in June 2020. The matter resolved in principle and a review hearing was scheduled for July 2020 to confirm the agreement. Upon review, however, the court was advised that hearing dates were required.
- The matter was heard on February 22 and 23, 2021 by cross-examination of affidavit evidence. In addition to providing her own testimony, TM called her mother SM, and her doctor, Dr. P, as witnesses. RR testified and did not call any other witnesses.
- Counsel for RR filed a written closing submission on March 18, 2021. TM elected to make an oral closing submission and did so on March 23, 2021.

Issues

1. Was there unjust enrichment? If so, does TM have a claim against the assets held by RR?
2. Is TM entitled to spousal support? If so, how much spousal support is payable and for how long?
3. Is TM entitled to retroactive spousal support? If so, how much?

[3] I will deal with TM's claim against the assets of RR first as the determination of this matter may impact upon the assessment of need as it relates to spousal support.

Issue 1: Was there unjust enrichment? If so, does TM have a claim against the assets held by RR?

Position of the Parties

Position of TM

- TM claims an equalization payment from RR with respect to the home they lived in together.
- TM requests an order that RR's pension be divided at source for the length of their relationship.
- TM argues that RR was unjustly enriched by her efforts in that:
 - TM was living in the home owned by her father before RR moved in and RR brought only his clothes and a couch into the home.
 - RR was only able to eventually take title of the home because of his relationship with TM.
 - TM contributed to the costs of running the household through the course of their relationship and was responsible for paying the household bills.
 - TM at one point stood as a guarantor of a mortgage on the home.
 - RR promised TM's father that he would never take the home away from TM.
 - RR now owns the home for his use only at TM's complete exclusion.
- TM cites the *Pension Benefits Act*, SNS, 2011, c. 41 and Regulations as applicable noting s. 2(ax)(v)(2) of that Act which defines "spouse" as including two people who are not married but have been cohabitating for specified periods of time.
- TM notes that in 2016 RR identified TM as being his "spouse" in his designation of beneficiary to his pension.

Position of RR

- RR argues that TM has not proved the elements of unjust enrichment.
- RR denies that TM is entitled to any share of the equity in the home or pension:

- RR claims he bought the home from TM's father to alleviate financial pressures being experienced by TM's father.
 - In the years after he bought the home, RR claims TM had little to no employment income and did not contribute to the costs of home ownership.
 - TM has not provided reliable evidence to quantify any amount which she contributed to the home.
 - TM left household bills unpaid, causing financial stress and hardship to RR.
 - RR argues he has borne sole financial responsibility for the debt on the home apart from a short period of time when TM was a guarantor.
 - RR says he did not make any promises to TM's father regarding TM and the home.
- RR does not dispute that TM is a spouse as defined by the *Pension Benefits Act* but claims that his accumulation of pension benefits started before his relationship with TM and continued without any significant contribution from TM. RR claims a division of the pension would be inappropriate.
 - RR argues that while the *Pension Benefits Act* allows for a division of pension benefits for parties who have cohabitated, it does not mandate such a division.

Applicable Law

[4] The Supreme Court of Canada in **Kerr v. Baranow**, 2011 SCC 10, and **Moore v. Sweet**, 2018 SCC 52, set out a principled approach to unjust enrichment. To establish unjust enrichment TM must prove:

1. RR received a benefit;
2. TM suffered a loss corresponding to the benefit; and
3. there is no juristic reason for the benefit and the loss.

[5] The benefit received must be tangible, even if not permanent. The loss must relate to the benefit. Mutual conference of benefits by the parties will not itself deprive a party to an unjust enrichment claim.

[6] Analysis of the third element, the absence of a juristic reason, occurs in two stages. First, TM must demonstrate that there is no justified reason for RR to retain the benefit at her expense such as by operation of law, gift, or agreement. Once this has been established, it is open for RR to argue there is a reason why the enrichment should be retained. This is when I may consider the reasonable expectations of the parties, as well as moral or policy- based arguments.

[7] Once the elements of unjust enrichment have been established, then the remedy must be considered. The objective of the remedy is restitution. I may, depending on the circumstances, award the claimant monetary relief or an interest in property. In most cases a monetary award is appropriate.

[8] There are two different approaches to valuation of a monetary award. The award may be based on “value received” or “fee-for-service” or the award may be based on a value survived basis. To receive an award on the value survived basis, the claimant must show there was a joint family venture and there is a link between contribution to the joint family venture and the growth of the asset or wealth.

[9] Whether there was a joint family venture is a question to be determined by analyzing the facts of any given case. It cannot be assumed. The Court may consider, among other things, mutual effort, economic integration, intent, and priority of the family, when assessing joint family venture.

[10] When a joint family venture has been established, the “mutual conferral of benefits” may be considered when determining remedy. A monetary award may be calculated based on a share of the accumulated wealth that is proportionate to the applicant’s contributions. As part of this analysis, the respective contributions of the parties must be considered to determine the claimant’s proportionate share based on a “reasoned exercise of judgment in light of all of the evidence.” **Kerr v. Baranow**, *supra*, para 102.

Findings

[11] In 1998 TM’s father bought the home in question at an auction for \$27,800 so that TM could have a place to live with her children. TM’s father held title to the home and was paid rent for the use of the home.

[12] In 1999 RR moved in with TM and her children. There was some question about how well appointed the home was when RR moved in. I find it more likely than not that the house was fully equipped with furnishings and appliances when RR

moved in because TM and her children had been living there for some time before RR moved in. I accept TM's evidence that RR brought only his personal belongings and a couch with him into the home.

[13] In 2005 TM's father became unwell and could no longer be financially responsible for the home. TM's father executed a deed for the property to RR in RR's name only and RR alone took out a mortgage on the home in the amount of \$22,750. TM characterizes this transfer as a gift from her father. RR characterizes this transfer as a favour to TM's father. I find it was likely a combination of both. There is no evidence that TM's father was paid anything for this transfer of property. RR was able to take title without a down payment and presumably there was some equity in the home that supported RR's mortgage on the property. Both TM and RR benefitted from the transfer in that they were able to stay in the home. I find that TM's father transferred the property to RR because he was cohabitating with TM.

[14] In 2013 the home was re-mortgaged by RR for \$58,000. TM was a guarantor for that mortgage. In 2014 the home was remortgaged again by RR for \$70,400 and TM was no longer a guarantor. TM moved out of the home in January 2016.

[15] Throughout the course of the relationship, I find that it was TM's chore to pay the household bills. TM paid the household bills from the income of both parties although they each maintained separate bank accounts. In his affidavit RR claimed he paid all expenses associated with the home but in his oral testimony he acknowledged that TM paid bills from her own income as well. I find the latter more likely: each party contributed to the costs of maintaining the home for the purpose of their cohabitation.

[16] For the first ten years of their relationship, TM was gainfully employed. TM testified she earned as much as RR during those years and contributed equally to the running of the household. RR disputes that fact. For the last six years of their relationship, TM's income was limited to disability benefits and her ability to contribute to household expenses lessened. However, despite any discrepancies between their income, I find that both parties contributed to economic implications of their cohabitation: shelter, food, utilities, etc.

[17] I am satisfied that TM has established a claim of unjust enrichment. RR received a benefit. As a result of his relationship with TM, RR was able to move into a fully furnished home and eventually take ownership of that home without a down payment or any other investment or savings. During their relationship, TM contributed to the financial implications associated with their relationship including

the payment of household bills and, at one point, guaranteeing the debt on the home. At the end of their cohabitation, RR has an unequal distribution of the wealth in that he owns the home and all the equity associated with it. RR's gains come at a loss to TM who remains uncompensated for her contributions to the home. I am satisfied that RR is "leaving the relationship with a disproportionate share of the wealth that accumulated as a result of the parties' joint efforts," **Kerr v. Baranow**, *supra*, para 142.

[18] There is no reason that justifies this inequity. I do find that TM was sometimes derelict in her duty to pay the bills and, on occasion, bills went unpaid. I find it more likely than not that this was due to the limited total household income available to pay bills. When asked about bills going unpaid, RR testified: "A few times we ran short on funds." When asked why, RR responded: "Because there was no money in the bank." I do not find any failure on behalf of TM to pay household bills as reason to deny her a remedy to the unjust enrichment that I have found to exist.

[19] TM and RR are in agreement that the appropriate remedy in relation to the home, should unjust enrichment be established, is a monetary award based on the value of the home, less the mortgage and disposition costs, at the date of separation.

[20] In her testimony, TM agreed that the value of the home at separation was \$95,000 less the mortgage balance of \$64,807 for an equity value of \$30,193. The parties agreed to a reduction of 5% for disposition costs on the value of the home as \$4,750 which reduces the equity in the home to \$25,443. An equal share of this net equity would be \$12,721.50.

[21] The parties did not agree upon the remedy in relation to RR's pension should unjust enrichment be established.

[22] RR is correct in his assertion that TM does not have automatic entitlement to a portion of his pension by virtue of the *Pension Benefits Act*. As Justice Jollimore found in **Murray v. McDougall**, 2015 NSSC 215, at paragraph 9, the *Pension Benefits Act of Nova Scotia* (now R.S.N.S. 1989, c. 340) and the Regulations thereto, does not address a person's entitlement to a share of his or her spouse's pension: it describes how the division is to be effected. ... If unmarried, an unjust enrichment claim must be made and the Supreme Court of Canada's decision in **Kerr v. Baranow**, 2011 SCC 10 is applicable.

[23] Having found unjust enrichment, I must consider the concept of joint family venture when determining the appropriate remedy in relation to TM's claim against

RR's pension. As discussed previously, I am satisfied that, although the parties maintained separate bank accounts, the parties worked together and were integrated in addressing the economic implications and demands of their cohabitation. There is evidence that RR, at one point, intended this asset to be shared by having designated TM as a beneficiary to his pension.

[24] I must also consider the respective contributions of the parties to the accumulation of wealth associated with the pension. TM's claim is grounded in the argument that she should be entitled to the wealth that accumulated from funds that were diverted from the joint family venture that she and RR shared into the pension now held solely by RR. I must engage in a reasoned exercise of judgment in determining TM's claim, considering all the evidence. While TM was employed during the first 10 years of her relationship with RR, I find it more likely than not that her income was lower than RR's. Certainly, after 2010, TM's income was significantly lower than RR's. While a portion of RR's income may have been diverted from the home into the pension, TM's financial contribution was significantly lower than RR's. I am not satisfied that it is appropriate or just that TM should now share equally in RR's pension benefits.

Issue 2: Is TM entitled to spousal support? If so, how much spousal support is payable and for how long?

Position of the Parties

Position of TM

- TM claims she is entitled to spousal support on a compensatory and non-compensatory basis.
- TM describes her common law relationship with RR as long term.
- TM argues there is significant disparity of income between RR and herself.
- TM claims she has a long-standing disability related to anxiety, depression and fibromyalgia that culminated in 2009-10.
- TM acknowledges that physical injuries she sustained in an accident after separation have also contributed to her disability.
- TM says she is permanently disabled from any form of employment.

- TM contends it is not fair that she now must “do without.”
- TM seeks spousal support in the mid to high range of the *Spousal Support Advisory Guidelines*

Position of RR

- RR disputes that TM is entitled to spousal support.
- RR denies that TM has contributed in any way to his career advancement.
- RR asserts that TM’s conduct disentitles her to spousal support:
 - RR says TM caused him financial stress by neglecting to pay household bills.
 - RR claims TM placed him at risk of criminal sanction and physical harm because of her conduct.
 - RR maintains that TM abuses cocaine.
 - RR argues that TM’s behaviour contributed to a judgment being entered against him in relation to a 2012 Honda Civic.
- RR argues that TM has re-partnered and her new relationship negates her claim of entitlement.
- RR asserts that TM has failed to prove she is disabled.
- Should the Court find that TM is entitled to spousal support, RR argues that income should be imputed to TM when calculating how much spousal support should be paid.
- If TM is entitled to prospective spousal support, RR argues it should be time limited.

Applicable Law

[25] The onus is on TM to prove she is entitled to spousal support. Entitlement is a threshold issue. I must determine whether a spouse is entitled to spousal support before determining how much support should be paid and for how long.

[26] RR did not contest TM's claim that she was a spouse as defined by s. 2(m)(v) of the *Parenting and Support Act*, SNS, 2015, c. 4 (the *Act*).

[27] The *Act* authorizes me to order spousal support (s. 3) and outlines the factors I must consider when making a spousal support order (ss. 4 and 5):

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:
 - (a) the division of function in their relationship;
 - (b) the express or tacit agreement of the spouses that one will maintain the other;
 - (c) the terms of a marriage contract or separation agreement between the spouses;
 - (d) custodial and parenting arrangements made with respect to the children of the relationship;
 - (e) the obligations of each spouse towards any children;
 - (f) the physical or mental disability of either spouse;
 - (g) the inability of a spouse to obtain gainful employment;
 - (h) the contribution of a spouse to the education or career potential of the other;
 - (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;
 - (l) the ability to pay of the spouse who is obliged to pay support having regard to that spouse's obligation to pay child support in accordance with the Guidelines;
 - (m) the ability of the spouse with the right to support to contribute to the spouse's own support.
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

[28] There are three conceptual bases for spousal support: (1) contractual; (2) compensatory; and (3) non-compensatory.

[29] TM claims entitlement to spousal support on a compensatory and non-compensatory basis. No contractual claim was put forth in this case.

[30] Compensatory - A compensatory spousal support award is meant to provide compensation for economic loss or disadvantage experienced by the recipient spouse as a result of the roles adopted during the relationship, or for the economic benefits which the payor spouse got from the claimant's sacrifices and contributions, for which the claimant has not been adequately compensated: **Moge v Moge** [1992] 3 SCR 813, at paras 68-70.

[31] Compensatory support can be used to compensate a spouse for diminished earning capacity or loss of future prospects. It can also be used to allow the spouse to share in economic advantages enjoyed by the other spouse that his or her sacrifices made possible.

[32] Non-compensatory – A non-compensatory spousal support award is based on need and is meant to narrow the disparity between the financial circumstances of each spouse: **Bracklow v. Bracklow**, [1999] 1 SCR 420, at para 37.

[33] The concept of “need” goes beyond the ability to satisfy basic needs. I must consider the standard of living the spouses enjoyed while together and following separation: **Chutter v Chutter**, 2008 BCCA 507, at paras 55-61; **Gray v Gray**, 2014 ONCA 659, at para 27; **Berger v Berger**, 2016 ONCA 884, at para 117.

[34] If possible, “the spouses should have approximately the same standard of living upon separation without unreasonably encroaching on capital, at least until retirement”: **McKenzie v McKenzie**, 2014 BCCA 381, at para 108. However, it may be impossible for the parties to replicate the standard of living they enjoyed while married: **Yemchuk v Yemchuk**, 2005 BCCA 406, at para 49.

[35] Disparity in the financial circumstances of the parties alone does not lead to entitlement to spousal support based on need: **Berger**, *supra*, at para 53. The analysis of need must be considered within the definition of “reasonable need” as defined by s. 2(k) of the *Act*:

“reasonable needs” means whatever is reasonably suitable for the maintenance of the person in question, having regard to the ability, means, needs and circumstances of that person and of any person obliged to contribute to such reasonable needs.”

[36] Justice Forgeron in **Standing v. MacInnis**, 2020 NSSC 304, reviewed and summarized the law around imputation of income as follows:

[21] In **Parsons v. Parsons** 2012 NSSC 239, this court reviewed legal principles that apply when underemployment is alleged. Paragraph 32 states in part as follows:

[32] Section 19 of the *Guidelines* provides the court with the discretion to impute income in specified circumstances. The following principles are distilled from case law:

- A. The discretionary authority found in s. 19 must be exercised judicially, and in accordance with rules of reason and justice, not arbitrary. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before a court can impute income: **Coadic v. Coadic**, 2005 NSSC 291.
- B. The goal of imputation is to arrive at a fair estimate of income, not to arbitrarily punish the payor: **Staples v. Callender**, 2010 NSCA 49
- C. The burden of establishing that income should be imputed rests upon the party making the claim, however, the evidentiary burden shifts if the payor asserts that his/her capacity is compromised by ill health: **MacDonald v. MacDonald**, 2010 NSCA 34; **MacGillivray v. Ross**, 2008 NSSC 339.
- D. The court is not restricted to actual income earned, but rather, may look to income earning capacity, having regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors in determining what is reasonable and fair in the circumstances: **Smith v. Helppi**, 2011 NSCA 65; **Van Gool v. Van Gool** (1998), 113 B.C.A.C. 200; **Hanson v. Hanson**, [1999] B.C.J. No. 2532; **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009

- E. A party's decision to remain in a unremunerative employment situation, may entitle a court to impute income where the party has a greater income earning capacity. A party cannot avoid support obligations by a self-induced reduction in income: **Duffy v. Duffy**, *supra*; and **Marshall v. Marshall**, 2008 NSSC 11.

[37] The *Spousal Support Advisory Guidelines* (SSAGs) are not law but provide useful suggestions on appropriate ranges of spousal support in given circumstances. Both TM and RR referred to the SSAGs in their submissions to the Court related to spousal support.

Findings

Conduct

[38] Much of RR's argument that TM is not entitled to spousal support essentially centers on her alleged misconduct. TM was portrayed as a drug user and a drug seller. She was depicted as financially irresponsible. It was suggested, on several occasions, that she had started a new relationship before her relationship with RR ended.

[39] Spousal support is not fault-based. Concepts of spousal support entitlement, whether compensatory or non-compensatory, are steeped in principles of economic justice, not moralistic ideologies.

[40] Spousal misconduct may be relevant but only to the extent that it impacts on the economic circumstances of the parties: **Leskun v. Leskun**, [2006] 1 SCR 920.

[41] Whether TM had a sexual relationship with another person during the time she lived with RR is irrelevant. Whether TM ended her relationship with RR because she was having an affair is also irrelevant. I make no findings in this regard because it is none of my business.

[42] RR characterized TM as being heavily involved in illicit drug use and argued this should negate TM's entitlement to spousal support. TM admitted to using cocaine. She testified that she used cocaine regularly for a period of about six months. TM testified that RR engaged in drug use as well, a point that RR did not refute.

[43] Counsel for RR relied heavily on the report of social worker HC dated October 10, 2017 which was submitted to the Court as part of TM's medical reports, in his extensive cross-examination of TM in relation to her drug use. In this report, HC noted that TM reported that she had been using cocaine frequently for several months as a form of medication replacement. In the same report, TM also told HC that her use of cocaine did not cause her financial hardship as "several friends chip in on the cost" and did not affect her ability to work because she was on disability. I find it likely that TM was speaking truthfully to social worker HC about the economic impacts of her drug use in 2017.

[44] Counsel for RR invited me to draw my own conclusions about the impact drug use may have had on TM's life. I decline to make assumptions or draw a negative inference. The conduct of the parties in this regard is of limited relevance to the consideration of spousal support entitlement because there is no evidence of any associated negative economic impact.

[45] RR testified that he witnessed TM selling her medication from their property. RR argues TM's conduct placed him at risk that he could be criminally sanctioned or that he might be physically harmed. RR argues TM's conduct in this regard disentitles her to spousal support.

[46] TM denies selling her medication. TM was questioned at great length about a multiple prescriber notification in her medical file dated August 26, 2015. On July 11, 2015, Dr. S prescribed TM a 60-day supply of Ritalin and on August 10, 2015, Dr. P also prescribed TM a 60-day supply of Ritalin. Dr. P's note on TM's medical file was that he had given TM the prescription because Dr. S had moved to another province and going forward he, Dr. P, would be prescribing TM this medication.

[47] I am satisfied that there was an overlap in TM's medication prescriptions. I also accept RR's evidence that he witnessed TM selling her medication from their property on one occasion. No evidence was tendered about any link between this incident and the economic circumstances of the parties. There is no evidence of police involvement. The conduct of TM in this regard has limited relevance to the consideration of spousal support entitlement.

[48] RR argues that TM is not entitled to spousal support because she was financially irresponsible. Both parties testified that TM was charged with the role of paying the household bills. RR would often give TM money or his bank card to do this chore. RR claims TM, on various occasions, would leave the bills unpaid

resulting in late charges, bank notifications and service interruptions. RR argues his financial stability and credit rating has been negatively impacted by TM's conduct.

[49] I find on a balance of probabilities that it is more likely than not that the parties used whatever money they had together, albeit from separate bank accounts, to pay household bills and any delinquency in the payment of such bills related more to the limits of the total household income as opposed to the conduct of TM.

[50] I do find RR's submissions in relation to the 2012 Civic Honda to be somewhat persuasive. RR claims he purchased and financed the vehicle for TM's use. He argues that the car was impounded as the proceeds of crime after a raid at a social gathering attended by TM. RR says the vehicle was in poor condition (stains and burns, dirt and mold, front grill smashed and both bumpers damaged) once the car was returned to his possession. In addition to having to pay impound fees to have the car returned to him, RR now has a judgment against him by the finance company in the amount of \$12,774, being the amount still owing on the Honda plus costs. The vehicle continues to be stored at an auto salvage business.

[51] TM was evasive in her testimony about the Honda. TM claims that when she discovered she could no longer drive the vehicle because RR had discontinued the insurance payments, she parked the car in the field of a friend where it was subsequently impounded. TM's explanation in this regard did not present as reasonable or credible. I find it more likely than not that TM essentially abandoned the vehicle which was damaged and eventually impounded because of TM's conduct.

[52] Given my analysis of the underpinnings of spousal support, I do not accept RR's argument that TM's misconduct in relation to the Honda negates her entitlement to support. I do, however, find that the economic consequences associated with this misconduct should be considered when assessing the overall remedy awarded to TM. Neither party made submissions in this regard and I have no evidence of current value in the car, if any. I will revisit this issue when assessing TM's claim for retroactive support.

[53] In summary, attacking personal character is an ill-advised response to a spousal support claim. Concepts of "blame" and "guilt" have limited basis in modern analysis of spousal support entitlement. Courts must be vigilant in ensuring that antiquated notions of entitlement do not creep into modern jurisprudence.

Re-Partnering

[54] RR argues that TM should not be entitled to spousal support because she took up with a “common law partner”, CH, in the “almost immediate aftermath” of the end of the parties’ relationship. Whether TM started a relationship with CH before ending her relationship with RR is of limited relevance to my analysis of spousal support entitlement. The fact that TM has re-partnered is relevant only insofar as it impacts upon her economic situation. Re-partnering may have an impact on need.

[55] TM was questioned at length about the nature and tenure of her relationship with CH. TM testified that she started a relationship with CH soon after her relationship with RR ended. Since separating from RR, TM testified that she has, at times, resided with CH, with her daughter and with her mother, with whom she started residing most recently approximately three months before the hearing. TM admits she spent about approximately four years living with CH. TM characterized her current relationship status with CH as “dating.”

[56] TM testified that CH is in receipt of disability payment in the amount of \$700 more per month than her. (I estimate that CH earns approximately \$1,400 per month based on TM’s current reported income).

[57] RR asks the Court to reject TM’s testimony that CH does not earn any income apart from a small disability payment, submitting “TM resided with CH for several years because there was a financial benefit for her” and “her (TM’s) claim that she no longer resides with him (CH) is either inaccurate or an attempt at a conveniently-timed change of circumstances to aid her claim for support.”

[58] I am not prepared to draw any inferences in relation to CH’s income. The notion that a woman would only date a man if there were a financial benefit to her is a conclusion not based in logic but grounded in archaic gender-based stereotypes. I accept that that TM is now validly residing with her mother and that TM has had insufficient resources to secure stable housing of her own after separation.

[59] TM acknowledged that she did not file confirmation of CH’s income with the Court. However, counsel for RR did not request such information from TM. Furthermore, RR has also re-partnered. RR has been living with this new partner, LM, who is a cook in a restaurant, for approximately 4 years. Counsel for RR did not file financial information in relation to RR’s new partner. Also, when questioned by the Court about his expenses, RR acknowledges that LM buys groceries and pays some of the household bills. This fact was not made apparent by any of the documentation filed by RR with the Court.

[60] In short, there is insufficient evidence before me to suggest that the re-partnering of either party has diminished need or ability to pay.

Disability

[61] TM claims she is permanently disabled from any type of employment. She claims that she began to experience debilitating health issues in 2008-2009. Her attending physician, Dr. P., completed several claim forms in 2009 in support of TM's application for disability benefits under her private insurance plan. These claim forms, along with TM's complete medical file from Dr. P, were submitted to the Court.

[62] RR claims TM has failed to meet the evidentiary burden of proving that she is disabled and is not, therefore, entitled to spousal support. RR argues that TM failed to provide a medical report compliant with *NS Civil Procedure Rule (CPR)-Rule 55*. RR acknowledges that TM made her family physician, Dr. P, available for examination during the hearing but claims Dr. P's evidence does not support TM's claim to be disabled.

[63] I have considered the decision in **Downey v. Burroughs**, 2021 NSSC 147.

[64] Counsel for RR is correct. Dr. P did not provide an expert report compliant with *CPR 55.04*. In fact, Dr. P testified that he was not able to provide an expert opinion in relation to TM's ability to work. Counsel for RR argues the analysis ends there: TM did not meet the evidentiary burden to proving her disability.

[65] Dr. P did, however, provide a complete copy of his medical file in relation to TM. TM's medical records from Dr. P were filed with the Court at the request of RR. Counsel for RR agreed the contents of the medical file should be admitted into evidence and relied on portions of the medical file to highlight perceived misconduct by TM.

[66] I am satisfied that this medical file constitutes a treating physician's narrative in compliance with *CPR 55.14*. Dr. P's records were prepared for the predominant purpose of treating TM and they provide a narrative of the relevant facts observed and the findings made by Dr. P during his treatment of TM. As confirmed in **Downey v. Burroughs**, *supra*, at paragraph 16, it is presumed that the facts and observations made by a physician during treatment will be objective and reliable.

[67] Beginning in 2007 and continuing throughout the medical file, Dr. P made notes about TM struggling with anxiety and depression. He also made notes about TM suffering from fibromyalgia and essential tremors. Dr. P made note on several occasions that these issues had prevented TM from working. Over the course of his treatment of TM, Dr. P prescribed medications to address these conditions and he referred TM at various times to psychiatrists, physiotherapists, and a pain management clinic.

[68] The documents authored by Dr. P in support of TM's disability claims were also filed with the Court. These documents were prepared for the purpose of supporting TM's claim for disability benefits and do not, therefore, qualify as a narrative prepared for the predominant purpose of treating TM. The content of these documents, therefore, have been given very little weight in my overall analysis of Dr. P's evidence.

[69] Having thoroughly reviewed Dr. P's treating physician's narrative, I am satisfied, on a balance of probabilities, that TM has been experiencing mental health issues, related to anxiety and depression and physical incapacity, related to fibromyalgia, since 2007. This finding, coupled with the objective fact that TM has been in receipt of disability benefits in one form or another since 2010, satisfies me that TM is disabled.

[70] I accept that TM's physical impairment was likely exacerbated in 2017 because of a motor vehicle accident. The nature of TM's disability may have evolved since the date of separation. This, however, has not affected TM's income which has remained relatively the same since 2010, five years before the separation.

Determination of Income

[71] RR is employed as a heavy equipment operator. He occasionally earns overtime. His income has been consistent since 2015. RR provided income tax returns for the years 2015-2018. He also provided confirmation of income from his employer for the years 2015-2020. Confirmation of income provided by his employer varied slightly from information reported to Canada Revenue.

[72] I have relied on information contained in RR's income tax returns for the years 2015 -2018 and confirmation from his employer for the years 2019-2020 to assess annual income for RR as follows:

2015 - \$62,668
2016 - \$61,171
2017 - \$59,388
2018 - \$64,113
2019 - \$65,069
2020 - \$62,895

[73] For the purposes of considering spousal support, I have assessed RR's income to be \$62,550, which is his average income from 2015-2020.

[74] RR is asking that I impute income to TM in the amount of \$26,936 to reflect that TM has failed to demonstrate that she is disabled. This figure represents a 40-hour work week at minimum wage. RR argues that this imputed income should be considered in addition to the income TM receives from CPP disability benefits in my analysis of spousal support.

[75] I have reviewed the evidence and found that TM has met the civil burden of proving she is disabled.

[76] TM has a grade 10 education. She worked for the first 10 years of her relationship with RR as a labourer in a fish plant, a clerk in a retail store and at a call centre. Since 2010 however, TM's income has been primarily limited to disability benefits.

[77] In 2018 TM attempted, unsuccessfully, to re-enter the workforce by participating in a back to work program. The record of employment from the call centre where she worked reported that TM was terminated from her position during the probationary period. TM testified she discontinued her employment with the call centre because there was no part-time work or modified work hours available to accommodate her disability.

[78] TM's testimony suggests an acknowledgement of her ability to work part-time or modified hours. Considering TM's age, health, education, and employment history, I have determined it is reasonable and fair in the circumstances to impute income to TM at minimum wage (\$12.95) but only on a limited, part-time basis of 10 hours per week. TM would need to be accommodated at any job that she would be able to secure and her employment options are extremely limited given her lack of education, age, length of time out of the workforce and health issues. Therefore, I have imputed income to TM in the amount of \$6,734 per annum.

[79] I have relied on information contained in TM's income tax returns to assess her annual income as follows:

2015 - \$7,640 (CPP disability benefits)

2016 - \$7,722 (CPP disability benefits)

2017 - \$7,839 (CPP disability benefits)

2018 - \$11,201 (\$7,957 CPP disability benefits and \$3,244 employment income)

2019 - \$13,623 (\$8,140 CPP disability benefits and \$5,483 employment income)

2020 - \$8,295 (CPP disability benefits)

[80] For the purposes of considering spousal support, I have assessed TM's income to be \$15,029 (\$8,295 plus \$6,734).

Entitlement - Compensatory v. Non-Compensatory

[81] I must consider this issue in light of my previous finding that TM shall be compensated for her contributions to the relationship which left RR unjustly enriched. With the understanding that TM will receive an equalization payment representing half of the net equity of the home, TM's claim for spousal support on a compensatory basis is diminished. Furthermore, I do not find there is any need to compensate TM for any reduction in earning capacity or loss of future prospects resulting from her relationship with RR.

[82] However, even taking into consideration TM's successful claim against the home held by RR, I find that TM is entitled to spousal support on a non-compensatory basis, based on need. There is significant disparity between the income of TM and RR. Disparity alone does not establish necessity. Having an income of \$15,000, however, is a pretty good indicator of need.

Quantum and Duration

[83] With RR's income being assessed at \$62,500 (employment income) and TM's income being assessed at \$15,029 (CPP disability plus imputed income), the *Spousal Support Advisory Guidelines* "without child support" formula suggests a range for spousal support from \$980 (low) to \$1,144 (mid) to \$1,307 (high) for a duration of 8.25 to 16.5 years from the date of separation, subject to variation and review.

[84] Having regard to the ability, means, needs and circumstances of both TM and RR, as demonstrated in their statements of income and expenses and reflected

in their oral testimony, I find that it is appropriate that RR pay spousal support to TM in the amount of \$1,307 per month.

[85] The prospective amount of support ordered is at the high range of the Spousal Support Advisory Guidelines to reflect the fact that TM has a disability and limited means or ability to support herself. I have also considered in my assessment that TM has already received a small monetary settlement in relation to the motor vehicle accident and that matter is now settled.

[86] TM had requested that RR reinstate her on his medical plan. I heard no evidence on what cost implications that might have for RR, if any. I have made this spousal support award contemplating RR will not reinstate TM on his medical coverage plan and that TM will assume all costs of her disability.

[87] I therefore direct that RR must pay TM spousal support in the amount of \$1,307 starting June 1st, 2021 and continuing the 1st day of every month thereafter until further Order of the Court.

[88] The spousal support award is reviewable upon RR's retirement.

Issue 3: Is TM entitled to retroactive spousal support? If so, how much?

Position of the Parties

Position of TM

- TM is claiming spousal support retroactive to the date of separation: January 2016.
- TM testified that upon separation, the parties agreed that RR would keep TM covered on his medical insurance and pay the costs (insurance and loan payments) associated with their 2012 Honda Civic which TM would keep in her possession for her own personal use.
- TM stated that she started her application for support in January 2018 when it became clear to her that RR had removed her from his medical coverage and was no longer paying for the car insurance.

Position of RR

- RR denies TM is entitled to spousal support but argues that if spousal support is ordered, it should be payable retroactively no further back than January 2018, the date TM applied for spousal support.
- RR acknowledges that TM had the car in her possession for “months” before it was impounded and released back into his possession.
- RR claims he cannot afford to pay a lump sum of retroactive spousal and that any retroactive award should be paid in monthly installments over a lengthy period.

Applicable Law

[89] **Kerr v. Baranow**, *supra*, confirms the **D.B.S. v. S.R.G.**, 2006 SCC 37, analysis applies to the determination of retroactive spousal support, with some adaptation to reflect the fact that the spousal support relates to a claim between adults and not children. When assessing whether to order spousal support retroactively I must consider:

- the reasonable excuse for any delay in seeking support by the recipient;
- the presence or absence of blameworthy conduct by the payor;
- the circumstances of the support recipient; and
- any hardship to the payor occasioned by a retroactive award.

[90] I may apportion more weight to concerns about notice, delay, and misconduct than I might otherwise in a child support claim. Failure to move for interim relief is not a bar to retroactive support: **Kerr v. Baranow**, *supra*, para 208.

Findings

[91] January 2018 is the date that TM formally provided RR with notice of her intention to seek spousal support. Prior to that date, I find it more probable than not that the parties were operating on an agreed upon arrangement in relation to the breakdown of their relationship: TM was using the Honda and RR was paying for it. TM acknowledges the breach of that agreement was the reason she filed an application for support. The conduct of TM in relation to Honda, at least in part,

contributed to the break down of the agreement. For these reasons, I am not inclined to reach further back than January 2018 in assessing TM's claim for relief.

[92] It has been three and a half years since TM filed an application for spousal support. In reviewing the progress of the file, I note that much of the delay can be associated with RR's failure to disclose or requests for adjournments. Non-disclosure is blameworthy conduct. Any hardship resulting from a retroactive award that is compounded by delay from non-disclosure should be borne solely by the party who failed to disclose.

[93] Furthermore, given the significant disparity of income between the parties, RR was ill-advised to continue to dispute entitlement. Any hardship associated with the delay in addressing his *prima facie* obligation must also be borne by RR alone.

[94] RR must pay TM spousal support retroactive to January 2018. The total amount of support from that date forward would be \$53,587 (\$1,307 per month for 2018, 2019, 2020 and 5 months in 2021). However, there are tax implications that must be considered when ordering retroactive spousal support.

[95] Both TM and RR asked the Court to refer to the SSAGs when determining spousal support. The SSAGs make recommendations on the range of spousal support payable based on the assumption that such support payments will be made periodically.

[96] Spousal support payments that are periodic attract different tax rules than lump sum spousal support payments. Periodic payments are tax deductible by the payor and considered taxable income for the recipient. Lump sum spousal support payments are not tax deductible by the payor.

[97] A retroactive lump sum spousal support based on a calculation of periodic payments \$1,307 multiplied by 41 months must be adjusted, therefore, because embedded in the figure of \$1,307 is a tax assumption that is not applicable to the lump sum award.

[98] Counsel for RR did not make submissions in relation to the tax implications of a retroactive spousal support award. TM hired a lawyer for limited purposes, including the preparation of a pre-hearing brief. In that brief, TM claimed a monthly periodic spousal support award of \$1,243 citing this amount, after tax, to be \$818 per month. Counsel did not explicitly state how this after-tax discount was calculated.

[99] Like the facts in **Volcko v. Volcko**, 2020 NSCA 68, counsel for RR did not identify the classification or taxability of arrears as an issue for me to determine. I find the approach suggested by TM to be reasonable under the circumstances. Absent any submission from RR on the issue, I am adjusting the lump sum retroactive spousal award to reflect tax considerations as put forth by TM: TM's after tax monthly support payment multiplied by the number of months owing.

[100] RR is ordered to pay TM spousal support retroactive to January 1, 2018. Calculations for TM's after-tax spousal support benefit as determined by the Divorce Mate application of the SSAGs is \$905, after tax rate (including TM being in receipt of employment income imputed to her). RR, therefore, must pay TM retroactive spousal support in the amount of \$37,105. This amount shall be paid to TM in the amount of \$500.00 per month until the total of the sum is repaid. These periodic payments shall not be tax deductible for RR or considered taxable income in the hands of TM. This amount should not be included in any future assessment of spousal support as it reflects payment for the period of January 1, 2018 to May 1, 2021.

Conclusion

[101] TM is successful in her claim against the assets of RR based on unjust enrichment. RR failed in his claim that TM's conduct has disentitled her to spousal support. TM has established she is entitled to spousal support on non-compensatory grounds.

[102] An Order will issue for the following:

[103] In relation to the home, RR must make an equalization payment in the amount of \$12,721.50 to TM for her interest in the home. This payment must be made within 60 days of this decision being rendered.

[104] RR must pay TM spousal support in the amount of \$1,307 starting June 1st, 2021 and continuing the 1st day of every month thereafter until further Order of the Court.

[105] RR is ordered to pay TM spousal support retroactive to January 1, 2018 in the amount of \$37,105 (after tax considerations). This amount shall be paid to TM in the amount of \$500.00 per month until the total of the sum is repaid. These periodic payments shall not be tax deductible for RR or considered taxable income in the hands of TM.

[106] RR shall maintain TM as the beneficiary of his Manulife Life Insurance Policy ending #38338 in the face amount of \$106,000 for so long as spousal support is payable and in the event that he does not, the spousal support of the face amount of the policy of \$106,000 shall be a first claim against his estate.

[107] The parties have 30 days following the release of this decision to make submissions with respect to costs.

Marche, J.