

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *Gates v. Gates*, 2023 NSSC 188

Date: 20230609

Docket: SBWD-123352

Registry: Bridgewater

Between:

Mary Ann Donna Gates

Petitioner

v.

Todd Hardy Gates

Respondent

Judge: The Honourable Justice Aleta C. Cromwell

Heard:

Final Written December 5 & 7, 2022, in Bridgewater, Nova Scotia

Submissions: January 13, 2023

Written Decision: June 9, 2023

Counsel: Sinead M. Russell for the Petitioner

Janice E. Beaton, K.C. for the Respondent

By the Court:

Introduction

[1] Mary Ann Donna Gates and Todd Hardy Gates are separated spouses, who have one adult child, who is no longer considered a child of the marriage.

[2] Ms. Gates claims spousal support, both retroactive and prospective, on a compensatory and non-compensatory basis. She seeks to accurately quantify income for Mr. Gates who is a sole-proprietor plumber with an undeclared cash component to his income.

[3] Mr. Gates does not dispute entitlement to spousal support. Mr. Gates admits that his customers typically pay in cash and admits to under-reporting his income. He disagrees as to the amount of his income for support purposes or that Ms. Gates is entitled to retroactive support. He suggests that if retroactive support is ordered, income should be imputed to Ms. Gates to calculate retroactive support as she was unemployed for a period following separation.

[4] The parties have agreed to an equal division of assets and debts.

Issues

[5] In this decision, I will address the following issues:

- Should income be imputed to Ms. Gates for the period from August 2021 to August 2022?
- What is a reasonable income to impute to Mr. Gates for the purposes of calculating spousal support?
- What is the appropriate spousal support order?

Background

[6] The parties began cohabiting in 1998 and were married on July 19, 2003. They have one son – born in October 1999. Ms. Gates also has an older son from a previous relationship.

[7] After twenty-two (22) years, the parties separated on August 24, 2020, when Mr. Gates left the matrimonial home. Ms. Gates has remained in the matrimonial home since separation. Following the separation, their son was residing with Ms. Gates while completing his post-secondary studies.

[8] Ms. Gates, at the date of separation, was fifty-seven (57) years of age. She is now sixty (60) years of age. Her highest level of education was business college, which she graduated from over thirty-five (35) years ago. During their relationship, she primarily worked as a receptionist, on a part-time basis in medical/dental offices.

[9] At the date of separation, Ms. Gates was unemployed having left her part-time employment in 2019 to look for another job that was more suitable. A decision supported by Mr. Gates during the marriage.

[10] Mr. Gates, at the date of separation was fifty (50) years of age. He is now fifty-three (53) years of age. When their relationship began and in the early months of their marriage, Mr. Gates worked seasonally at the Chester Golf Course as a maintenance worker, and he occasionally fished in the winter.

[11] Beginning in the Fall of 2008, when he was almost thirty-nine (39) years of age, Mr. Gates returned to school to upgrade his education through the Nova Scotia Community College, graduating in the Spring of 2009. He received his Red Seal certification as a plumber in June 2017.

[12] Mr. Gates opened his own plumbing business on March 1, 2018, and operates as a sole proprietor under the name Todd Gates Plumbing. Mr. Gates mainly works in the Chester and Lunenburg County area.

[13] Following separation, and for a period of eleven months, Mr. Gates paid the mortgage, mortgage insurance, property insurance, power and cable bills associated with the matrimonial home and paid to Ms. Gates support of \$300 bi-weekly.

[14] Mr. Gates stopped the \$300 bi-weekly support payments to Ms. Gates with the last payment made on August 2, 2021. Mr. Gates also disconnected the cable and power to the matrimonial home. He says he did so out of frustration as he was tired of paying everything and he wanted to force the matter forward to resolution.¹

[15] Mr. Gates continues to pay the mortgage, the mortgage insurance and property insurance for the matrimonial home totalling \$768.23 per month.

[16] Ms. Gates claims throughout their relationship, she was primarily a stay-at-home mother responsible for maintaining the home and caring for their son. While Mr. Gates was pursuing an upgrade to his education and training to become a Red Seal plumber, she says she maintained the home and cared for their son while Mr. Gates studied and worked towards their goal.

[17] Mr. Gates disagrees and says that he shared in the responsibilities to maintain the home and care for their son but acknowledges the support provided by Ms. Gates while he was attending school and working.

¹ Exhibit #1, Tab 1 is the Affidavit of Ms. Gates sworn December 10, 2021, attaching several text messages sent by Mr. Gates to her from August 2, 2021, to August 10, 2021. In those texts, Mr. Gates threatened to stop support payments, stop paying bills associated with the matrimonial home and cancel the credit card. He called her names including “an entitled bloodsucking bitch” and a “hateful bitch”. He threatened to attend at the matrimonial home with his friends after golf to drink beer on the deck. He then blamed her for his behaviour.

[18] Ms. Gates obtained full-time employment beginning in September 2022 with the Chester and Area Family Resource Centre with a projected annual income of \$32,916. She also had a period beginning in February 2022 where she worked part-time with the South Shore Regional Centre for Education until she obtained full-time employment.

[19] Mr. Gates submits that he had an annual gross income of \$75,000 in 2021 after accounting for the cash component of his business and business expenses. He suggests that \$75,000 be used to calculate any retroactive and prospective spousal support.

[20] Mr. Gates says his customers typically pay in cash and rarely pay by either e-transfer or cheque.

[21] Over an eighteen (18) month period, Mr. Gates hourly rate charged for his labour increased from \$50 an hour to \$70 an hour. He says he raised his hourly rates because of gas price increases.

[22] Ms. Gates initiated divorce proceedings by filing the Petition for Divorce on August 16, 2021. Mr. Gates filed his Answer on November 9, 2021.

[23] Ms. Gates also filed a Notice of Motion for interim spousal support on January 17, 2022, which was adjourned, when she retained new counsel, and was not re-scheduled.

[24] This contested hearing was held on December 5 and 7, 2022. Each of the parties testified along with two additional witnesses called by Ms. Gates – her mother and a friend. Submissions were made both in writing and orally.

[25] The parties' assets consist of a matrimonial home in Chester; household contents; three motor vehicles; a chequing and savings account; and RRSPs. The debts consist of a line of credit and mortgage.

[26] The parties agree that Ms. Gates will retain the matrimonial home provided she receives lender approval to refinance and pay out the existing mortgage. Ms. Gates will become responsible for all expenses associated with the matrimonial home.

[27] The parties further agree that Ms. Gates will be required to pay to Mr. Gates the equalization payment within sixty (60) days of an Order being issued.² Should Ms. Gates not receive approval to refinance to pay out the existing mortgage and pay

² A draft Asset and Debt Division Chart (Equalization Chart) is attached as Tab A to the Pre-Trial Brief of Mr. Gates filed November 30, 2022. The parties agreed to equally divide the assets and debts as set out in this chart. An equalization payment by Ms. Gates to Mr. Gates is owed of \$72,232.73.

the equalization to Mr. Gates, the home will be listed for sale within sixty (60) days of an Order being issued.

[28] Most of the household contents have been retained by Ms. Gates and valued in the Equalization Chart. There are a few items that Mr. Gates would like to retain which are not disputed.

Analysis

Should income be imputed to Ms. Gates for the period from August 2021 to August 2022?

Position of Mr. Gates

[29] Mr. Gates seeks to impute income to Ms. Gates because of her unemployment post-separation. He suggests that Ms. Gates should have been earning from August 2021 to August 2022, at least, minimum wage of \$26,396.00.³

[30] Further, Mr. Gates says at the time of separation, Ms. Gates was fifty-seven (57) years of age with experience as a medical receptionist, having been employed in this capacity for several years. He suggests that she could have found employment post-separation in accordance with her training.

³ Page 16, Pre-trial Submissions of Mr. Gates, filed November 30, 2022. In Nova Scotia, minimum wage was \$12.95 per hour in 2021.

[31] Finally, Mr. Gates says that despite Ms. Gates anxiety and depression, for which she is prescribed medication, she could work and there is no medical evidence that she was not able to work a job paying minimum wage.

Position of Ms. Gates

[32] Ms. Gates says the decision for her to leave her part-time employment in 2019 was a joint decision made during the marriage, which Mr. Gates does not dispute. She was dissatisfied with her employment and left to search for other employment. She suggests that income should not be imputed to her for the period from August 2021 to August 2022. She says she was trying to obtain suitable employment despite the breakdown of her marriage in August 2020 and being out of the workforce since 2019 and only having worked part-time from 2007 to 2019.

The Law

[33] Although there is no specific provision regarding the imputation of income for purposes of spousal support, the courts have relied on the *Federal Child Support Guidelines*, SOR/97-175 (the *Guidelines*”) for the principles for imputing income for spousal support purposes.

[34] Section 19(1)(a) of *Guidelines* provides discretion to a court to impute income in appropriate circumstances including where “the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the ... health needs of the spouse.”

[35] The burden of proof is upon the party seeking to impute income and it is proof on a balance of probabilities. The burden shifts to the other party, only where that party asserts their ability to work is compromised by ill health.⁴

[36] In *Standing v. MacInnis*, 2020 NSSC 304, at paragraph 21, Justice Forgeron reviewed the legal principles that apply when under-employment is alleged. They include the following principles taken from *Parsons v. Parsons*, 2012 NSSC 239 at paragraph 32 and distilled from other case law:

- a. The discretionary authority found in s.19 must be exercised judicially, and in accordance with rules of reasons and justice, not arbitrarily. 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 income has been reduced or his/her income earning

⁴ Ms. Gates at the hearing did not provide evidence to establish a link between health needs and an inability to work. By Agreement of the parties, paragraph 21 of Ms. Gates’ affidavit sworn December 10, 2021 was struck.

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. The court must also look to objective 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 (S.C.); **Saunders-Roberts v. Roberts**, 2002 NWTSC 11; and **Duffy v. Duffy**, 2009 NLCA 48.

e. A party's decision to remain in an 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.

Decision

[37] Ms. Gates did not provide reliable evidence at the hearing to suggest that her unemployment was because of health needs although she did suggest that she required time following the breakdown of her marriage to recover emotionally and move forward.

[38] Imputing income to Ms. Gates of minimum wage would not be fair or reasonable in the circumstances for three reasons. First, Ms. Gates was unemployed following separation for a period of less than eighteen (18) months. She was able to obtain part-time work in February 2022 and full-time work in September 2022.

[39] Second, prior to August 24, 2020, Ms. Gates had been out of the workforce for at least two years having left her part-time employment in search of a more satisfying job, a decision supported by Mr. Gates during their marriage.

[40] Third, when Ms. Gates worked during the relationship, she primarily worked part-time for at least the previous dozen years following a cancer diagnosis and treatment in 2006. Her highest level of education is business college from over thirty-five (35) years ago. Her work experience has been as a receptionist in medical and dental offices, primarily on a part-time basis and she had not worked full-time since at least 2006.

[41] Mr. Gates has not met the burden to establish that income should be imputed to Ms. Gates for the thirteen-month period between August 2021 and August 2022.

What is a reasonable income to impute for Mr. Gates?

Position of Mr. Gates

[42] Mr. Gates admits that he has under-reported his income as he receives cash directly from customers who he does not charge HST.

[43] Mr. Gates filed evidence contained in three volumes of exhibits, including, but not limited to the following:

- Receipts filed with his 2021 Income Tax Return.
- *Some* receipts for his 2022 Income Tax Return.
- Copies of *some* receipts provided to customers in 2022.⁵
- List of all customers in 2020⁶ and 2021⁷ that he did provide receipts.
- Gas and vehicle receipts for 2020⁸ and 2021.

[44] Mr. Gates acknowledges an increased hourly rate charged to customers in 2021 and 2022. He suggests however, that as a self-employed person, responsible for administrative duties related to his business operations, including purchasing stock and tools, preparing receipts and tallying expenses, he is unable to work five days a week for eight hours per day as a plumber. Instead, he suggests it would be reasonable to assume that he works as a plumber, five (5) days a week for seven (7) hours per day totalling thirty-five (35) hours per week. Further, as he does not receive vacation pay as an employee would, he also suggests that it would be reasonable to assume that he works forty-eight (48) weeks in a year.

⁵ Receipts totalling \$12,792.50 plus HST for six months between May 6 and November 6, 2022 were filed.

⁶ For 2020, Mr. Gates has provided Receipts for 105 customers totalling \$64,590 plus HST of \$9,387.

⁷ For 2021, Mr. Gates has provided Receipts for 56 customers totalling \$51,025 plus HST of \$7653.25.

⁸ Mr. Gates has provided Gas receipts for 2020 totalling approximately \$4000 a year.

[45] Mr. Gates also says that whatever his gross annual income is determined to be, that \$12,000 be deducted for costs associated with maintaining his business and keeping it running as he has had to go into debt to continue to operate his business.

[46] Mr. Gates suggests that a reasonable imputation of his gross annual income for 2021 and 2022 to account for the cash customers for which he did not collect HST is \$75,000.00 after business expenses.⁹

[47] Although Mr. Gates, at the time of the Hearing, had not collected his receipts or materials to submit to his accountant to prepare his income tax return for 2022, he suggests that a reasonable gross annual income to impute for 2022 would also be \$75,000.00 (net \$51,130 annually).¹⁰

[48] He says this for three primary reasons:

- He had increased mileage expenses in 2022 as he worked for a period of three months in Fredericton, New Brunswick. With the increasing price of gas, he suggested that his monthly fuel costs increased from \$800 per month in 2021 to \$2400 per month in 2022.

⁹ Mr. Gates reported a gross annual income for 2021 of \$51,025.00. After deducting business expenses of \$33,357.00 which included motor vehicle expenses of \$8,353.08 (\$5621.47 as fuel and oil), his net self-employment income was \$17,668.98.

¹⁰ Exhibit #3, Tab 7 contains the Updated Statement of Expenses of Todd Hardy Gates prepared on November 25, 2022 (unsworn but confirmed) and attaches Childview 2021 Calendar year Calculations, Schedule D-Cash Projection showing Income Tax for Mr. Gates of \$23,870.00 on a gross income of \$75,000.00.

- He has capital costs related to replacement of tools, the costs of which are not passed along to his customer. He must also purchase stock to have on hand.
- He struggled financially post-separation and had to increase the balance owing on his line of credit, since the date of separation by approximately \$26,000. He also cashed out his RRSPs to help pay his expenses.¹¹

Position of Ms. Gates

[49] Ms. Gates seeks to impute a higher income than \$75,000 to Mr. Gates for 2021 and 2022. She suggests that Mr. Gates' Income Tax Return for 2021 does not accurately reflect his income and must be grossed up to determine the support payable. In addition, she suggests that Mr. Gates' business expenses are excessive and not supported by the evidence.

[50] Ms. Gates suggests for 2021, that \$75,000 be grossed up based on the under-reporting of income to the Canada Revenue Agency because he paid less income tax on his declared income and paid no income tax on the remaining undeclared income.

¹¹ Mr. Gates admits to using the line of credit for both personal and business expenses equally. The Equalization Chart accounts for Mr. Gates cashing out the RRSPs post-separation after deducting 30% for the withholding taxes.

[51] Ms. Gates suggests that Mr. Gates income for the purpose of calculating spousal support owing from August 2021 to August 2022 after grossing up is \$108,605.¹²

[52] Ms. Gates suggests that Mr. Gates' annual income has increased in 2022 and he should have an imputed income of \$117,600 to calculate prospective spousal support.¹³

[53] She says this for two primary reasons. Mr. Gates increased his hourly labour rate in 2022 and he has over-represented his expenses for 2022. She asks that I consider the costs of fuel as set by the Nova Scotia Utility and Review Board for the months ending January 2021 to November 2022.¹⁴

[54] After acknowledging the administrative tasks associated with running a business, Ms. Gates agrees to the suggestion by Mr. Gates that it is reasonable for him to work as a plumber thirty-five (35) hours per week, forty-eight (48) weeks per year.¹⁵

¹² Ms. Gates filed post-trial submissions on January 4, 2023, attaching DivorceMate calculations showing self-employment income for Mr. Gates of \$17,766 with non-taxable income of \$58,000 grossed up.

¹³ Post Trial Submissions from Ms. Gates dated January 4, 2023 at page 2.

¹⁴ Exhibit # 2 filed by Ms. Gates are the Orders and schedules from the Nova Scotia Utility and Review Board prescribing prices for petroleum products of \$112.70, January 2021 to \$156.70, November 2022.

¹⁵ Post Trial Submissions from Ms. Gates dated January 4, 2023 at page 2.

The Law

[55] The same principles noted when reviewing imputation of income for Ms. Gates apply when quantifying income for Mr. Gates.

[56] The *Spousal Support Advisory Guidelines: The Revised User's Guide* (the "SSAG") at page 20 addresses grossing up non-taxable income using the *without child support* formula and notes:

"Income can be legitimately non-taxable, such as workers' compensation or income earned on reserve or long-term disability payments, or it can be income that is **improperly not reported for tax purposes, such as tips or cash payments for work.**" [Emphasis added]

[57] In *Burghardt v. Burghardt*, 2019 NSSC 106 at paragraph 43, Justice Warner notes "one consideration on whether to impute income to the respondent includes assessing whether he is reporting all his income".

[58] In *Thompson v. Thompson*, 2013 NSSC 58, Associate Chief Justice O'Neil when dealing with a self-employed carpenter, imputed income for under-employment. At paragraph 25 he noted, "...I am satisfied, first of all, that these earnings are not claimed in his hands, so at a minimum, I would gross this amount up..."

[59] As already noted, section 19 of the *Guidelines* provides a framework for imputation of income and may apply to cases where spousal support is at issue. In addition, to circumstances where the spouse is intentionally under-employed or unemployed, income may be imputed where “the spouse unreasonably deducts expenses from income.”

[60] Section 12 of Schedule III of the *Guidelines* provides “Where a spouse earns income through a ...sole proprietorship, deduct any amount included in income that is properly required by the ... sole proprietorship for purposes of capitalization”.

[61] Counsel for Mr. Gates, relies on a case from British Columbia *S.M.E. v. J.A.E.*, 2020 BCSC 332 at paragraph 41 to 44 addressing capitalization in child support. Mr. Gates suggests that consideration be given to his capital costs in accordance with s. 12 of Schedule III of the *Guidelines* to adjust his income.

Decision

[62] Mr. Gates did not provide to the court any bank records for consideration. However, the usefulness of this information to come to a fair estimate of income for Mr. Gates would be impacted by his admission that cash payments for jobs are not deposited to his bank account.

[63] I have considered the tax returns and assessments for Mr. Gates for 2019, 2020 and 2021 along with his business expenses to assist to quantify his income for support purposes.

[64] Mr. Gates' tax returns, show his income as follows:

Time Period	Mr. Gates' Gross Business Income	Mr. Gates' Total Income	Mr. Gates' Net Business Income
2019	\$76,990	\$24,775.23	\$24,370.02
2020	\$62,580	\$20,278.46	\$20,066.23
2021	\$51,025.00	\$17,710.97	\$17,668.98

[65] Mr. Gates says he expects business expenses in 2022 to be slightly less than in 2021. He also says that he was as busy in 2022 as he was in 2021. He acknowledges that he does not typically work eight hours a day and there is a high demand for his services, and he *could* work seven days a week, but this would not be sustainable, so he tries his best to schedule his work around regular hours.

[66] I accept that based on the nature of Mr. Gates' work running a small business as a sole proprietor that he cannot be expected to bill customers based on forty hours

a week. Any consideration of earning capacity must address his responsibilities to purchase stock, capital costs including those related to the purchase of tools, and the performance of other administrative tasks related to running a business.

[67] A reasonable expectation would be for Mr. Gates to work forty-eight weeks in a year at thirty-five hours a week. This, in my view, reasonably addresses the administrative responsibilities of running a small business with four weeks vacation.

[68] There was no suggestion that Mr. Gates worked less hours between 2021 and 2022 nor any suggestion that his age or health impact his earning capacity.

[69] Mr. Gates acknowledges that after business expenses, he has an income of approximately \$75,000 for 2021.

[70] I am satisfied that a reasonable income for Mr. Gates for 2021 after considering business expenses, his earning capacity, a reduction for capital costs, his declared gross business income of \$51,025.00 and grossing up his undeclared income would be an annual income of \$100,000.00.

[71] For 2022, Mr. Gates suggests he has an income, after business expenses of \$75,000.00.

[72] Mr. Gates has overstated his fuel expenses for 2022 and suggests that they increased from \$800 per month in 2021 to \$2400 per month in 2022.

[73] For 2022, I am prepared to accept a reasonable increase of 30% for his fuel expenses to address the increased costs of gas and his additional fuel costs associated with his travel outside of the province for three months.

[74] I have considered, when quantifying Mr. Gates income for 2022 that Mr. Gates will no longer be required to pay the mortgage, mortgage insurance and property insurance for the matrimonial home (an addition to his budget of \$768.23) although he says he will be responsible for paying rent once he leaves his temporary accommodations with no particulars provided in this regard.

[75] Further, in his Statement of Expenses for November 2022, Mr. Gates has expenses totaling \$1000 per month for food and entertainment. He explained on cross-examination that \$500 for entertainment related to pizza, beer, and cigarettes.¹⁶

[76] I conclude after considering all the evidence, that Mr. Gates has under-reported his income at the same time as over-representing his expenses.

¹⁶ Exhibit #1, Tab 7 contain the Statement of Expenses of Mary Ann Gates prepared on August 10, 2021 and show she budgets \$600 for food and only \$50.00 for entertainment.

[77] Having considered the tax returns for 2019, 2020 and 2021 filed by Mr. Gates since commencing his own business, the capital costs along with increased mileage expenses, resulting from three months working in New Brunswick, and his increased hourly rate charged in 2022, I have concluded that a reasonable gross annual income for Mr. Gates for 2022 is \$110,000.00.

What is the appropriate spousal support order?

Position of Ms. Gates

[78] Ms. Gates says for eleven months post-separation her only source of income was spousal support of \$4500 annually. She acknowledges receiving Mr. Gates' GST monies deposited to her account along with her own GST; and the Guaranteed Income Supplement that she began to receive post-separation, although she was unable to recall when she began to receive these monies or the amount.

[79] Ms. Gates says when Mr. Gates stopped support payments in August 2021, she relied on her mother and a friend to assist her to pay for groceries and bills until she was able to obtain employment.

[80] Ms. Gates says that Mr. Gates should be required to pay spousal support beginning in August 2021.

[81] Ms. Gates agrees that any support owing to her must deduct any payments already made by Mr. Gates, including Mr. Gates' GST payments that she received post-separation.¹⁷

[82] Ms. Gates seeks spousal support from Mr. Gates in the mid range, resulting in a Net Disposable Income split of 50%.¹⁸

[83] Ms. Gate suggests that Mr. Gates be ordered to pay support until he reaches the age of sixty-five in October 2034.

Position of Mr. Gates

[84] Mr. Gates does not dispute entitlement to spousal support by Ms. Gates although Mr. Gates does not agree that Ms. Gates is entitled to retroactive support as he says, she did not pursue interim support in a reasonable time. The date of retroactivity is not disputed.

[85] However, if retroactive support is ordered, Mr. Gates suggests it should be on the low end of the range as Ms. Gates did not have a strong compensatory claim and because of work incentives for him.

¹⁷ The parties agree that Mr. Gates has paid \$11,775.50 (payments for the mortgage, mortgage insurance and property insurance total \$10,001.44 and GST payments of \$1,775.50).

¹⁸ Post-Trial submissions from Ms. Gates dated January 4, 2023.

[86] Mr. Gates acknowledges that the *SSAG* suggests support indefinitely, but that an appropriate termination date would be eleven years (half the time of the relationship) with an end date of September 2031.

[87] Finally, Mr. Gates suggests that based on the means and needs of the parties, that prospective spousal support should be in the low range.

The Law

[88] The issues on spousal support relate to entitlement and quantum, both amount and duration. Ms. Gates bears the burden of proof.

[89] The leading authorities with respect to spousal support are the Supreme Court of Canada cases of *Moge v. Moge* [1992] 3 S.C.R. 813 and *Bracklow v Bracklow*, [1999] 1 SCR 420.

[90] In *Bracklow*, the Supreme Court of Canada confirmed that entitlement is based on one, or more, of the following three principles:

- Compensatory support to address economic advantages and disadvantages flowing from the marriage, or the roles adopted during the marriage.
- Non-compensatory support to address the disparity between the needs and means of the parties and arising from the marriage breakdown.

- Contractual support, either express or implied.

[91] The *Divorce Act* provides jurisdiction to award spousal support pursuant to s. 15.2 “... as the court thinks reasonable for the support of the other spouse”. Any such order may include a lump sum, periodic payments, or a combination of both.

[92] The factors to be considered are stated in s. 15.2(4) of the *Divorce Act*:

15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including:

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[93] The objectives to be considered are set out in s. 15.2(6) of the *Divorce Act*:

15.2(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

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

[94] According to *Leskun v. Leskun*, 2006 SCC 25, the objective of promoting the economic self-sufficiency of each spouse within a reasonable period is not a duty per se and there is recognition that complete self-sufficiency may not be attainable. However, reasonable efforts of the recipient to contribute to their own support is to be considered.

[95] To calculate spousal support, both parties' income, and lack thereof, will be relevant.

[96] Although the *SSAG*, are not law, they are a useful tool which can enhance legitimacy and consistency as noted by our Court of Appeal.¹⁹

[97] As noted in the *SSAG*, at page 24, in cases where there are no dependent children, the *without child support* formula applies:

“(this formula) relies heavily upon **length of the relationship** to determine both the amount and duration of support. Both amount and duration increase with the length of the relationship. This formula is constructed around **merger over time** which offers a useful tool for implementing the mix of compensatory and non-compensatory support objectives in cases where there are no dependent children.”

¹⁹ *MacDonald v. MacDonald*, 2017 NSCA 34.

[98] Although when determining a location in the ranges for support, one must look at net disposable income positions of the parties after payment of an amount, the guidance found at Chapter 9 of the *SSAG*, clarifies that mid-range should not be the default. Location in the range reflects several factors including, but not limited to the income determinations, the strength of the compensatory claim, the depth of need as a strong non-compensatory factor, ability to pay, and work incentives for the payor.

[99] *Kerr v. Baranow*, 2011 SCC 10, addresses the law of retroactive spousal support and Justice Cromwell, has said at paragraph 208, “concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support”.

[100] The factors from *D.B.S. v. S.R.G.*, 2006 SCC 37, are modified and should apply to the exercise of discretion when determining if retroactive spousal support is ordered. They are:

- 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.

Decision

[101] The parties were in a relationship for twenty-two years and the basis for entitlement of support is a mix of both compensatory and non-compensatory factors.

[102] Ms. Gates filed the Petition for Divorce on August 16, 2021, two weeks after Mr. Gates stopped paying support of \$300 bi-weekly. In the Petition, she seeks spousal support pursuant to s. 15.2 of the *Divorce Act*. She is owed prospective spousal support from the date she filed the Petition for Divorce.

[103] Mr. Gates has not paid support to Ms. Gates since August 2, 2021, although he has continued to pay the mortgage, mortgage insurance and property insurance.

[104] Although I do not believe retroactive support is an issue, if retroactive spousal support were an issue, I am satisfied, after applying the *Kerr* analysis, and based on the evidence, that Ms. Gates is entitled to spousal support on a retroactive basis for the period from August 2021 to June 1, 2023, for three primary reasons:

- Ms. Gates filed her Petition for Divorce two weeks after Mr. Gates stopped paying her \$300 biweekly. There was no delay. Ms. Gates also filed a Motion for interim spousal support on January 17, 2022. In the circumstances, this delay was not excessive and her excuse for any delay in seeking support from Mr. Gates is reasonable. She had no source of

support after August 2021 when Mr. Gates made the unilateral decision to cut her support payments to force an agreement on his terms. Within two weeks, she filed the Petition for Divorce on August 16, 2021. Mr. Gates Answer was filed on November 9, 2021, and two months later, she filed her Notice of Motion for interim spousal support with both parties pursuing the proceeding to a hearing.

- When Mr. Gates was asked to explain his decision to stop support payments to Ms. Gates in August 2021, he explained that he wanted to move the matter forward to resolution, but he also left her without a source of income for several months to push her to accept his offer. As already mentioned, Ms. Gates was forced to ask her mother and a friend for money to pay for groceries and other necessities during this period. Mr. Gates acknowledges entitlement based on the length of the marriage and age of the parties. To stop the payments as he did, is blameworthy conduct.
- Hardship to Mr. Gates from any retroactive award would be minimized as the parties agree that any retroactive award would be deducted from Mr. Gates' GST payments inadvertently deposited to

Ms. Gates account between the date of separation and November 2022.

[105] Although Mr. Gates concedes entitlement and duration as indeterminate (duration not specified) due to the length of the relationship and age of the parties, he suggests that Ms. Gates did not have a strong compensatory claim and as a result should be awarded spousal support on the low end of the range. Furthermore, as already mentioned, the parties are both suggesting that duration be fixed, although they do not agree on the end date for support.

[106] In my view, Ms. Gates has a stronger compensatory claim than suggested by Mr. Gates for the following reasons:

- The role Ms. Gates assumed during the marriage resulted in a significant economic disadvantage. She initially worked full-time, when Mr. Gates was working seasonally, but upon the birth of their son, she left work for one year to care for their son. Following her cancer diagnosis and treatment, Ms. Gates returned to work on a part-time basis, a decision supported by Mr. Gates. After Mr. Gates was laid off from his employment at GN Plastics, Mr. Gates upgraded his education beginning in 2008 to become a Red Seal Plumber in June 2017. Mr. Gates after

graduating from the one-year program was required to return to school for additional teaching blocks which required that he study in the evenings while also working during the day. This required Ms. Gates to take on additional responsibilities in the home during these periods while she was also working part-time to support the family.

- The role assumed by Mr. Gates provided him significant economic advantages from 2008 until the date of separation. Priority was given to Mr. Gates upgrading his education and career opportunities to become a Red Seal Plumber and opening his own business, while Ms. Gates worked part-time.
- Before Ms. Gates could enjoy the benefits of Mr. Gates enhanced earning capacity, resulting from the upgrade to his education and employment and opening his own plumbing business, they separated.
- After separation and currently, there is a pronounced difference between the parties' incomes. Ms. Gates was unemployed at the date of separation until February 2022 when she obtained part-time employment and then full-time employment in September 2022. Mr. Gates has remained

employed, running his own business, and continuing to enjoy extra-curricular activities such as golf.

[107] Ms. Gates upon the breakdown of the marriage suffered a greater economic disadvantage than Mr. Gates. She was unemployed at the time of the separation by mutual agreement. During the marriage, Mr. Gates managed the money with Ms. Gates having access to a credit card where he was the primary card holder and she was not named on the Line of Credit, used by Mr. Gates. Mr. Gates, as he threatened to do in August 2021, cut off Ms. Gates access to this credit card.

[108] Mr. Gates continued to contribute to his Registered Retirement Savings Plan in 2021 and 2022 while Ms. Gates had to call upon her mother and friend to assist to purchase necessities.

[109] In my view, Ms. Gates need is a strong non-compensatory factor when considering the location in the range for support.

[110] When considering the means and needs of the parties, I note that Ms. Gates lives modestly. She has no vehicle or vehicle related expenses and her other discretionary expenses, like food and entertainment are less than those of Mr. Gates. At the time of filing her Statement of Expenses, Ms. Gates acknowledged that Mr.

Gates was paying for the housing related expenses but following this decision, Ms. Gates will become responsible for those expenses.

[111] As I have said, when considering, Mr. Gates' Updated Statement of Expenses, he has overstated some expenses. He has also included business related expenses, which I do not take great issue with, as he is running a small business and there will be some overlap with his personal expenses from time to time.

[112] Although the mid-range should not be the default, I am satisfied that based on the significant disparity in the incomes and the income earning potential of the parties, Mr. Gates' cash flow and his ability to pay support and Ms. Gates' corresponding need for support that the mid-range, is appropriate.

[113] Ms. Gates agrees that any support owing to her must deduct any payments already made by Mr. Gates, including Mr. Gates' GST payments that she received post-separation.

[114] From both the pre-trial and post-trial submissions of counsel, any spousal support found owing to Ms. Gates is to be deducted from the equalization payment to be provided to Mr. Gates.

[115] After considering the factors and objectives contained in the *Divorce Act* along with the various SSAG calculations prepared and provided by counsel in their

pre- and post-trial briefs, net disposable income of the parties, the particular facts in this case and a holistic view of all the circumstances, I have determined the following:

- For a period of five months (August 2021 to December 2021) based on a gross income of \$100,000 for Mr. Gates and no income for Ms. Gates, Mr. Gates owes Ms. Gates spousal support at a monthly rate of \$3200.
- For a period of eight months (January 2022 to August 2022) based on a gross income of \$110,000 for Mr. Gates and no income for Ms. Gates, Mr. Gates owes Ms. Gates spousal support at a monthly rate of \$3500.
- For a period of ten months (September 2022 to June 1, 2023) based on a gross income of \$110,000 for Mr. Gates and a gross income of \$32,916 for Ms. Gates, Mr. Gates owes Ms. Gates spousal support at a monthly rate of \$2500.
- Commencing July 1, 2023, until Mr. Gates turns sixty-five years of age on October 24, 2034, based on an imputed gross annual income for 2022 of \$110,000 for Mr. Gates and prospective annual income for 2022 for Ms. Gates of \$32,916, Mr. Gates will pay spousal support at a monthly rate of \$2500.

Findings/Conclusions

[116] In summary, my findings are as follows:

- Ms. Gates is entitled to spousal support from Mr. Gates on a mixed compensatory and non-compensatory basis.
- Mr. Gates income for 2021 is determined to be \$100,000.00.
- Mr. Gates income for 2022 is determined to be \$110,000.00.
- Mr. Gates will pay Ms. Gates for spousal support arrears accumulated from August 2021 to June 1, 2023.
- Mr. Gates will pay to Ms. Gates monthly spousal support commencing July 1, 2023, of \$2500 until he reaches the age of sixty-five on October 24, 2034.

[117] I am satisfied there is no possibility of reconciliation between the parties. I am satisfied that all jurisdictional requirements have been met based on the breakdown of the marriage caused by a separation of more than one year as set out in the *Divorce Act* section 8(1)(2)(a). Accordingly, I grant the Divorce.

[118] If the parties are unable to reach agreement on costs, I will accept written submissions from each party within a month of receipt of this decision.

Cromwell, J.