

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Kerpel v. Kerpel, 2008 NSSC 394

Date: 20081224

Docket: 1201-060451

Registry: Halifax

Between:

Beth Kerpel

Applicant

and

Guido Kerpel

Respondent

Judge: Justice Lawrence I. O’Neil

Heard: November 7, 2008, in Halifax, Nova Scotia

Counsel: Leigh Davis, counsel for the Applicant
Judith Schoen, counsel for the Respondent

By the Court:

Introduction, para. 1

Issues, para. 5

Sale of Matrimonial Home, para. 6

Conclusion: Prospective Spousal Support, para. 12

Retroactive Spousal Support on These Facts, para. 22

The Basis of the Different Calculations, para. 27

Ms. Kerpel’s Calculations of Retroactive Spousal Support, para. 30

Mr. Kerpel’s Calculations of Retroactive Spousal Support, para. 32

Credits: retroactive spousal support, para. 35

Conclusion: retroactive spousal support, para. 44

Costs, para. 46

Introduction

[1] This is an interim application as provided by s.15.2 of the *Divorce Act* 1985, c.3 and the *Matrimonial Property Act*, R.S.N.S. 1985 c.275. The principal issue for determination is the quantum of retroactive and prospective spousal support payable to Ms. Kerpel.

[2] The parties were married February 2, 1994. They separated November 2005. They have two children, Daniel, age 14 and Kirsten, age 12. The children currently live with their father. Ms. Kerpel is forty-five years of age and Mr. Kerpel is forty-four years of age. He is a high income earner, employed as a manager of a major hotel, earning \$231,600 per year. She is currently employed with SNC Lavalin with an annual income projected to be \$37,000.

[3] The couple moved to Nova Scotia from Ontario in 2000. They purchased the current matrimonial home in Bedford at that time. Ms. Kerpel continues to live there. Mr. Kerpel lives in Porter's Lake, Nova Scotia.

[4] The chronology of pleadings is as follows:

February 14, 2006	Petition for Divorce filed
September 10, 2007	Ms. Kerpel filed an Interlocutory Notice and Application
February 13, 2008	Mr. Kerpel filed an Interim Application
March 28, 2008	Ms. Kerpel filed an Interim Application
July 24, 2008	Ms. Kerpel filed a response to the Interim Application of Mr. Kerpel
September 17, 2008	Mr. Kerpel filed an Amended Application
September 18, 2008	Ms. Kerpel's amended response to Interim Application

[5] **Issues**

1. Whether an order for the sale of the matrimonial home should be made, pursuant to sections 10 and 11 of the *Matrimonial Property Act*, R.S.N.S. 1989 c.275.
2. Whether an order for prospective spousal support pursuant to s.15.2 of the *Divorce Act S.C. 1985*, c. 3 should be made. If so, for what amount.
3. Whether an order for retroactive spousal support pursuant to s.15.2 of the *Divorce Act* should be made. If so, for what period and in what amount.

Sale of the Matrimonial Home

[6] Ms. Kerpel opposed an order for the sale of the matrimonial home at the time of the hearing. Mr. Kerpel's counsel sought an order for the sale and submitted that Ms. Kerpel get her one half of the equity immediately and that Mr. Kerpel's one half equity remain in trust until a determination is made on Ms. Kerpel's claim for retroactive spousal support.

[7] In a written post hearing submission, Ms. Kerpel's counsel advised that her client is now prepared to agree to list the matrimonial home for sale in March, 2009 and to have Mr. Kerpel's share of the equity from the sale applied to any outstanding spousal support obligation he has at that time.

[8] The parties separated in February 2006, almost three years ago. Ms. Kerpel lives by herself in the home. The parties have not had an orderly separation and many marital issues remain to be resolved. The Department of Community Services, child protection section, has been involved. The home is subject to a

mortgage of \$179,000; requires repairs and has an outstanding tax account of more than \$8,000.

[9] Ms. Kerpel's counsel (at Tab 5 of her pre-hearing submission) estimates the net equity in the home as \$83,939.74. The parties agree that this should be equally divided.

[10] Pursuant to the *Matrimonial Property Act*, R.S.N.S. 1989 c.275, I direct that the matrimonial home be listed for sale on or before the end of January 2009 and that the closing be after March 1, 2009. The parties are free to agree to dispose of the property on other dates and on other terms. Absent such an agreement, the foregoing directions will govern. A delay in listing the property will permit the parties to ready it for sale with a view to realizing the maximum value for the home.

[11] I direct that Mr. Kerpel's share of the equity be held in trust by his solicitor, representing him in the matrimonial litigation, pending a resolution of all outstanding issues in that litigation. Mr. Kerpel may release those funds to Ms. Kerpel on terms and conditions agreeable to them, subject to any further order of this court.

Prospective Spousal Support

[12] The parties agree that Ms. Kerpel is entitled to ongoing spousal support. Mr. Kerpel submits that the appropriate quantum of support is \$2,400 per month. Ms. Kerpel seeks a monthly payment of \$3,310 per month.

[13] Although entitlement to ongoing spousal support is not an issue, the guidance of the Supreme Court as provided in *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow* [1999] S.C.J. No. 14 is still relevant. In the words of Justice McLachlin (as she then was) at para. 50 in *Bracklow*:

B. Quantum of the Award

50. The parties segregate entitlement and quantum for purposes of analysis in their submissions on how the Court should exercise its discretion. While I am content to deal with the case in this manner, it must be emphasized that the same factors

that go to entitlement have an impact on quantum. In terms of the underlying theories, there is no strong distinction. The real issue is what support, if any, should be awarded in the situation before the judge on the factors set out in the statutes . . .

[14] The parties essentially argue for the calculation most favourable to their respective clients based on an application of the spousal support advisory guidelines.

[15] Ms. Davis, on behalf of Ms. Kerpel, calculates the prospective spousal support obligation on the basis of 2% of the INDI (individual net disposal income of the parties) per year of cohabitation. This is the upper range of spousal support recommended by the spousal support advisory guidelines for a spouse not responsible for the primary care of the parties' children. She arrives at a monthly spousal support obligation of \$3,309. This is the ongoing spousal support obligation she seeks for her client. Ms. Davis acknowledges that if the lower range is calculated on the basis of 1.5% per year of cohabitation, the monthly spousal support obligation is \$2,479.

[16] Ms. Schoen, on Mr. Kerpel's behalf, advocates the appropriate quantum of spousal support as \$2,400 per month. She argues that Mr. Kerpel's spousal support obligation should be on the lower end of the range because Ms. Kerpel is not paying child support. Essentially she is arguing for a set off should the court decide Mr. Kerpel's ongoing spousal support obligation should be greater than \$2400 per month.

[17] There is no direct claim for child support by Mr. Kerpel. However, he asks that Ms. Kerpel's unfulfilled obligation to pay it be a factor in his favour. Had Mr. Kerpel made a claim for child support, it would have resulted in the payment of a tax free award in the range of \$541 per month for two children, based on Ms. Kerpel's projected earned income of \$37,000 per year.

[18] Although Ms. Kerpel calculated the spousal support obligation on the basis of spousal support paid by the custodial parent, it is agreed that Mr. Kerpel will not receive child support from Ms. Kerpel. This has the effect of decreasing the gross income difference by the grossed up child support attributed to Ms. Kerpel. This is \$10,664 and reduces the gross income difference to \$131,141. Using Ms. Kerpel's figures, the low range based on the spousal support advisory guidelines begins at \$2,294.96 and the higher number in the range is \$3,059.

[19] Given that Mr. Kerpel continues to bear a disproportionate share of the costs associated with the matrimonial home, I am persuaded that the award should be in the lower range recommended by the spousal support guidelines. In addition, Mr. Kerpel 's decision to not seek child support of \$541 per month is a significant benefit to Ms. Kerpel.

[20] Mr. Kerpel and Ms. Kerpel have had periods of separation over the fourteen years they are now characterized as having been together. The separations experienced by these parties is relevant to an assessment of the length of their relationship and the nature of it.

[21] I award \$2,400 per month spousal support for Ms. Kerpel commencing January 30, 2009.

Retroactive Spousal Support on These Facts

[22] The parties agree that Mr. Kerpel has an unfulfilled spousal support obligation for some of the period since the parties' separation. The quantum of the retroactive award must be calculated.

[23] The Petitioner, Ms. Kerpel filed the Petition for Divorce on February 14, 2006. She sought child support, spousal support and costs. She declared that as of January 21, 2006, the Respondent was transferring \$4,500 per month to a joint account. This was at a time when the children were living with Ms. Kerpel. In her accompanying application and intake form, she identified November 8, 2005 as the date of the parties' separation. The parties lived separate and apart in the family home for a period of three months after November 2005. Ms. Kerpel also claimed spousal support in her Interim Application filed September 10, 2007; her Interim Application" filed March 28, 2008 and her amended "Response to Interim Application " filed September 18, 2008. Clearly, Mr. Kerpel has been aware of and consistently reminded of Ms. Kerpel's claim for spousal support since February 2006.

[24] The court is being asked to determine what spousal support obligation is unfulfilled for 2006, 2007 and 2008. Given that a ruling may have significant tax implications for the 2007 & 2008 taxation years , provided it is given before December 31, 2008, I am prepared to define Mr. Kerpel's spousal support

obligation for 2007 and 2008 at this time. Both parties have asked the court to do so based on affidavit evidence and a brief court appearance that consisted of submissions and supplementary written submissions requested by the court. I interpret the parties' position to be that the resolution of retroactive spousal support is very important.

[25] No tax benefits are lost by delaying a decision on whether there are unfulfilled spousal support obligations for 2006. This decision preserves the rights and obligations of the parties concerning spousal support for 2006.

[26] The parties disagreement with respect to the calculation of spousal support for 2007 and 2008 is two fold. They disagree on what value or credit should be given to Mr. Kerpel for payments made to or on behalf of Ms. Kerpel. Secondly, they disagree on where Mr. Kerpel's obligation falls within the range that results from the application of the Spousal Support Advisory Guidelines. They do not argue against the use of the guidelines.

The Basis of the Different Calculations

[27] Mr. Kerpel seeks a ruling that third party payments he made in 2006, 2007 and 2008 are in essence spousal support. He wishes to claim them as such under the Income Tax Act, which the court is advised by counsel permits a claim for payments, as far back as January 1, 2007 if the spousal support order pre dates December 31, 2008. This has caused Mr. Kerpel to seek a ruling on his spousal support obligation before December 31, 2008.

[28] The parties agree that should Ms. Kerpel be awarded retroactive spousal support, Mr. Kerpel should be credited with third party payments made by him during this period. Ms. Davis, on behalf of Ms. Kerpel, agrees that a credit should be given to Mr. Kerpel for some of the identified expenditures. She submits that some of the payments are not third party payments and should not be considered as a credit against Mr. Kerpel's retroactive spousal support obligation. Other payments, she submits, should be valued at less than the amount claimed. She submits that no credit should be given by way of set off for child support Ms. Kerpel has not paid to Mr. Kerpel.

[29] It is agreed that the parties' gross incomes for the years 2006, 2007 and 2008 is as shown below:

2006

Mr. Kerpel - \$231,611.00

Ms. Kerpel \$29,737.37 (Camm.\$21,959.92+Commission \$796.45+EI \$6,981.00)

2007

Mr. Kerpel - \$239,918.00

Ms. Kerpel \$16,891.00 (Air Canada \$6,649.00+EI \$10,242.00)

2008

Mr. Kerpel - \$231,600.00

Ms. Kerpel \$23,728.00 (to September 1, 2008 - now projected to be \$37,000
on an annualized basis)

Ms. Kerpel's Calculations of Retroactive Spousal Support

[30] The result is that for 2006, Ms. Kerpel credits Mr. Kerpel with \$5,225 representing lease payments on Ms. Kerpel's vehicle during the period February - December 2006. For 2007, Ms. Kerpel submits that Mr. Kerpel should receive a credit of \$6,880.75 for third party payments, not the \$12,460.00 he claims. For 2008, she argues the appropriate credit is \$10,104.60, not the \$16,759.11 claimed.

[31] Beginning February 2006 to December 2008, Ms. Davis calculates the range of Mr. Kerpel's total spousal support obligation as \$122,868.00 to \$160,257.00. This is arrived at as follows:

Year	Range of Monthly Spousal Support	Totals
2006 (Feb. - Dec.)	\$3,952.00 - \$5,167.00	\$43,472.00 - \$56,837.00
2007 (Jan. - Aug.)*	\$4,545.00 - \$5,734.00	\$36,360.00 - \$45,872.00
2007 (Sept. - Dec.)	\$2,824.00 - \$3,794.00	\$11,296.00 - \$15,176.00
2008 (Jan. - Dec.)	\$2,645.00 - \$3,531.00	\$31,740.00 - \$42,372.00
Total for 2006-2008		\$122,868.00-\$160,257.00
Total for 2007-2008 only		\$79,396 - \$103,420
Less credits as follows: For 2007 - \$6,880.75 + For 2008 - \$10,104.60		
		= \$16,985.35

***children with Ms. Kerpel, therefore with child spousal support guidelines apply**

Revised range after credits for 2007 & 2008: \$62,410.65 - \$86,434.65

Mr. Kerpel's Calculations of Retroactive Spousal Support

[32] Ms. Schoen on behalf of Mr. Kerpel offers what she describes as the mid range spousal support obligation of Mr. Kerpel for 2007 and 2008. Her calculations for 2007 and ten months in 2008 quantify Mr. Kerpel's spousal support obligation as follows:

2007 mid range spousal support

2007(Jan.- July)	$\$4,500 * 7 = \$31,500.00$	\$31,500.00
2007 (Aug. - Dec.)	$\$2,844 * 4 = \$12,460.00$	\$12,460.00

2008 mid range spousal support

2008 (Jan. - Oct.)	$\$3,087 * 10 = \$30,870.00$	\$30,870.00
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Total Spousal Support Obligation = \$74,830.00

[33] Ms. Schoen then argues that Mr. Kerpel should receive credits as follows:

2007 credits claimed

Less payments in 2007 of \$12,460.00

Less 2007 child support set off of \$3,640 (based on an annualized income for Ms. Kerpel of \$51,016 for 5 months in 2007, $5 * \$728 = \$3,640$)

2008 credits claimed

Less payments in 2008 of \$16,759.11

Less 2008 child support set off of \$8,600 (based on an annualized income for Ms Kerpel of \$60,766 for 10 months in 2008, $10 * \$860 = \$8,600$)

Total Credits Claimed by Mr. Kerpel = \$37,819.11

**Total Spousal Support Obligation less total credits \$74,830.00 - \$ 37,819.11
= \$37,010.89**

[34] In the case of Ms. Kerpel, the court has not considered taxable income resulting from RRSP withdrawals nor social assistance income. The RRSP withdrawals represent depletion of an asset and in the case of a retroactive spousal support award, an obligation to repay the social assistance income may arise.

Credits: Retroactive Spousal Support

2007: January - July; August - December

[35] The parties disagree on whether the children began living with Mr. Kerpel in August or September 2007. Ms. Kerpel argues that although the children were with Mr. Kerpel in August of 2007 they were on vacation with him and therefore the spousal support obligation for August 2007 should be on the basis of the children living with her at that time. I conclude that the children were primarily the financial responsibility of Mr. Kerpel in August of 2007. Ms. Kerpel's September 17, 2007 affidavit offers August 10, 2007 as the date the children came under the primary care of Mr. Kerpel.

[36] I accept Ms. Kerpel's lowest range for the calculation of spousal support for January-July 2007 and August - December 2007. The 2007 spousal support obligation of Mr. Kerpel is \$45,935 calculated at on the basis of seven (7) months at \$4,545 and five (5) months at \$2,824.

2008 : January - December

[37] Again for 2008 I accept the lower range put forward by Ms. Kerpel, \$2,645 per month for twelve months. This is a total obligation of \$31,740.00.

[38] Therefore, for 2007 and 2008 the spousal support obligation totals \$77,675 less payments already made or credits to be taken into account.

Credits

[39] The parties submit that the credits are as follows:

	Ms. Kerpel		Mr. Kerpel
2007	\$6,880.75		\$12,460.00
2008	\$10,104.00		\$16,759.11
Total	\$16,985.35	Total	\$29,219.11

[40] For the reasons that follow, I fix the credit for 2007 at \$9,000 and for 2008 at \$15,040.

2007 Credits

[41] For 2007 I have already accepted the argument of Mr. Kerpel that he should get some credit for child support over paid to Ms. Kerpel for one half of August 2007. This is a potential credit of \$1,425 not reflected in the credits shown by Ms. Kerpel. Taking Ms. Kerpel's credit calculation of \$6,880.75 as a base this increases the credit to \$8,305.75. Mr. Kerpel also asks for set off of Ms. Kerpel's unpaid child support obligation for five months in 2007. He values this amount as $5 * \$728 = \$3,640.00$. I find his calculation excessive. I will credit an amount to reflect the fact that the children were with Mr. Kerpel for four and one half months in 2007 is more accurate. On the basis of Ms. Kerpel's annualized earnings at the time (\$16,891.00) this is a potential credit of \$261 per month. Again using Ms. Kerpel's suggested value of the credit as a base this increases the 2007 credits of Mr. Kerpel by an additional \$1,174.50 to \$9,480.25.

[42] If I were to take Mr. Kerpel's claimed credit of \$12,460 as a base, a number of reductions would need to be made. For example, I would reduce, by one half, the credit claimed by Mr. Kerpel for mortgage and loan payments during the period September to December 2007. I do so on the basis of these payments being half his responsibility. This results in a reduction in credits to Mr. Kerpel of $\frac{1}{2} * (\$3,600 + \$2,185 + \$235) = \$3,010$. After this change his credit for 2007 is thereby reduced to \$9,450. As stated I would also reduce the credit Mr. Kerpel claims as child support set off to \$1,174 from \$3,640 to reflect Ms. Kerpel's actual earnings in 2007. Using

Mr. Kerpel's suggested value of the credits as a base and making the identified reductions the 2007 credit amount is \$8,276.

2008 Credits

[43] For 2008 I reduce, by one half, the credit claimed by Mr. Kerpel for mortgage and loan payments during the year. For the first ten months these amount to \$10,104.60. He shall also receive a credit of one half of the same payments for November and December 2008. He shall also be credited with payments to Ms. Kerpel potentially equal to her child support obligation to him. Based on her income for 2008 (\$23,728 until November 1, 2008) I calculate this amount as 10 months at \$350 per month and two months at \$541 per month based on an income of \$37,000. Her potential child support obligation in 2008 was $\$3,500 + \$1,082 = \$4,582$. This is a potential set off for Mr. Kerpel of \$4,582.00. Using either party's calculation of the 2008 credit as a base Mr. Kerpel's total credits for 2008 are therefore in the range of \$14,000 - \$ 17,000.

Conclusion: Retroactive Spousal Support 2007 & 2008

[44] Applying the foregoing calculations strictly, the yet unpaid spousal support obligation would be for 2007: $\$45,935 - \$9,000 = \$36,935$ and for 2008: $\$31,740 - \$16,700 = \$15,040$. The total for the two years is \$51,975.

[45] I am not prepared to ignore the unfilled child support obligation of Ms. Kerpel in assessing the parties circumstances and mutual obligations. I have settled on credits of \$9,000 and \$15,040 respectively. The spousal support advisory guidelines are used as a reference, in assessing the retroactive spousal support obligation. The court retains a significant level of discretion in setting the appropriate level of spousal support. In determining the appropriate level of spousal support the court must consider the condition, means, needs and other circumstances of both parties as required by s. 15.2 (4) of the Divorce Act and the court must strive to achieve the objectives of s. 15.2 (6) of the Divorce Act.

Costs

[46] The positions advanced on behalf of the parties were reasonable and success was divided. Subject to a further request of the parties and to hearing further from the parties, I am not prepared to order costs.

J.