

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: MacIntyre v. Spooney, 2022 NSSC 281

Date: 20221004
Docket: 119892
Registry: Sydney

Between:

Pamela MacIntyre

Applicant

v.

Derrick Spooney

Respondent

LIBRARY HEADING

Judge: The Honourable Justice Pamela Marche

Heard: August 4, 2022, in Sydney, Nova Scotia

Written Decision: October 4, 2022

Subject: Unjust Enrichment; Prospective Spousal Support; Retroactive Spousal Support; Nova Scotia *Parenting and Support Act*; Nova Scotia *Civil Procedure Rule 74*; *Spousal Support Advisory Guidelines*

Summary: The parties, both in their early fifties and with no children between them, lived together for nearly nine years. Ms. MacIntyre was found to have an income of \$31,751 and Mr. Spooney was found to have an income of \$114,347.

Ms. McIntyre claimed unjust enrichment and requested the home in which she and Mr. Spooney resided, owned solely by Mr. Spooney, be sold and the net proceeds divided. She also claimed spousal support, on a compensatory and non-compensatory basis, at the high range of \$1,170 for a period of eight years commencing September 1, 2022. Ms. MacIntyre further sought spousal support in this amount retroactive to November 2020.

Mr. Spooney did not participate in the final hearing.

Issues:

- (1) Has Ms. MacIntyre established the elements of unjust enrichment? If so, what is the appropriate remedy?
- (2) Is Ms. MacIntyre entitled to spousal support? If so, how much and for how long?
- (3) Is Ms. MacIntyre entitled to retroactive spousal support?

Result:

Although the hearing was uncontested, the Court must be satisfied the elements of the legal claims advanced have been proven before granting relief.

Ms. MacIntyre was found to have contributed half of the down payment toward the purchase of the home owned by Mr. Spooney. She was also found to have made payments on the mortgage and contributed to the continued upkeep of the property. Having successfully established Mr. Spooney was unjustly enriched, the Court awarded Ms. MacIntyre a joint interest in the property and directed that the home be sold and the proceeds divided after making adjustments for any spousal support owed, outstanding court costs and mortgage payment arrears.

Ms. MacIntyre established entitlement to spousal support on a compensatory basis. She paid for expenses which allowed Mr. Spooney to complete a scaffolding course thereby significantly increasing his income. Disparity in income alone does not prove entitlement to spousal support. Ms. MacIntyre established entitlement to spousal support on a non-compensatory basis upon an analysis of the reasonable needs and means of both parties.

Spousal support was awarded to Ms. MacIntyre at the mid range of \$1,024 for a period of six years, commencing November 1, 2020. The commencement date sought by Ms. MacIntyre was subsequent to her date of application and is not, therefore, a claim for retroactive support.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.
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Heard: August 4, 2022, in Sydney, Nova Scotia

Written Release: October 3, 2022

Counsel: Alan Stanwick, counsel for the Applicant
Derrick Spooney, Self-Represented

Written Submissions: August 23, 2022, Counsel for Ms. MacIntyre
Supplementary Submissions: September 22, 2022, Counsel for Ms. MacIntyre

By the Court:

Overview

[1] Pamela MacIntyre and Derrick Spooney lived together for almost nine years. Ms. MacIntyre claims unjust enrichment as the basis for her request that the home in which she and Mr. Spooney resided, owned solely by Mr. Spooney, be sold and the net proceeds be shared between them. Ms. MacIntyre is also seeking spousal support from Mr. Spooney on a compensatory and non-compensatory basis, both prospectively and retroactively.

Background and Procedural History

[2] The parties were in a common law relationship from July 2010 to January 2019. Ms. MacIntyre was born in September 1968 and was fifty when the parties separated. Mr. Spooney was born in October 1966 and was fifty-two when the relationship ended. The parties have no children together. Ms. MacIntyre is employed as a cleaner and Mr. Spooney is a scaffolder who works out of province on a rotational basis.

[3] Ms. MacIntyre started an application in October 2020 seeking spousal support, retroactive to June 2020, exclusive occupation of the residence, a “division of assets” and costs. At the same time, Ms. MacIntyre filed a motion for interim relief for spousal support and interim exclusive possession of the home.

[4] In December 2020, the Court awarded Ms. MacIntyre interim exclusive possession of the home. Subsequently, there were multiple court appearances to deal with issue of interim spousal support. On several occasions Mr. Spooney did not appear because he had not been properly notified of the court appearance by counsel for Ms. MacIntyre. On two occasions, Mr. Spooney was granted an adjournment so he could obtain legal counsel. On Mr. Spooney’s second adjournment request, the Court awarded costs against him, given the ongoing delay and his continued lack of disclosure.

[5] Some of the delay is attributable to neither party. In September 2021, the scheduling office erroneously removed the hearing, without consulting the Court or counsel for Ms. MacIntyre. In December 2021, hearing was removed from the docket due to Covid-19 restrictions. The interim hearing was ultimately scheduled for April 2022 and in March 2022, the Court granted a motion for substituted service to provide Mr. Spooney with notice of the hearing.

[6] On April 8, 2022, Mr. Spooney presented via videoconferencing for the interim hearing. (At that time, the Court was unable to proceed in person due to continued Covid-19 restrictions). Counsel for Ms. MacIntyre objected to Mr. Spooney giving evidence due to his failure to disclose as directed. The Court noted, however, that Mr. Spooney had filed a Statement of Property, Statement of Income (with income information for 2018, 2019 and 2020) and a Statement of Expenses. Counsel for Ms. MacIntyre had not received this documentation. Ultimately, there were

technical difficulties that made it impossible to proceed via videoconferencing. The hearing was adjourned upon agreement from both parties that all matters would be dealt with on a final basis on August 4, 2022.

[7] Mr. Spooney did not appear for the August 2022 hearing, nor did he file updated financial information or affidavit evidence as directed by the Court. The Court, being satisfied that Mr. Spooney was aware of the hearing date and had ample opportunity and direction on how to participate in the court proceeding, proceeded to final hearing in Mr. Spooney's absence.

[8] Although the hearing was uncontested, the Court must still be satisfied the elements of claims advanced have been established in a manner adequate to grant the relief sought. The Court considered the affidavit evidence, testimony and court forms of Ms. MacIntyre, uncontroverted by Mr. Spooney, as well as the court forms filed by Mr. Spooney, referenced previously, which were entered as exhibit evidence by Ms. MacIntyre.

Issues

1. Has Ms. MacIntyre established the elements of unjust enrichment? If so, what is the appropriate remedy?
2. Is Ms. MacIntyre entitled to spousal support? If so, how much and for how long?
3. Is Ms. MacIntyre entitled to retroactive spousal support?

Issue 1 - Has Pamela MacIntyre established the elements of unjust enrichment? If so, what is the appropriate remedy?

Position of the Parties

Position of Pamela MacIntyre

[9] Ms. MacIntyre is seeking an Order that the house located at 61 Fraser Avenue, Sydney Mines, Nova Scotia, be sold and the proceeds shared equally between the parties, with an adjustment to account for any amount of spousal support owed to her by Mr. Spooney. Ms. MacIntyre is seeking this relief based on unjust enrichment.

[10] Ms. MacIntyre acknowledges the home in question is registered in the name of Mr. Spooney solely. Ms. MacIntyre claims, however, that she paid one half of the \$10,000 down payment for the home. Ms. MacIntyre further contends that she contributed to the ongoing payment of the mortgage and other costs related to the maintenance of the property.

[11] Ms. MacIntyre acknowledges that the mortgage has fallen into arrears subsequent to her being awarded interim exclusive possession of the home.

Position of Derek Spooney

[12] Mr. Spooney did not put forth a position despite being given ample opportunity to do so. Mr. Spooney did not take any step necessary to contest Ms. MacIntyre's claims.

Applicable Law

[13] 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 the common law remedy of unjust enrichment. To establish unjust enrichment Ms. MacIntyre must prove:

1. Mr. Spooney received a benefit.
2. Ms. MacIntyre suffered a loss corresponding to the benefit; and
3. there is no juristic reason for the benefit and the loss.

[14] 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.

[15] Analysis of the third element, the absence of a juristic reason, occurs in two stages. First, Ms. MacIntyre must demonstrate that there is no justified reason for Mr. Spooney 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 Mr. Spooney to argue there is a reason the enrichment should be retained (such as the reasonable expectations of the parties or moral or policy-based arguments).

[16] Once the elements of unjust enrichment have been established, the remedy must be considered. The objective of the remedy is restitution. The Court may, depending on the circumstances, award the claimant monetary relief or an interest in property.

Findings

[17] The standard prescribed court form *Notice of Application* is a check-the-box form. The design of this form can result in pleadings that are sparse. The form, as filed by Ms. MacIntyre, contained the general pleading "division of assets" in answer to an "Other" checkbox.

[18] It is somewhat concerning that Mr. Spooney was not put on notice of the specific relief that Ms. MacIntyre was seeking, (i.e. the sale of the home as a remedy to unjust enrichment). Earlier court appearances in which Mr. Spooney had participated were focused on interim spousal support.

[19] That being said, Mr. Spooney was personally served with Ms. MacIntyre's Application in which she claimed a division of assets. Further, there was agreement in April 2022 from both parties to deal with all issues on a final basis in August 2022. Mr. Spooney was given several opportunities to consult with legal counsel and was advised that a court order could be issued in his absence. And so, while it is advisable that pleadings be drafted with a level of specificity to allow a Respondent to know and speak to the case being advanced against them, ultimately, in this case, Mr. Spooney was unable to speak to the specific issue of unjust enrichment and sale of the home because he stopped participating in the court process.

[20] I am satisfied that Ms. MacIntyre has established the elements of unjust enrichment. I find that Mr. Spooney received the benefit of title to the property due, in equal part, to Ms. MacIntyre's financial contribution (she paid half of the down- payment, she made ongoing payments on the mortgage, and she contributed to other costs of property upkeep). I further find that Ms. MacIntyre suffered a corresponding economic loss because of this benefit to Mr. Spooney (she spent her money). Mr. Spooney offered no evidence to suggest a juristic reason for the benefit and loss.

[21] Counsel for Ms. MacIntyre asked only for an Order that the house be sold, and the proceeds divided. Given the circumstances, I find it appropriate to provide a more detailed disposition. I find it just to award Ms. MacIntyre a joint interest in the real property located at 61 Fraser Avenue, Sydney Mines, Nova Scotia, as if Mr. Spooney had executed and delivered an instrument, transferring such an interest to Ms. MacIntyre, as per *Nova Scotia Civil Procedure Rule 74.03 (2)*.

[22] Further, pursuant to *Nova Scotia Civil Procedure Rule 74*, I am directing that the property be sold so that Ms. MacIntyre's legal interest may translate into monetary relief to which I find she is entitled as a result of Mr. Spooney's unjust enrichment. The sale will proceed as follows:

- Ms. MacIntyre will continue to have exclusive occupation of the home. Ms. MacIntyre will be responsible for paying the home's existing mortgage, property taxes and utilities until the home is sold.
- The home will immediately be listed with a realtor of Ms. MacIntyre's choice (called the "listing agent").
- If the parties cannot agree on any step of the sale, Ms. MacIntyre will be responsible for the home's sale, the sale price, accepting or rejecting offers, making counter offers and the closing terms.
- Ms. MacIntyre and Mr. Spooney will execute any documents and do all things required by the listing agent.
- The net proceeds of the sale are the proceeds after the usual adjustments on closing including the listing agent's commission fee, value and title opinion, legal fees and disbursements on closing, and payment of the outstanding mortgage.
- Ms. MacIntyre will be solely responsible for any arrears that have accumulated on the mortgage during the time she has had exclusive possession of the home.
- The net proceeds of the sale shall be held in trust by counsel for Ms. MacIntyre and shall be distributed equally between the parties after adjusting for any arrears on the mortgage owed by Ms. MacIntyre and any spousal support or court costs owing by Mr. Spooney to Ms. MacIntyre.
- The Court expressly reserves its jurisdiction to provide further direction or orders related to the sale of the home, including sale by auction, sheriff or other expedited process.

Issue Two - Is Pamela MacIntyre entitled to spousal support? If so, how much and for how long?

Position of the Parties

Position of Pamela MacIntyre

- Ms. MacIntyre asserts her income should be set at \$37,755 based on her income tax information for the year 2021. She argues that income for Mr. Spooney should be set at \$114,347 based on the income tax information Mr. Spooney provided for the year 2020, given he failed to provide any other additional financial information.
- Ms. MacIntyre claims she is entitled to spousal support on a compensatory and non-compensatory basis:
 - When the parties began living together, Mr. Spooney was delivering pizzas and Ms. MacIntyre was paying most of the expenses. Ms. Spooney encouraged and supported Mr. Spooney in his effort to complete a scaffolding course which allowed him to significantly increase his income.
 - There is a significant income disparity between Ms. MacIntyre and Mr. Spooney
- Ms. MacIntyre seeks spousal support in the amount of \$1,170, which is in the high range of the Spousal Support Advisory Guidelines for a period of 8 years commencing September 1, 2022.

Position of Derrick Spooney

- At pretrial conferences, Mr. Spooney indicated an intention to dispute Ms. MacIntyre's entitlement to spousal support. Ultimately, however, Mr. Spooney did not contest Ms. MacIntyre's claim for spousal support.

Applicable Law

[23] The onus is on Ms. MacIntyre 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.

[24] The Nova Scotia *Parenting and Support Act*, S.N.S. 2015, c. 44, (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.

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

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

[27] 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.

[28] 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.

[29] 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.

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

“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.

[31] The *Spousal Support Advisory Guidelines* (SSAGs) are not law but provide useful suggestions on appropriate ranges of spousal support in given circumstances.

Findings

Determination of Income

[32] Mr. Spooney is employed as a scaffolder. He works out of province on rotation. Mr. Spooney provided income tax information for the years 2018-2020. He did not disclose income tax information for 2021 or year to date income information for the year 2022, as ordered by the Court.

[33] I have relied on information provided by Mr. Spooney for the years 2018-2020 to assess his annual income as follows:

- 2018 - \$121,523 (\$105,768 employment income from Safway Services Canada plus \$15,755 Employment Insurance)
- 2019 - \$102,567 (\$82,328 employment income from Aluma Safway plus \$20,239 Employment Insurance)

- 2020 - \$118,347 (\$99,755 employment income from Aluma Safway plus \$14,592 Employment Insurance and \$4000 Canadian Emergency Response Benefit).

[34] For the purposes of considering spousal support, I find Mr. Spooney's income to be \$114,347. This figure is reflective of the most current information available for Mr. Spooney for 2020, minus the CERB payment.

[35] Ms. MacIntyre is a cleaner at the Cape Breton Regional School Board where she has been employed for over 30 years. I have relied on information contained in Ms. MacIntyre's income tax returns to assess her annual income as follows:

- 2019 - \$29,769 (\$21,722 employment income plus \$8,047 Employment Insurance)
- 2020 - \$42,398 (\$25,518 employment income plus \$8,800 Employment Insurance and \$8,000 other)
- 2021- \$31,751 (\$14,199 employment income plus \$17,552 Employment Insurance)

[36] For the purposes of considering spousal support, I find Ms. MacIntyre's income to be \$31,751.

Entitlement - Compensatory and Non-Compensatory

[37] Ms. MacIntyre testified that she paid the household expenses while Mr. Spooney took the scaffolding course. She encouraged Mr. Spooney to take the scaffolding course, and he agreed to do so, because they wanted to buy a home together. Mr. Spooney's successful completion of the scaffolding course significantly improved his financial situation. He had previously been employed delivering pizzas.

[38] Ms. MacIntyre is entitled to share in the economic advantages enjoyed by Mr. Spooney because her sacrifices (i.e., "covering the expenses") made possible for Mr. Spooney to complete the scaffolding course and increase his earning potential and his employment income. Ms. MacIntyre contributed to the education and career growth of Mr. Spooney, as per s. 4(h) of the *Act, supra*. I find that Ms. MacIntyre is entitled to spousal support on a compensatory basis.

[39] Disparity of income alone does not prove entitlement to spousal support. It is insufficient to point simply to differences in income as being determinative of entitlement to spousal support. The reasonable needs of each party, including the ability, means, needs and circumstances of each person, must also be considered. Even in an uncontested matter, entitlement must be established before spousal support may be awarded.

[40] By choosing not to participate in the court hearing, Mr. Spooney did not challenge the evidence submitted by Ms. MacIntyre in terms of need. Given the circumstances of this case, it was necessary for the Court to review the Statement of Property, Statement of Expenses and Statement of Income filed by each party.

[41] Both parties claimed to be paying the mortgage on the home located at 61 Fraser Avenue, Sydney Mines in their sworn Statements of Property. I accept the uncontroverted evidence of Ms. MacIntyre that, apart from a short period after separation, she has been paying the mortgage (although she has recently fallen into arrears of mortgage payments). This reduces Mr. Spooney's claimed expenses by \$800 per month.

[42] In assessing his claimed deficit of \$1,831, Mr. Spooney framed his expenses within a declared income of \$29,841. I have found Mr. Spooney to have an income of \$114,347. By adjusting Mr. Spooney's declared income from \$29,841 to \$114,347, and by reducing Mr. Spooney's declared expenses by the mortgage payment of \$800, I find that Mr. Spooney's claimed monthly deficit was inflated and Mr. Spooney enjoys a monthly surplus of income.

[43] I am satisfied that the expenses claimed by Ms. MacIntyre were modest and reasonable. I find that Ms. MacIntyre has demonstrated a reasonable need and is entitled to spousal support on a non-compensatory basis.

Spousal Support - Quantum and Range

[44] Having determined Ms. MacIntyre is entitled to spousal support, I must now consider quantum and range.

[45] The *Spousal Support Advisory Guidelines* suggest the following range, using the without child support formula, given the respective income of the parties and the length of their relationship: Low - \$878; Mid - \$1,024 and High \$1,170. The suggested duration is a period of 4.25 to 8.5 years.

[46] I do not have any evidence as to what proceeds, if any, Ms. MacIntyre may receive upon the sale of the home and cannot, therefore, consider this factor when determining quantum of support. Having considered the respective age and employment history of the parties, in addition to the length of their relationship and their respective incomes and expenses, along with the strength of Ms. MacIntyre's entitlement claim, I find it reasonable to order spousal support in the mid range of \$1,024 for a period of six years.

Issue 3: Is Ms. MacIntyre entitled to retroactive spousal support? If so, how much?

Position of the Parties

Position of Pamela MacIntyre

- In the pleading Ms. MacIntyre filed with the court on October 23, 2020, she claimed spousal support retroactive to June 2020. In the final submissions filed by Ms. MacIntyre, however, she sought spousal support retroactive to November 2020.

Position of Derrick Spooney

- As previously indicated, Mr. Spooney did not appear in court to contest Ms. MacIntyre's claim.

Applicable Law

[47] *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.

Findings

[48] In her final submissions, Ms. MacIntyre claimed spousal support "retroactive" to November 2020. November 2020 is a date after which Ms. MacIntyre filed her application for spousal support (October 2020) and is not, therefore, truly a retroactive claim for spousal support. A traditional *DBS* analysis, therefore, is not applicable in this fact situation.

[49] Mr. Spooney is to pay Ms. MacIntyre spousal support in the amount of \$1,024 per month, commencing November 1, 2020, and continuing until November 1, 2026.

Conclusion

[50] Although the hearing was uncontested, the Court must still be satisfied the elements of claims advanced by Ms. MacIntyre have been established in a manner adequate to grant the relief she is seeking. Ms. MacIntyre proved the components of unjust enrichment. She also demonstrated entitlement to spousal support and offered evidence sufficient to established mid-range spousal support for a period of six years.

[51] Within seven days of receipt, counsel for Ms. MacIntyre will kindly file an Order reflecting the operative aspects of this decision. The Court further asks that counsel for Ms. MacIntyre serve Mr. Spooney with a certified copy of this decision and the resulting Order, once issued, substitutionally as per the prior direction of the Court.

[52] Either party wishing to be heard on costs must file submissions on the issue on or before November 15, 2022.

Marche, J.