**NOVA SCOTIA COURT OF APPEAL**
**Citation:** Marsh v. Snow, 2004 NSCA 155

**Date:** 20041230
**Docket:** CA 220008
**Registry:** Halifax

**Between:**

Jean Marie (Churney) Marsh

Appellant

v.

Sheldon W. Snow

Respondent

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| **Judges:** | Bateman, Hamilton and Fichaud, JJ.A. |
| **Appeal Heard:** | November 18, 2004, in Halifax, Nova Scotia |
| **Held:** | Appeal dismissed per reasons for judgment of Bateman, J.A.; Hamilton and Fichaud, JJ.A. concurring. |
| **Counsel:** | Appellant, in person<br>Darlene MacRury, for the respondent |

Reasons for judgment:

[1] This is an appeal by Jean Marie (Churney) Marsh from an order of Justice J. Vernon MacDonald of the Supreme Court (Family Division) granting Sheldon W. Snow an interest in certain property.

**Factual Background**

[2] Ms. Marsh and Mr. Snow commenced living together in 1987 when Mr. Snow moved into the rental accommodation where Ms. Marsh had been living with her two children. Ms. Marsh owned the furnishings in the rental unit. Mr. Snow had no assets apart from his personal effects. Both parties were employed throughout the relationship and had employment pension plans. Until their separation thirteen years later, both contributed their earnings into a joint bank account from which they paid their household and personal operating expenses. Additionally, Mr. Snow had some non-taxable income which also came into the household. While her daughters were dependent, Ms. Marsh received child support. Ms. Marsh was the financial manager of the family.

[3] In 1990 the parties moved into Ms. Marsh's mother's house at 40 International Street in Glace Bay, Nova Scotia. It was a rent to purchase arrangement developed between Ms. Marsh and her mother. From April 1991 to May 1998, $29,190 was paid to Ms. Marsh's mother for the house from the parties' joint bank account. The assessed value of the house in 1990 was $37,900. Unknown to Mr. Snow until after the fact, the deed was placed in Ms. Marsh's name alone. At the time of separation in 2000, the assessed value of the house was $40,900.

[4] Over the course of the relationship the parties purchased a number of automobiles. At separation there was a 1993 Sunbird, a 1980 truck and a 1986 Buick LeSabre. Mr. Snow retained the vehicles, Ms. Marsh the home and contents.

[5] After separation the parties were unable to reach a resolution on the division of the personal and real property. In January 2004, Mr. Snow commenced the within proceeding, claiming compensation for unjust enrichment through the vehicle of a constructive trust. The matter came before Justice MacDonald in

October 2003. By order flowing from a written decision delivered in January 2004, Ms. Marsh was required to pay to Mr. Snow, $12,560.00 in satisfaction of his interest in the accumulated assets. It is from that award Ms. Marsh appeals.

**Issues on Appeal**

[6] Ms. Marsh has raised a number of grounds of appeal which can be summarized as follows:

> The judge erred in evaluating the materiality of Mr. Snow's financial contribution to the household as it related to the acquisition of the International Street house;
>
> The judge was wrong in including in the asset pool available for "division" those assets owned by Ms. Marsh prior to cohabitation;
>
> The judge erred in failing to exclude from the value of the assets available for distribution, the value of the improvements to the assets made free of charge by Ms. Marsh's family members;
>
> If Mr. Snow was to receive a share of the assets, the values of the parties' pensions should have been included;
>
> The judge erred in finding that Ms. Marsh was unjustly enriched by Mr. Snow's financial contribution;
>
> The judge erred in his award of costs.

[7] An appeal is not a re-trial of the matter. In order to interfere with the trial judgment we must be persuaded that the judge erred at law or made a palpable or overriding error of fact.

**The Law**

[8] The law of unjust enrichment and the related remedy of constructive trust, as applied to marital or marriage-like relationships, has been developed in a series of cases including **Rathwell v. Rathwell**, [1978] 2 S.C.R. 436, **Pettkus v. Becker**,

[1980] 2 S.C.R. 834, **Sorochan v. Sorochan**, [1986] 2 S.C.R. 38 and **Rawluk v. Rawluk**, [1990] 1 S.C.R. 70. In **Peter v. Beblow**, [1993] 1 S.C.R. 980, in concurring opinions, the majority by McLachlin, J. (as she then was) and the minority by Cory, J., the Court summarized the test for unjust enrichment and constructive trust (per McLachlin, J.) at p. 987:

> The basic notions are simple enough. An action for unjust enrichment arises when three elements are satisfied: (1) an enrichment; (2) a corresponding deprivation; and (3) the absence of a juristic reason for the enrichment. . . .

[9] The establishment of unjust enrichment can give rise to a monetary judgment or a recognition of an interest in property through the vehicle of constructive trust. A constructive trust generally ". . . arises, where monetary damages are inadequate and where there is a link between the contribution that founds the action and the property in which the constructive trust is claimed.." (per McLachlin J., **Peter v. Beblow,** above, at p. 988).

[10] Prior to **Peter v. Beblow** there had been much discussion about whether domestic services by one partner in a marriage or marriage-like relationship could support a claim for unjust enrichment or an interest in property. The Court confirmed that domestic services are of value and warrant recognition as a "contribution". In the context of discussing the value to be assigned to the services, the Court discussed the "value received" and "value survived" approaches. McLachlin, J. said at p. 998:

> Before leaving the principles governing the remedy of constructive trust, I turn to the manner in which the extent of the trust is determined. The debate centres on whether it is sufficient to look at the value of the services which the claimant has rendered (the "value received" approach), or whether regard should be had to the amount by which the property has been improved (the "value survived" approach). Cory J. [in the minority judgment] expresses a preference for a "value survived" approach. However, he also suggests, at p. 1025, that "there is no reason why *quantum meruit* or the value received approach could not be utilized to quantify the value of the constructive trust." With respect, I cannot agree. It seems to me that there are very good reasons, both doctrinal and practical, for referring to the "value survived" when assessing the value of a constructive trust.
> (Emphasis added)

[11] Both the majority and concurring minority in **Peter v. Beblow** favour the "value survived" approach as the more equitable method for determining the quantum of a claimant's share in family cases, particularly where a constructive trust is found at pp. 996 and 999:

> Nor does the distinction between commercial cases and family cases on the remedy of constructive trust appear to be necessary. Where a monetary award is sufficient, there is no need for a constructive trust. Where a monetary award is insufficient in a family situation, this is usually related to the fact the claimant's efforts have given him or her a special link to the property, in which case a constructive trust arises.
>
> For these reasons, I hold the view that in order for a constructive trust to be found, in a family case as in other cases, monetary compensation must be inadequate and there must be a link between the services rendered and the property in which the trust is claimed. Having said this, I echo the comments of Cory J. at p. 1023 that the courts should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases.
>
> . . .
>
> I note, as does my colleague, that there may also be practical reasons for favouring a "value survived" approach. Cory J., alludes to the practical problems with balancing benefits and detriments as required by the "value received" approach, leading some to question whether it is the least attractive approach in most family property cases (see *Davidson v. Worthing* (1986), 6 R.F.L. (3d) 113, McEachern C.J.S.C.; *Hovius and Youdan, supra*, at pp. 136 *et seq.*). Moreover, a "value survived" approach arguably accords best with the expectations of most parties; it is more likely that a couple expects to share in the wealth generated from their partnership, rather than to receive compensation for the services performed during the relationship.
> (Emphasis added)

## Analysis

[12] The judge found that the asset pool legitimately in dispute included three vehicles, the furnishings and the house at 140 International Street. He fixed the value of those assets at $51,900, using the assessed value of the real property for the year 2000 which was $40,900.

[13] He further found that Mr. Snow had made a significantly greater monetary contribution to the acquisition of these assets, in particular the home, than had Ms. Marsh. He correctly observed that, unlike the presumption of equal sharing of matrimonial property, it is not assumed, at law, that the asset share of unmarried partners be equal. In arriving at Mr. Snow's entitlement, Justice MacDonald considered it material that the home was available for purchase only through Ms. Marsh's familial connection. He further took note of the fact that there were improvements to the home paid for by Ms. Marsh's family. Applying the "value survived" approach from **Peter v. Beblow**, he fixed Mr. Snow's interest in the property pool at 40% or $20,560. He assigned a value of $8,000 to the items of personal property retained by Mr. Snow at separation, leaving a balance of $12,560 owing to Mr. Snow by Ms. Marsh.

[14] In reaching this result the judge made a number of key factual findings:

> Each party deposited his/her total net income to the joint bank account;
>
> All loans over the years were paid through the joint account;
>
> Mr. Snow knew of the arrangements to purchase Ms. Marsh's mother's home and did not learn until after the fact that the deed was in Ms. Marsh's name alone. He, nevertheless, thought he had an "interest" in the property through his contribution and Ms. Marsh did not advise him otherwise;
>
> It was reasonable for Mr. Snow to expect an interest in the home;
>
> Mr. Snow's financial contribution to the household substantially exceeded that of Ms. Marsh. This contribution was significant in terms of the operation of the household;
>
> Neither party had any debt owing when the relationship ended;
>
> Without Mr. Snow's financial contribution, Ms. Marsh would not have been able to acquire the home nor maintain the lifestyle she and Mr. Snow enjoyed while together;

> Mr. Snow's financial contribution to the home over the years was far greater than just contributing to the cost of his shelter and the use of utilities;
>
> The parties each contributed to employment pensions but did not demonstrate any unequivocal intention to share their pension entitlements should the relationship break down;
>
> A monetary judgment would not be an adequate remedy in these circumstances. In view of Mr. Snow's direct financial contribution to the assets and, in particular, the home, it was appropriate to fix Mr. Snow's interest on the basis of a remedial constructive trust.

[15] Ms. Marsh alleges a number of errors by the trial judge. Using the income tax filings tendered by the parties, the judge calculated Mr. Snow's contribution to the joint account over the years of cohabitation at $414,735 and that of Ms. Marsh at $285,544. Ms. Marsh says the figure for her contribution is in error and should be reflected as $314,505. She further says that the judge failed to take into account the renovations undertaken by her daughters (the hardwood flooring and siding). Finally, she says the judge erred in concluding that she was enriched by the relationship. It is Ms. Marsh's submission that she could have purchased her mother's home without financial assistance from Mr. Snow.

[16] I have reviewed the income tax returns of the parties filed at trial. While I cannot exactly replicate the above figures reached by the trial judge, when I subtract income tax paid from Ms. Marsh's net income from employment, I reach a total very close to the amount calculated by the trial judge. In her submission to this Court, Ms. Marsh was using "total earnings" while the judge appeared to be working with the "net of tax" amounts, which may account for the difference. I have compared the reported incomes of each party and it suffices to say that Mr. Snow's net income after tax substantially exceeded that of Ms. Marsh, as was found by the judge. I am not persuaded that he erred in so concluding. The relative differential in their respective contributions is supported by the record.

[17] The judge was aware of the improvements to the property made by Ms. Marsh's family, without cost to the parties, and specifically mentioned such as a

factor in fixing Mr. Snow's lesser interest in the assets, notwithstanding his greater financial contribution.

[18] Ms. Marsh says the judge erred in including, as part of the common asset pool, the furniture existing at the time of separation. While Ms. Marsh owned the furniture in the rental apartment at the outset of their relationship, some additional items were acquired over the thirteen years of cohabitation. No evidence was presented as to the worth of the original furniture. Ms. Marsh chose not to file a statement of property. The judge assigned only a nominal value to the furniture - $2500. His inclusion of it in the assets, subject to the constructive trust, is not reversible error.

[19] Given the imbalance in the parties' respective financial contributions and taking into account that neither came out of the relationship with savings nor with debt, it was open to the judge to conclude, as he did, that they enjoyed the full benefit of their joint earnings while living together. While Ms. Marsh is adamant in her view that she was not "enriched" by their relationship and that she could have acquired the property on her own, on the record before him it was reasonable for the judge to infer that they could not have enjoyed the lifestyle that they did and have purchased the property without Mr. Snow's significant financial contribution.

[20] I further find no error in the judge's application of the law to the facts as found. His analysis is true to that endorsed in **Peter v. Beblow**, **supra**.

[21] Nor was it error for the judge to conclude that the parties' respective employment pensions not be shared. Neither contributed to that of the other. The pensions were not part of the assets acquired from the pooling of their net employment incomes.

[22] The judge awarded costs payable by Ms. Marsh to Mr. Snow based upon an amount involved of $51,400, being the value of the assets in dispute, excluding the pensions. Ms. Marsh says that such was in error, and that the amount involved should have been limited to the $12,560 found to be owing to Mr. Snow by Ms. Marsh. It was Ms. Marsh's position before the trial judge that Mr. Snow had no interest in the assets held by her - that any interest had been satisfied by his retention of assets found by the judge to be worth $8,000.00. In addition, she put the pensions in dispute by claiming, in the alternative, an interest in Mr. Snow's

pension entitlement. Recognizing that the judge has a discretion with respect to costs, I am not persuaded that in fixing the amount involved as he did, the judge erred in principle.

[23] I would dismiss the appeal with costs payable by Ms. Marsh to Mr. Snow in the amount of 40% of those payable at trial, which amount I fix at $2000 plus disbursements as taxed or agreed.

Bateman, J.A.

Concurred in:
Hamilton, J.A.
Fichaud, J.A.