IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Kelloway v. Kelloway, 2008 NSSC 261

Date: 20080910
Docket: 1201-061038, SFHD-048630
Registry: Halifax

Between:

Michelle Kelloway

Petitioner

v.

Derrick Kelloway

Respondent

Judge:	The Honourable Justice Beryl MacDonald
Heard:	August 25, 2008, in Halifax, Nova Scotia
Written Decision:	September 9, 2008
Counsel:	Vanessa Tynes, counsel for Michelle Kelloway Terry Sheppard, counsel for Derrick Kelloway

By the Court:

[1] On March 6, 2008 Mr. Kelloway filed an application to vary the Corollary Relief Judgment issued in these proceedings on January 28, 2008. He requested a reduction in the quantum of spousal support and a fixed termination date. Ms. Shaw (nee: Kelloway) resists this application and requests that there be no termination date and the quantum remain the same.

[2] The objectives to be considered when examining a request for variation of an order for spousal support issued pursuant to the Divorce Act, R.S. 1985, c.3 are found in s. 17(7)(1):

> "A variation order varying a spousal support order should (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or it's breakdown; (b) apportion between the former 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 former spouses arising from the breakdown of the marriage; (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time."

[3] These directions are the same as those contained in s. 15.2 (6) of the Divorce Act, the section governing interim or initial spousal support orders.

[4] The Divorce Act also requires a court :

> 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
>
> © any order, agreement or arrangement relating to support of either spouse.

[5] Although these factors are not repeated in respect to variation orders presumably they remain to be considered in a variation proceeding.

[6] The Supreme Court of Canada in *Moge v. Moge* (1992), 43 R.F.L. 345 (S.C.C.) and in *Bracklow v. Bracklow* [1999] 1 SCR 420 confirmed that all four objectives set out in 15.2 (6) and 17 (7)(1) are to be considered in every case. No one objective has paramountcy. If any one objective is relevant upon the facts a spouse is entitled to receive support.

[7] In *Bracklow v. Bracklow, supra,* the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support:

1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.

2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.

3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other.

[8] These rationales take into account both the factors set out in s. 15.2 (4) and the objectives set out in s. 15.2 (6) and s. 17(7)(1).

[9] The Supreme Court did recognize that many claims have elements of two or more of the stated rationales. It confirmed that analysis of all of the objectives and factors is required. Pigeonholing was to be avoided.

[10] In this decision I will not comment on the contractual objective because it is not a factor in the case before me.

[11] McLachlan, J. in *Bracklow, supra*, indicated that the basis for a spouse's support entitlement also affects the form, duration, and amount of any support awarded.

[12] Examples of circumstances that may lead to a decision that a spouse is entitled to compensatory support are:

a) a spouse's education, career development or earning potential have been impeded as a result of the marriage because, for example:

- a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;

- a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;

- a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons.

b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.

[13] Non-compensatory support incorporates an analysis based upon need and ability to pay. If spouses have lived fully integrated lives, so that the marriage creates a pattern of dependence, the higher-income spouse is to be considered to have assumed financial responsibility for the lower-income spouse. In such cases a court may award support to reflect the pattern of dependence created by the marriage and to prevent hardship arising from marriage breakdown. L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra,* at p. 390:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin (1991), supra*, and *Linton v. Linton, supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. *As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson,* "*Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)*", supra, at pp. 174-75). (emphasis added)

[14] It is not clear from Justice L'Heureux-Dubé's, decision whether entitlement arising from a "pattern of dependence" is compensatory or non-compensatory. This pattern of dependence may create a compensatory claim because it can justify an entitlement even though a spouse has sufficient income to cover reasonable expenses and might be considered to be self-supporting. This often is described as

the “lifestyle argument” - that the spouse should have a lifestyle upon separation somewhat similar to that enjoyed during marriage.(*Linton v. Linton* 1990 Carswell Ont 316 (Ont. C.A.) A lengthy marriage generally leads to a pooling of resources and an interdependency even when both parties are working. Usually the recipient spouse will never be able to earn sufficient income to independently provide the previous lifestyle. This would form the basis of a compensatory claim but does not necessarily entitle a spouse to lifetime spousal support. The essence of a compensatory claim is that eventually it may be paid out. This leads to a discussion about the quantum and duration of the claim.

[15] Once it is decided that a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse. In considering the condition, means, needs and other circumstances of each spouse one may examine the division of matrimonial property and consider the extent to which that division has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage and its breakdown and any continuing need the spouse may have for support arising from other factors and other objectives set forth in s. 15(2). (*Tedham v. Tedham* 2005 Carswell BC 2346 (B.C.C.A.)

[16] There will be cases when the analysis may indicate that the only way to adequately address the compensatory or non-compensatory claim is to continue support for significant periods of time possibly during the entire life of the recipient or payor. (*Rondeau v. Kerby*, 2004 Carswell NS 140 (N.S.C.A.) This most often will occur in respect to lengthy marriages where there is significant income disparity.

[17] Generally a non-compensatory claim in a short to mid length marriage is satisfied when a spouse becomes self-supporting and, in such a case, neither the payor spouse’s greater income nor the inability of a recipient spouse to replicate a previous lifestyle, is a factor entitling a spouse to continuing support. When spouses have not had a lengthy relationship and the only effect of the relationship has been that a spouse has enjoyed a better lifestyle than he or she could afford alone, the duration of support will likely be for a period required to ease the recipient spouse’s transition to economic independence. Self-sufficiency, however, is a relative concept. It constitutes something more than an ability to meet

basic living expenses. It incorporates an ability to provide a reasonable standard of living from earned and other income exclusive of spousal support.

[18] In this proceeding the Corollary Relief Judgment required Mr. Kelloway to pay spousal support in the amount of $1,000 per month commencing November 1st, 2007. It provided in paragraph 7 that the quantum "may be reviewed in 6 months" and that a review " may be prior to the 6 months in the event that Michelle Helen Nora Kelloway obtains employment through the accommodation process at her former employer.....or other employment."

[19] By February 2008 Ms. Shaw had obtained employment with her previous employer as a housekeeper earning $13.87 per hour which, over the course of the year on this base rate alone, would provide her with a gross annual income of $27,046. Up until just recently she also was paid a shift differential for working outside of her regular hours. Her evidence is that she will no longer be working these additional hours. Her hourly rate of pay has been increased to an amount between $14.49 per hour and $14.69 per hour. She is uncertain about the exact amount. At an hourly rate of $14.50 per hour she would earn $28,275 gross annual income. Her employment is full time and there is nothing to indicate any inability on her part to continue with this employment. A recent back injury has caused her to open a workers compensation claim but she expects to return to the workplace within the next few weeks.

[20] Although the Corollary Relief Judgment states that Ms. Shaw's income at the time of the judgment was $13,300.00 she in fact at that time had no income. The $13,300.00 was a previous income calculation based on a disability insurance claim under which she had been receiving benefits that had been discontinued, thus leading to the agreement by Mr. Kelloway to pay $1,000.00 per month as spousal support. Mr. Kelloway's evidence is that the amount of support he agreed to pay, as reflected in the Corollary Relief Judgment, was offered because Ms. Shaw had no income. If she had been receiving $13,300 he would not have agreed to pay $1,000 per month. In addition Mr. Kelloway had the mistaken understanding that the spousal support provisions of the previous Interim Consent Order were incorporated into the Corollary Relief Judgment. In particular he refers to paragraph 13 of that Interim Consent Order that states "....when Michelle Kelloway..... returns to work on a full-time basis or changes her lifestyle in order to increase her financial circumstances, spousal support payments to Michelle Kelloway shall cease and may only be reestablished by an order by a court of

competent jurisdiction." In fact this term was not specifically incorporated into the spousal support provisions of the Corollary Relief Judgment although the terms of the Interim Consent Order relating to property division were incorporated by reference. I am not satisfied that I can read those provisions into the Corollary Relief Judgment over the objection of Ms. Shaw. Her position is that this term was to be in effect only until a final hearing was held or the parties agreed to the terms of a Corollary Relief Judgment, which they eventually did. She did not agree that her spousal support would permanently end when she obtained full time employment. Even if I could consider those terms to be part of the Corollary Relief Judgment they do not require a termination of spousal support in the event of full employment. At best they may justify Mr. Kelloway's termination of payment until such time as payments may be reinstated by court order. Since there is a lack of clarity in the wording of this provision itself and since there is disagreement about whether it was to be incorporated in the Corollary Relief Judgment and specifically because it is clear there is no wording in the Corollary Relief Judgment incorporating these provisions, I am satisfied there is no fetter upon my jurisdiction to determine the issues of entitlement, quantum, and duration in respect to this variation application.

[21] Because the Corollary Relief Judgment provided for a review, the applicant is not required to establish a material change in circumstances since the date of the issuing of the Corollary Relief Judgment. However, an examination of the circumstances of the parties as they existed from time to time in the progress of these proceedings must be undertaken. This examination may explain the basis upon which there may be a continuing entitlement to spousal support and the appropriate quantum to be awarded based on all of the factors courts have been directed to examine in spousal support cases.

[22] These parties were married for 18 years. They have one child, a daughter. Since the parties separated in September 2006 their daughter has lived primarily with her father. At the time the parties entered into the Interim Consent Order it appears Ms. Shaw was earning $22,595 per year. She accepted less spousal support than the amount to which she believed she was entitled because Mr. Kelloway did not require her to pay child support. In addition, she was to remain the recipient of the child tax credit. The Interim Consent Order also provided that if their daughter changed her primary residence to live with her mother, spousal support would be reduced to one dollar per year. The parties daughter is presently living with her

father and intends to attend community college in the fall. Mr. Kelloway is not presently seeking any child support from Ms. Shaw.

[23] At the time the parties separated Ms. Shaw was 42 years old. She had worked continuously during their marriage and there is no evidence before me to suggest that she was in any way impeded in advancing her career or pursuing other job or educational opportunities as a result of the marriage. The interruption that she had in her career was not due to any assumption of family responsibilities but came as a result of life style choices she made for which she must take responsibility. She has not denied the information provided by Mr. Kelloway in respect to those choices. The parties are well aware of the facts upon which I base this finding and I therefore do not consider it necessary to review those facts.

[24] After an 18 year marriage the financial lives of this couple were intertwined. Ms. Shaw did depend upon Mr. Shaw's income to sustain her lifestyle. This gives rise to a compensatory claim for spousal support.

[25] At the time of separation Ms. Shaw was clearly entitled to non-compensatory support. She was not self-supporting. She needed to obtain full employment commensurate with her skills and training or to pursue career development and educational opportunities which may permit her to become self- supporting. Whether a person has become self-supporting is to be determined by taking into consideration all the circumstances of the parties and this may include their non-separation lifestyle. The ability to pay for one's basic needs is not the only yardstick of self sufficiency. Even when an individual appears to have sufficient income to meet immediate need it is not uncommon for the courts to find that there is a further period of entitlement to permit the spouse to adjust to economic independence, in other words, to learn to live within his or her means.

[26] While Mr. Kelloway's income is greater than Ms. Shaw's, he has been and still is solely financially responsible for their daughter. The pattern of dependency that existed during the marriage does not justify compensatory support beyond a reasonable transition period.

[27] If it were not for her job related injury, which will reduce her gross annual income for this year, Ms. Shaw would have earned at least $27,000.00. Ms. Shaw's monthly expenses, including income tax, are $4,023.00 which would require an annual income of $48,276. Of course at this income she would need to

pay additional tax and therefore her gross income would need to be even higher. Mr. Kelloway's expenses with income tax are $6,593.00 per month which would require an annual income of $79,160. Clearly both of these individuals are living beyond their means. Mr. Kelloway should have some assistance with his expenses because he is now living with an individual who earns sufficient income to pay at least one half of the common living expenses such as the rent / mortgage, fire insurance, heat, electricity, water, cable, and so on, all of which both she and her children enjoy and for which compensation should be provided to Mr. Kelloway. Because of this I am satisfied there is room within Mr. Kelloway's budget to pay spousal support and I do not accept his proposition, which was not strenuously argued, that he has no ability to pay.

[28] Mr. Kelloway will not earn as much as he has in the recent past because he is not available for sea duty at the present time. It is expected his total annual income for 2008 will be similar to his 2007 income which was $71,472. This is the income amount that was used at the time the parties entered into the Corollary Relief Judgment.

[29] Ms. Shaw has full time employment and has likely reached her maximum earning potential. The parties separated in August 2006 but she only began receiving spousal support January 1, 2007. Even though Mr. Kelloway was supporting their daughter the amount of spousal support Ms. Shaw would have received pursuant to the Spousal Support Guidelines "spousal support paid by custodial parent formula" was greater than the amount provided to her pursuant to the Interim Consent Order. Using separation incomes this formula produces a range from $815.00 to $1,087.00 per month with $951.00 as the mid range. Subtracting Ms. Shaw's child support obligation the net amount of spousal support would be in a range from $626.00 to $898.00 per month. The duration suggested by the Guidelines is indefinite from 9 to 18 years. The interim spousal support amount actually paid was $400.00 per month .

[30] The Spousal Support Guidelines are of some use in variation proceedings but they have limitations. The authors state on page 97 of their report *Spousal Support Advisory Guidelines: A Draft Proposal - January 2005:*

> We identified certain situations where the advisory guidelines would apply on reviews and variations, including increases in the recipient's income and decreases in the payor's income. We have left others, such as post-separation

> increases in the payor's income, re-partnering, remarriage and second families, to discretionary, case by case determinations under the evolving framework of current law.

[31] In their recent update to the guideline proposal the authors's state

> "Requests for an increase in spousal support, either because of an decrease in the recipient's income or a post-separation increase in the payor's income can also indirectly raise entitlement issues. In these cases you cannot simply apply the formulas to the new incomes (see FV, ch. 14, variation and review.) There must be a threshold determination of whether the change in income is relevant to the support obligation and if so, to what extent. The analysis requires going back to the compensatory and non-compensatory basis for spousal support."

[32] There are cases, for example *Fletcher v. Fletcher,* 2003 Carswell Alta 1534 (Q.B.), that suggest recipients of spousal support should not receive greater quantum simply because the payor has an increase in income unless that ability to earn greater income was in some way a consequence of or could be linked to sacrifices or other contribution by the recipient spouse - the most common example being the spouse who delayed or did not pursue or develop a career but instead worked during the marriage to assist the other spouse to obtain a university degree or professional status.

[33] The guidelines are clearly intended to begin with the financial situation of the parties at separation. The parties before me have not developed a complete analysis of the guidelines as they may apply to this situation. Nevertheless the guidelines do provide some useful information relevant to issues of quantum and duration. I think it is also interesting to note in this case if separation incomes are used and if an appropriate quantum is a range from $626.00 to 898.00, Ms. Shaw is now able, because of her increased income to provide $473.00 per month towards her need. Does this suggest the monthly spousal support should now be reduced by this amount? Had the guidelines been used to determine the initial award this may have been an attractive argument on a variation application.

[34] I have determined that Ms. Shaw has both a compensatory and non-compensatory claim to spousal support. Although the parties were not married for over 20 years, the typical "lengthy" marriage, 18 years is significant. There was a pattern of dependency based primarily upon the differences in parties income. The

support paid to date has not satisfied the compensatory claim and, in respect to the non-compensatory claim, Ms. Shaw does require additional time to adjust to economic independence. However, in this case it is appropriate that Mr. Kelloway know when his obligation to pay spousal support will end. In making this award I have taken into consideration the parties ages, the fact that Mr. Kelloway is the sole financial support for his daughter but that she likely soon will no longer be a dependent. I have considered Ms. Kelloway's present earning capacity and Mr. Kelloway's ability to pay. I have considered both the statutory objectives and the factors outlined in the Divorce Act in respect to spousal support.

[35] Mr. Kelloway is to pay Ms. Shaw $600.00 per month beginning September 1, 2008 and continuing monthly for a period of 6 years at which time spousal support shall cease.

[36] Neither party has addressed the issue of costs. If costs are requested written submissions are to be provided to this court by Mr Kelloway, with a copy to Ms. Shaw within 10 days of his receipt of this decision. Ms. Shaw's submissions are to be provided, to this court with a copy to Mr. Kelloway, within 5 days of her receipt of his submissions. If Ms. Shaw has raised an issue in her submissions not considered in Mr. Kelloway's submissions he may file and copy to Ms. Shaw a further submission addressing those issues within 2 days of receiving her submissions.

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Beryl MacDonald, J.